



16
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SEP 27 2019
S.C. SUPREME COURT

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
Facsimile: (843) 545-3282
Email: bculbertsonj@sccourts.org

September 24, 2019

Via U. S. Mail and Email Delivery

The Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Email: DShearouse@sccourts.org

Tonnya K. Kohn, Director
Court Administration, S.C. Judicial Department
1220 Senate St., Suite 200
Columbia, SC 29201-3739

Email: TKohn@sccourts.org

RE: *Louis Michael Winkler, Jr. v. State of South Carolina*
Case Number: 2011-CP-26-03907

Dear Ms. Kohn and Mr. Shearhouse:

Pursuant to the Supreme Court order dated 5/25/2011 regarding the above referenced PCR action, I provide the following status of this case:

6/24/2011: The applicant was deemed indigent and entitled to court appointed counsel. This determination was based upon the applicant's Affidavit of Indigency and Request for Counsel without a formal hearing.

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- 11/23/2016: South Carolina Supreme Court "Reversed, vacated, and remanded" case "for further proceedings."
- 6/22/2018: Status conference held in Georgetown, SC
- 4/9/2019: Order issued setting case for day certain trial commencing 7/29/2019.
- 4/10/2019: Applicant files Motion for Summary Judgment.
- 5/2/2019: Respondent files Cross Motion for Summary Judgment.

The Honorable Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Tonnya K. Kohn, Director, Court Administration, S.C. Judicial Department
September 24, 2019
Page Four

5/9/2019: Applicant files Motion for Attorney Fees and Expenses.
Applicant files Motion to Authorize Funding for Expert Services.

5/16/2019: Applicant's Motion for Attorney Fees and Expenses is granted.
Applicant's Motion to Authorize Funding for Expert Services is granted.

5/29/2019: Applicant's Motion for Summary Judgment and Respondent's Cross Motion for Summary Judgment are argued and taken under advisement by the Court.

5/30/2019: Applicant's Motion for Summary Judgment is denied.
Respondent's Cross Motion for Summary Judgment is granted.

6/6/2019: Applicant files Motion to Alter or Amend Judgment.

6/27/2019: Applicant's Motion to Alter or Amend Judgment is denied.

7/19/2019: Respondent files Motion for Continuance.

7/22/2019: Respondent's Motion for Continuance is granted.
Case is re-scheduled for date certain trial commencing 10/28/2019.

8/29/2019: Applicant files Motion to Continue Evidentiary Hearing.

9/4/2019: Respondent consents to continuance of evidentiary hearing.

9/24/2019: Applicant's Motion to Continue Evidentiary Hearing is granted.
Case will be rescheduled for date certain trial upon receipt of 2020 court schedule.

With kindest regards, I remain

Very truly yours,



Benjamin H. Culbertson

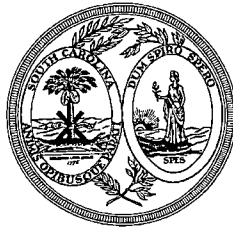
BHC/bhc

The Honorable Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Tonnya K. Kohn, Director, Court Administration, S.C. Judicial Department
September 24, 2019
Page Five

pc: Hon. Renee Elvis, Horry County Clerk of Court
Emily C. Paavola, Esquire
Hannah L. Freedman, Esquire
W. Edgar Salter, III, Sr. Assistant Attorney General
Donald J. Zelenka, Deputy Attorney General
Melody J. Brown, Sr. Assistant Deputy Attorney General
Jimmy A. Richardson, Solicitor

Louis Michael Winkler, Jr., SCDC #00006027
Kirkland Correctional Institution
4344 Broad River Rd.
Columbia, SC 29210

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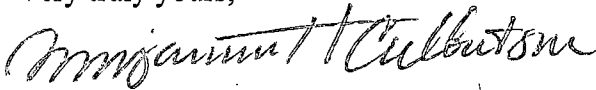
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The Honorable Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Tonnya K. Kohn, Director, Court Administration, S.C. Judicial Department
April 9 2019
Page Four

With kindest regards, I remain

Very truly yours,


Benjamin H. Culbertson

BHC/bhc

pc: Hon. Melanie Huggins-Ward, Horry County Clerk of Court
Emily C. Paavola, Esquire
John R. Mills, Esquire
Alphonzo Simon, Jr., Asst. Attorney General
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April 9, 2019

The Honorable Renee Elvis
Horry County Clerk of Court
PO Box 677
Conway, SC 29528

RE: *Louis Michael Winkler, Jr. v State of South Carolina*
Case Number: 2011-CP-26-03907

Dear Ms. Elvis:

Please find enclosed for filing with your office the Order For Day Certain Trial in the above referenced case. This case was remanded from the Supreme Court "for further proceedings."

By copy of this letter and enclosure to the attorneys in this case, I am providing them with a copy of the order and notice of its filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/rpm

Enclosure (a/s)

pc: Hon. Daniel E Shearouse, Clerk of Court, SC Supreme Court
Tonya K. Kohn, Director of Court Administration
Emily C. Paavola, Esquire
John R. Mills, Esquire
Alphonzo Simon, Jr., Asst. Attorney General
Jimmy Richardson, Solicitor
Louis Michael Winkler, Jr., SCDC #00006027

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2011-CP-26-03907

Louis Michael Winkler, Jr.,)
Petitioner,)

vs.)

ORDER FOR DAY CERTAIN TRIAL

State of South Carolina,)
Respondent.)

IT APPEARING that this case was remanded to this court "for further proceedings" by order of the South Carolina Supreme Court in *Winkler v. State*, 418 S.C. 643, 795 S.E.2d 686 (2016); and

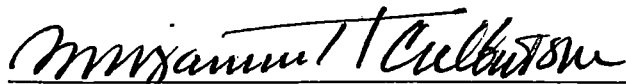
IT FURTHER APPEARING that a "day certain" trial is necessary.

NOW, THEREFORE, it is hereby

ORDERED, that this case is scheduled for a "day certain" trial before the undersigned presiding judge commencing July 29, 2019 at 9:30 a.m. in the Horry County Judicial Center in Conway, South Carolina; it is further

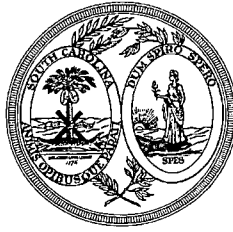
ORDERED, that the South Carolina Department of Corrections shall be responsible for the transportation of the Petitioner to the trial of this case.

AND IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge

April 9, 2019
Conway, South Carolina



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State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

APR 04 2014

Benjamin H. Culbertson
Resident Circuit Judge

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S.C. SUPREME COURT
APR 1, 2014

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Email: DShearouse@sccourts.org

Rosalyn W. Frierson, Director
Court Administration, S.C. Judicial Department
1015 Sumter St., Suite 200
Columbia, SC 29201-3739

Email: RFrierson@sccourts.org

RE: *Louis Michael Winkler, Jr. v. State of South Carolina*
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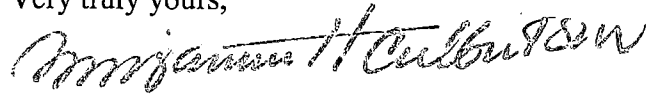
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- 1/9/2013: Supreme Court issues order remanding case to circuit court to decide Respondent's Motion to Alter or Amend Judgment.
- 4/1/2014: The lower court denies the Respondent's Motion to Alter or Amend Judgment.

This letter shall serve as the final report from this court of the status of this case.

The Honorable Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Roselyn W. Frierson, Director, Court Administration, S.C. Judicial Department
April 1, 2014
Page Four

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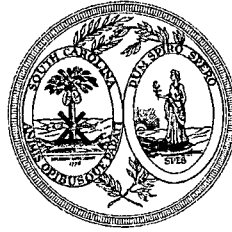
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Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

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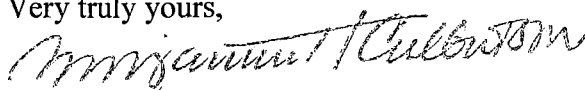
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Shearouse, Daniel

From: Culbertson, Benjamin H.
Sent: Wednesday, September 26, 2012 1:53 PM
To: Shearouse, Daniel; Talley, Motte
Subject: Winkler v. State (2011-CP-26-3907)
Attachments: 9-26-2012 status letter to SC & CA.dotx

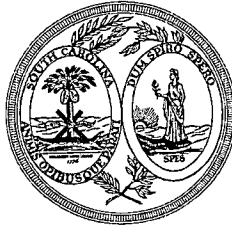
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Resident Circuit Judge

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401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
Facsimile: (843) 545-3282
Email: bculbertson@sccourts.org

September 26, 2012

Via U. S. Mail and Email Delivery

The Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Email: DShearouse@sccourts.org

Motte L. Talley, Assistant Director
Court Administration, S.C. Judicial Department
1015 Sumter St., Suite 200
Columbia, SC 29201

Email: MTalley@sccourts.org

RE: *Louis Michael Winkler, Jr. v. State of South Carolina*
Case Number: 2011-CP-26-03907

Gentlemen:

Pursuant to the Supreme Court order dated 5/25/2011 regarding the above referenced PCR action, I provide the following status of this case:

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The Honorable Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
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September 26, 2012
Page Two

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The Honorable Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Motte L. Talley, Assistant Director, Court Administration, S.C. Judicial Department
September 26, 2012
Page Three

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6/18/2012 – 6/21/2012: Trial

8/15/2012: Court issues order denying post-conviction relief on applicant's conviction but granting post-conviction relief on applicant's sentencing.

8/28/2012: The respondent mails to the court its Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP; however, the post mark on the envelope is dated 8/31/2012.

9/6/2012: Applicant submits his Return to Respondent's Motion to Alter or Amend Judgment.

9/10/2012: Applicant submits his Supplemental Return to Respondent's Motion to Alter or Amend Judgment.

9/12/2012: Respondent submits its Reply to Applicant's Return to Respondent's Motion to Alter or Amend Judgment.

9/14/2012: Respondent files Notice of Appeal with the South Carolina Supreme Court.

9/17/2012: Applicant files Notice of Cross Appeal with the South Carolina Supreme Court.

9/26/2012: The lower court issues its order involuntarily dismissing the respondent's Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP, for lack of jurisdiction.

This letter shall serve as the final report from this court of the status of this case.

With kindest regards, I remain

Very truly yours,

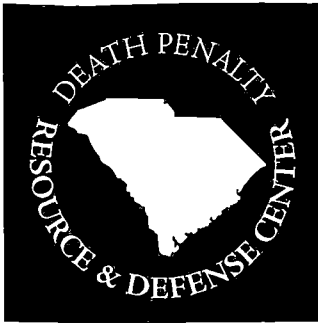
Benjamin H. Culbertson

The Honorable Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Motte L. Talley, Assistant Director, Court Administration, S.C. Judicial Department
September 26, 2012
Page Four

BHC/bhc

pc: Hon. Melanie Huggins-Ward, Horry County Clerk of Court
Emily C. Paavola, Esquire
John R. Mills, Esquire
Alphonzo Simon, Jr., Asst. Attorney General
J. Gregory Hembree, Solicitor

Louis Michael Winkler, Jr., SCDC #00006027
Lieber Correctional Institution
P.O. Box 205
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September 17, 2012

The Honorable Daniel E. Shearouse
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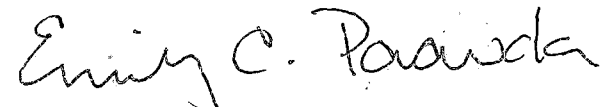
Re: *Louis M. Winkler v. State of South Carolina, 2011-CP-26-03907*

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. Mr. John Mills, Esq. and I were appointed to serve as Mr. Winkler's post-conviction counsel. An evidentiary hearing took place on June 18-21, 2012. The PCR Court entered an order granting sentencing phase relief on August 15, 2012.

If you have any questions or require any additional information, please do not hesitate to contact me.

Sincerely yours,


Emily C. Paavola

cc: John Mills, Esq.

RECEIVED

SEP 19 2012

S.C. SUPREME COURT



State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

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August 21, 2012

CONFIDENTIAL

The Honorable Melanie Huggins-Ward
Horry County Clerk of Court
P.O. Box 677
Conway, SC 29528

RE: *Louis Michael Winkler, Jr. v. State of South Carolina*
Case Number: 2011-CP-26-03907

Dear Ms. Huggins-Ward:

Please find enclosed for filing **under seal** with your office the Order Denying Final Motion for Authorization of Funds in the above referenced case.

By copy of this letter and enclosure to the applicant's attorneys in this case, I am providing them with a copy of the order and notice of its filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc

Enclosure (a/s)

pc: Hon. Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Motte L. Talley, Assistant Director, S.C. Court Administration
Emily C. Paavola, Esquire
John R. Mills, Esquire
Louis Michael Winkler, Jr., SCDC #00006027

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2011-CP-26-3907

Louis Michael Winkler, Jr.,)
Applicant,)
vs.) EX PARTE TO BE FILED UNDER SEAL
State of South Carolina,) ORDER DENYING FINAL MOTION
Respondent.) FOR AUTHORIZATION OF FUNDS
_____)

Before the court is the applicant's Final Motion for Authorization of Funds in this post-conviction relief case. The trial of this case was held June 18 – 21, 2012. The applicant was denied post-conviction relief regarding his conviction for murder but, was granted post-conviction relief for his sentence of death. The applicant's sentence was commuted to life in prison. The applicant now seeks additional funding, post-trial, to cover expenses incurred in the preparation and trial of this case.

Pursuant to Code of Laws of South Carolina 1976 § 17-27-160(B), an indigent defendant convicted of murder and sentenced to death is entitled to two court appointed attorneys to represent him in his PCR case. Counsel appointed in these cases shall be compensated from the funding provided in § 16-3-26. Code § 16-3-26(C)(1) authorizes the funding of investigative, expert, or other services found "***reasonably necessary*** for the representation of the defendant..." (emphasis added).

Heretofore, the court approved the applicant's request for funding to pay for a forensic scientist, a mitigation specialist, a fact investigator, a paralegal, neuroimaging and attorney fees. Now, the applicant seeks additional funding and the reallocation of unused funds authorized for

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mk

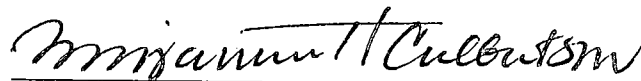
other services to cover unpaid expenses for these services. However, none of the relief granted in this PCR case is attributable to services provided by the forensic scientist, mitigation specialist, fact investigator or neuroimaging. Therefore, the applicant has failed to show how the additional funding for these services were "reasonably necessary" for the applicant's representation in this PCR case.

The applicant seeks \$3,000.00 in additional funds for the paralegal. Previously, the court authorized \$7,000.00 for a paralegal. The applicant also seeks attorney fees for an additional 140 hours of representation. However, the applicant has failed to provide any itemization or verification evidencing the work performed by the paralegal or attorney, or the time they devoted to representing the applicant. Further, nothing has been presented to show drafts against funds previously authorized by the court for attorney and paralegal fees. Therefore, the applicant's request for additional funding for attorney and paralegal fees should be denied.

NOW, THEREFORE, based upon the above, it is hereby

ORDERED, that the applicant's Final Motion for Authorization of Funds is DENIED.

AND IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge

August 21, 2012
Georgetown, SC

Shearouse, Daniel

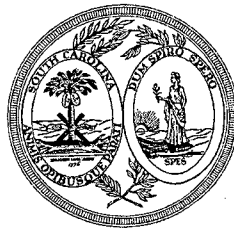
From: Culbertson, Benjamin H.
Sent: Tuesday, August 21, 2012 4:45 PM
To: Shearouse, Daniel; Talley, Motte
Subject: Winkler v. State (2011-CP-26-3907)
Attachments: 8-21-2012 status letter to SC & CA.dotx

Please find attached my letter regarding the status of the above referenced PCR death penalty case.

Sincerely,

Benjamin H. Culbertson

Circuit Court Judge
P.O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Phone: (843) 545-3030
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State of South Carolina
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August 21, 2012

Via U. S. Mail and Email Delivery

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August 21, 2012
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The Honorable Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
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August 21, 2012
Page Three

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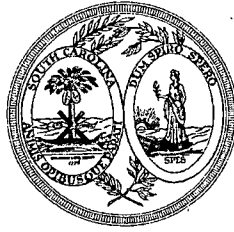
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BHC/bhc

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Case Number: 2011-CP-26-03907

RECEIVED
SOUTH CAROLINA

AUG 27 2012

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August 21, 2012
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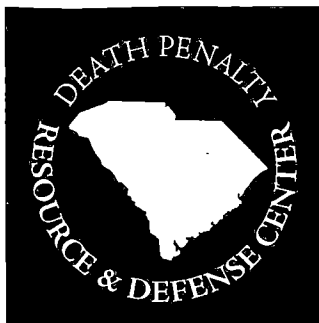


Benjamin H. Culbertson

BHC/bhc

pc: Hon. Melanie Huggins-Ward, Horry County Clerk of Court
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J. Gregory Hembree, Solicitor

Louis Michael Winkler, Jr., SCDC #00006027
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472



July 16, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

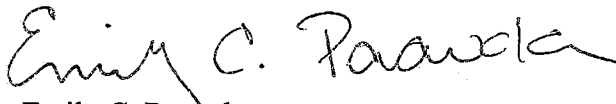
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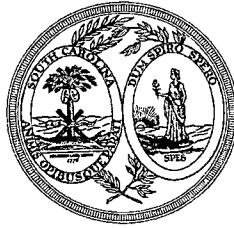

Emily C. Paavola

cc: John Mills, Esq.

RECEIVED

JUL 17 2012

S.C. SUPREME COURT



RECEIVED

JUN 11 2012

S.C. SUPREME COURT

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

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June 6, 2012

Via U. S. Mail and Email Delivery

The Honorable Daniel E. Shearouse
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The Honorable Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
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June 6, 2012
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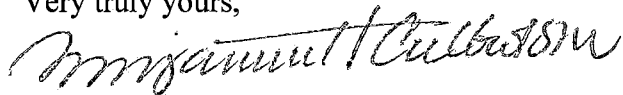
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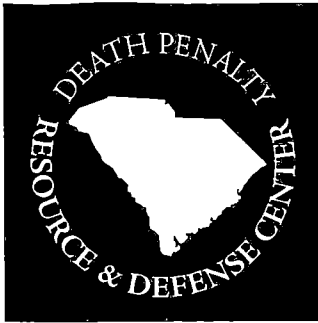


Benjamin H. Culbertson

BHC/bhc

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Louis Michael Winkler, Jr., SCDC #00006027
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May 15, 2012

RECEIVED

MAY 16 2012

S.C. SUPREME COURT

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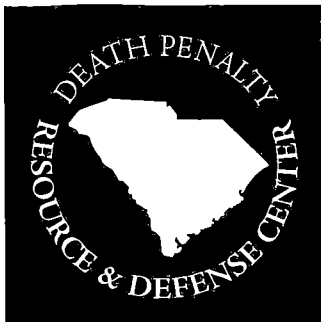
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MAR 19 2012

March 16, 2012

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Louis M. Winkler v. State of South Carolina*, 2011-CP-26-03907

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. Mr. John Mills, Esq. and I were appointed to serve as Mr. Winkler's post-conviction counsel. An evidentiary hearing has been scheduled for June 18, 2012.

If you have any questions or require any additional information, please do not hesitate to contact me.

Sincerely yours,

Emily C. Paavola

Emily C. Paavola

cc: John Mills, Esq.



State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
Facsimile: (843) 545-3282
Email: bculbertson@sccourts.org

RECEIVED

JAN 20 2012

January 18, 2012

S.C. SUPREME COURT

Via U. S. Mail and Email Delivery

The Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Email: DShearouse@sccourts.org

Motte L. Talley, Assistant Director
Court Administration, S.C. Judicial Department
1015 Sumter St., Suite 200
Columbia, SC 29201

Email: MTalley@sccourts.org

RE: *Louis Michael Winkler, Jr. v. State of South Carolina*
Case Number: 2011-CP-26-03907

Gentlemen:

Pursuant to the Supreme Court order dated 5/25/2011 regarding the above referenced PCR action, I provide the following status of this case from 9/21/2011 to the present. This letter supplements the status of this case as set forth in the undersigned's letter dated 9/21/2011.

9/21/2011: By order of the undersigned dated 9/21/2011, this case is set for a date certain trial commencing at 9:30 a.m. on 6/18/2012. Further, the South Carolina Department of Corrections is ordered to transport the applicant to the trial of this case.

11/30/2011: Applicant makes a Motion to Alter the Scheduling Order dated 7/7/2011.

12/8/2011: Applicant's Motion to Alter the Scheduling Order is partially granted and partially denied. This motion is decided without oral arguments.

An amended scheduling order dated 12/8/2011 is issued which grants the petitioner until 2/2/2012 to file and serve his Initial Amended Application for Post-Conviction Relief, if any.

The Honorable Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Motte L. Talley, Assistant Director, Court Administration, S.C. Judicial Department
January 18, 2012
Page Two

The Amended Scheduling Order also reflects that this case is set for date certain trial commencing 6/18/2012. All other mandates of the Scheduling Order dated 7/7/2011 remain the same under the Amended Scheduling Order.

With kindest regards, I remain

Very truly yours,



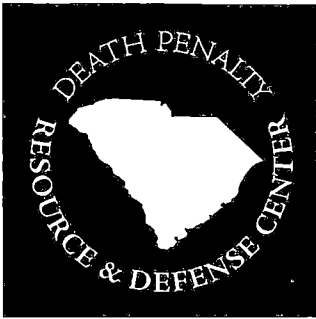
Benjamin H. Culbertson

BHC/bhc

pc: (via U.S. Mail Delivery only)

Hon. Melanie Huggins-Ward, Horry County Clerk of Court
Emily C. Paavola, Esquire
John R. Mills, Esquire
Alphonzo Simon, Jr., Asst. Attorney General
J. Gregory Hembree, Solicitor

Louis Michael Winkler, Jr., SCDC #00006027
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472



November 15, 2011

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S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Louis M. Winkler v. State of South Carolina*, 2011-CP-26-03907

Dear Mr. Shearouse:

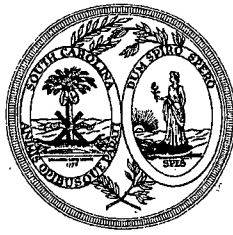
Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. Mr. John Mills, Esq. and I were appointed to serve as Mr. Winkler's post-conviction counsel. An evidentiary hearing has been scheduled for June 2012.

If you have any questions or require any additional information, please do not hesitate to contact me.

Sincerely yours,

Emily C. Paavola

cc: John Mills, Esq.



RECEIVED

SEP 26 2011

State of South Carolina S.C. Supreme Court
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
Facsimile: (843) 545-3282
Email: bculbertsonj@sccourts.org

September 21, 2011

The Honorable Melanie Huggins-Ward
Horry County Clerk of Court
P.O. Box 677
Conway, SC 29528

RE: *Louis Michael Winkler, Jr. v. State of South Carolina* (2011-CP-26-03907)

Dear Ms. Huggins-Ward:

Please find enclosed for filing with your office the Order For Day Certain Trial in the above referenced PCR/Death Penalty case that was assigned to me by order of the Supreme Court. Please note that I have scheduled this case for a day certain trial before me commencing at 9:30 a.m. on 6/18/2012. Both Judge Steven H. John and I are assigned to common pleas court that week in Horry County.

By copy of this letter and enclosure to the attorneys in this case, I am providing them with a copy of the order and notice of its filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc

Enclosure (a/s)

pc: Hon. Steven H. John
Hon. Larry B. Hyman
Hon. Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Motte L. Talley, Assistant Director, S.C. Court Administration
Emily C. Paavola, Esquire
John R. Mills, Esquire
Alphonzo Simon, Jr., Asst. Attorney General
J. Gregory Hembree, Solicitor
Louis Michael Winkler, Jr., SCDC #00006027

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NUMBER: 2011-CP-26-03907
Louis Michael Winkler, Jr.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	ORDER FOR DAY CERTAIN TRIAL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Pursuant to Code of Laws of South Carolina 1976 §17-27-160(C) and the Scheduling Order in this case dated July 7, 2011, it is hereby

ORDERED, that this case is scheduled for a “day certain” trial before the undersigned presiding judge commencing **June 18, 2012 at 9:30 a.m.** in the **Horry County Judicial Center in Conway, South Carolina**; it is further

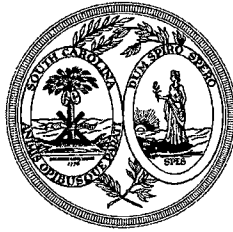
ORDERED, that the South Carolina Department of Corrections shall be responsible for the transportation of the Petitioner to the trial of this case.

AND IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge

September 21, 2011
Georgetown, South Carolina



RECEIVED
SEP 26 2011
S.C. SUPREME COURT

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
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September 21, 2011

Via U. S. Mail and Email Delivery

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Columbia, SC 29211

Email: DShearouse@sccourts.org

Motte L. Talley, Assistant Director
Court Administration, S.C. Judicial Department
1015 Sumter St., Suite 200
Columbia, SC 29201

Email: MTalley@sccourts.org

RE: *Louis Michael Winkler, Jr. v. State of South Carolina*
Case Number: 2011-CP-26-03907

Gentlemen:

Pursuant to the Supreme Court order dated 5/25/2011 regarding the above referenced PCR action, I provide the following status of this case:

6/24/2011: The applicant was deemed indigent and entitled to court appointed counsel. This determination was based upon the applicant's Affidavit of Indigency and Request for Counsel without a formal hearing.

Emily C. Paavola, Esquire, was appointed as lead counsel for the applicant. This appointment was based upon the attorney's affidavit of qualifications as counsel and the consent of the attorneys and applicant in this case without a formal hearing.

John R. Mills, Esquire, was admitted *pro hac vice* and appointed second counsel for the applicant. The admission *pro hac vice* was based upon the attorney's application without a formal hearing. His appointment as counsel was based upon the attorney's affidavit of qualifications as counsel and the consent of the attorneys and applicant in this case without a formal hearing.

7/7/2011: A status conference was held in the undersigned judge's chambers at Georgetown County Judicial Center. Emily C. Paavola and John R. Mills (petitioner's attorneys) and Alphonzo Simon, Jr. (respondent's attorney) attended the status conference. A scheduling order was issued in this case as follows:

- A. Petitioner shall file and serve his Initial Amended Application for Post-Conviction Relief, if any, by no later than 12/1/2011. Should petitioner not file an Initial Amended Application for Post-Conviction Relief, petitioner shall be barred from filing any subsequent Amended Application for Post-Conviction Relief without prior order of the court authorizing such filing.
- B. Petitioner shall file and serve his Final Amended Application for Post-Conviction Relief, if any, by 5/1/2012.
- C. Respondent shall file and serve its Return to Amended Applications for Post-Conviction Relief within 30 days of receipt of the amended application.
- D. The parties shall complete discovery by 6/1/2012. Any party desiring discovery shall serve discovery requests and/or notice of depositions within sufficient time to allow the opposing party to comply with the said discovery by 6/1/2012.
- E. Any and all motions regarding discovery in this case shall be filed with a supporting brief and simultaneously submitted to the undersigned judge and served on opposing counsel. Opposing counsel may file/submit/serve a brief in opposition to the motion within 14 days of receipt of the motion. All motions regarding discovery shall be decided on briefs without oral arguments.
- F. Any and all pre-trial motions, saving and excepting motions regarding discovery, shall be filed with a supporting brief and simultaneously submitted to the undersigned judge and served on opposing counsel. Opposing counsel may file/submit/serve a brief in opposition to the motion within 14 days of receipt of the motion. All pre-trial motions subject to this section shall be decided on briefs without oral arguments unless a party requests a hearing for oral arguments at the time the party files/serves/submits his brief.
- G. The merits hearing in this case shall be held on or before 7/1/2012. A "day certain" hearing date shall be scheduled by the undersigned judge upon receipt of the circuit court's schedule for 1/1/2012 through 6/30/2012. The merits hearing in this case is continued beyond the 180-day scheduling requirements set forth in Code §17-27-160(C) for the following good causes:

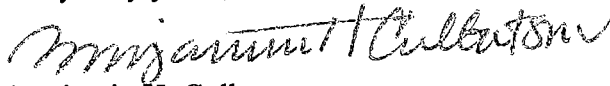
The Honorable Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Motte L. Talley, Assistant Director, Court Administration, S.C. Judicial Department
September 21, 2011
Page Three

- a) Petition is originally from another state and petitioner's attorneys are not sure whether a social history investigation was performed. If not, petitioner's attorneys need additional time to conduct a social history investigation.
- b) Several pre-trial hearings were conducted prior to the trial of this case that are not included in the Record On Appeal. Petitioner's attorneys need additional time to research and investigate these pre-trial hearings.
- c) Experience of petitioner's attorneys has shown that a case of this magnitude cannot be investigated, researched and prepared for hearing within 180 days.

At this time, the court anticipates setting this case for a "day certain" trial commencing 6/18/2012.

With kindest regards, I remain

Very truly yours,



Benjamin H. Culbertson
Presiding Judge

BHC/bhc

pc: Hon. Melanie Huggins-Ward, Horry County Clerk of Court
Emily C. Paavola, Esquire
John R. Mills, Esquire
Alphonzo Simon, Jr., Asst. Attorney General
J. Gregory Hembree, Solicitor

Louis Michael Winkler, Jr., SCDC #00006027
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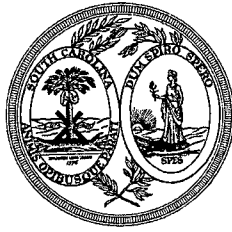
Shearouse, Daniel

From: Culbertson, Benjamin H.
Sent: Wednesday, September 21, 2011 10:27 AM
To: Shearouse, Daniel; Talley, Motte
Subject: Death Penalty PCR re: Winkler v. State (2011-CP-26-3907)
Attachments: 9-21-2011 status letter to SC & CA.dotx

Please see attached letter which is being mailed today (9/21/2011).

Benjamin H. Culbertson

Circuit Court Judge
P.O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Phone: (843) 545-3030
Fax: (843) 545-3282



State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

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September 21, 2011

Via U. S. Mail and Email Delivery

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Columbia, SC 29211

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Motte L. Talley, Assistant Director
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The Honorable Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Motte L. Talley, Assistant Director, Court Administration, S.C. Judicial Department
September 21, 2011
Page Three

- a) Petition is originally from another state and petitioner's attorneys are not sure whether a social history investigation was performed. If not, petitioner's attorneys need additional time to conduct a social history investigation.
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- c) Experience of petitioner's attorneys has shown that a case of this magnitude cannot be investigated, researched and prepared for hearing within 180 days.

At this time, the court anticipates setting this case for a "day certain" trial commencing 6/18/2012.

With kindest regards, I remain

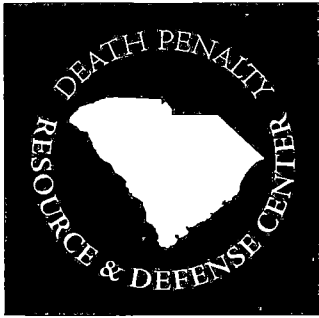
Very truly yours,

Benjamin H. Culbertson
Presiding Judge

BHC/bhc

pc: Hon. Melanie Huggins-Ward, Horry County Clerk of Court
Emily C. Paavola, Esquire
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September 15, 2011

The Honorable Daniel E. Shearouse
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South Carolina Supreme Court
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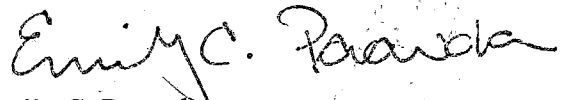
Re: *Louis M. Winkler v. State of South Carolina, 2011-CP-26-03907*

Dear Mr. Shearouse:

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If you have any questions or require any additional information, please do not hesitate to contact me.

Sincerely yours,

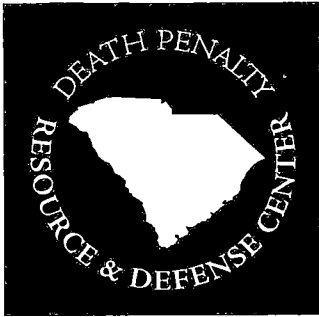

Emily C. Paavola

cc: John Mills, Esq.

RECEIVED

SEP 16 2011

S.C. SUPREME COURT



July 15, 2011

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

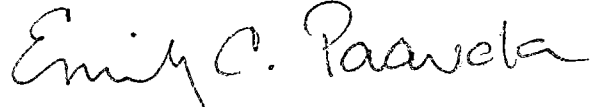
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If you have any questions or require any additional information, please do not hesitate to contact me.

Sincerely yours,


Emily C. Paavola

cc: John Mills, Esq.

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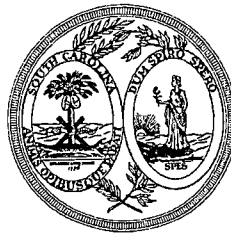
JUL 20 2011

S.C. SUPREME COURT

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JUL 11 2011

S.C. SUPREME COURT



State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

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July 7, 2011

The Honorable Melanie Huggins-Ward
Horry County Clerk of Court
P.O. Box 677
Conway, SC 29528

RE: *Louis Michael Winkler, Jr. v. State of South Carolina*
Case Number: 2011-CP-26-03907

Dear Ms. Huggins-Ward:

Please find enclosed for filing with your office the Scheduling Order in the above referenced case.

By copy of this letter and enclosure to the attorneys in this case, I am providing them with a copy of the order and notice of its filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc

Enclosure (a/s)

pc: Hon. Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Motte L. Talley, Assistant Director, S.C. Court Administration
Emily C. Paavola, Esquire
John R. Mills, Esquire
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J. Gregory Hembree, Solicitor
Louis Michael Winkler, Jr., SCDC #00006027

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NUMBER: 2011-CP-26-03907
Louis Michael Winkler, Jr.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SCHEDULING ORDER
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

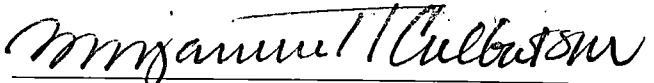
Pursuant to the Order of the South Carolina Supreme Court dated 5/25/2011 and Code of Laws of South Carolina 1976 §17-27-160(C), a status conference was convened in this case on 7/7/2011 at 10:00 a.m. in the chambers of the undersigned judge at the Georgetown County Judicial Center, 333 Cleland Street, Georgetown, South Carolina. Attorneys Emily C. Paavola and John R. Mills appeared on behalf of the petitioner and Assistant Attorney General Alphonzo Simon, Jr. appeared on behalf of the respondent.

Pursuant to the said status conference, the following schedule is hereby set in this case:

1. Petitioner shall file and serve his Initial Amended Application for Post-Conviction Relief, if any, by no later than 12/1/2011. Should petitioner not file an Initial Amended Application for Post-Conviction Relief, petitioner shall be barred from filing any subsequent Amended Application for Post-Conviction Relief without prior order of the court authorizing such filing.
2. Petitioner shall file and serve his Final Amended Application for Post-Conviction Relief, if any, by 5/1/2012.
3. Respondent shall file and serve its Return to Amended Applications for Post-Conviction Relief within 30 days of receipt of the amended application.
4. The parties shall complete discovery by 6/1/2012. Any party desiring discovery shall serve discovery requests and/or notice of depositions within sufficient time to allow the opposing party to comply with the said discovery by 6/1/2012.

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7. The merits hearing in this case shall be held on or before 7/1/2012. A "day certain" hearing date shall be scheduled by the undersigned judge upon receipt of the circuit court's schedule for 1/1/2012 through 6/30/2012. The merits hearing in this case is continued beyond the 180-day scheduling requirements set forth in Code §17-27-160(C) for the following good causes:
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 - b. Several pre-trial hearings were conducted prior to the trial of this case that are not included in the Record On Appeal. Petitioner's attorneys need additional time to research and investigate these pre-trial hearings.
 - c. Experience of petitioner's attorneys has shown that a case of this magnitude cannot be investigated, researched and prepared for hearing within 180 days.

AND IT IS SO ORDERED.


Benjamin H. Culbertson
Presiding Judge

July 7, 2011
Georgetown, SC



RECEIVED

JUN 29 2011

S.C. SUPREME COURT

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

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June 24, 2011

Via Email and U.S. Mail Delivery

Emily C. Paavola, Esquire
Death Penalty & Defense Center
P.O. Box 11311
Columbia, SC 29211

Email: Emily@deathpenaltyresource.org

John R. Mills, Esquire
Attorney at Law
201 W. Main Street, Suite 301
Durham, NC 27701

Email: John@jrmillslaw.com

Alphonzo Simon, Jr., Asst. Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Email: asimon@scag.gov

J. Gregory Hembree, Solicitor
Office of the Solicitor, 15th Judicial Circuit
P.O. Box 1276
Conway, SC 29528

Email: hembree1@horrycounty.org
psnowden@horrycounty.org

RE: *Louis Michael Winkler, Jr. v. State of South Carolina*
Case Number: 2011-CP-26-03907

Dear Ms. Paavola and Gentlemen:

Please find enclosed the order appointing Ms. Paavola and Mr. Mills as counsel for the applicant in the above referenced case. Also enclosed is a copy of the order admitting Mr. Mills *pro hac vice* in this case.

Pursuant to S.C. Code Annotated §17-27-160(C), I have scheduled a status conference in this case on 7/7/2011 at 10:00 a.m. in my chambers in the Georgetown County Judicial Center in

Emily C. Paavola, Esquire
John R. Mills, Esquire
Alphonzo Simon, Jr., Asst. Attorney General
J. Gregory Hembree, Solicitor

June 24, 2011
Page Two

Georgetown, SC. At this status conference, I will schedule the merits hearing in this case and address any other scheduling matters and/or concerns. Per the Order of the Supreme Court dated 5/25/2011, I must issue a scheduling order in this case by 7/25/2011.

With kindest regards, I remain

Very truly yours,



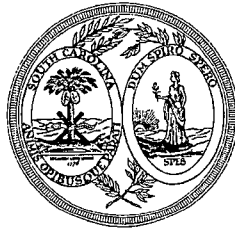
Benjamin H. Culbertson

BHC/bhc

Enclosures (a/s)

pc: Hon. Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Motte L. Talley, S.C. Court Administration
Hon. Melanie Huggins-Ward, Horry County Clerk of Court

Louis Michael Winkler, Jr., SCDC #00006027
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472



State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
Facsimile: (843) 545-3282
Email: bculbertsonj@sccourts.org

June 16, 2011

Via Email and U.S. Mail Delivery

Emily C. Paavola, Esquire
Death Penalty & Defense Center
P.O. Box 11311
Columbia, SC 29211

Email: Emily@deathpenaltyresource.org

John R. Mills, Esquire
Attorney at Law
201 W. Main Street, Suite 301
Durham, NC 27701

Email: John@jrmillslaw.com

John Blume, III, Esquire
Blume, Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211

Alphonzo Simon, Jr., Asst. Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Email: asimon@scag.gov

J. Gregory Hembree, Solicitor
Office of the Solicitor, 15th Judicial Circuit
P.O. Box 1276
Conway, SC 29528

Email: hembree1@horrycounty.org
psnowden@horrycounty.org

RE: *Louis Michael Winkler, Jr. v. State of South Carolina*
Case Number: 2011-CP-26-03907

Ladies and Gentlemen:

RECEIVED

JUN 20 2011

S.C. SUPREME COURT

Emily C. Paavola, Esquire
John R. Mills, Esquire
John Blume, III, Esquire
Alphonzo Simon, Jr., Asst. Attorney General
J. Gregory Hembree, Solicitor

June 16, 2011
Page Two

I received the necessary consents for the appointment of Ms. Paavola and Mr. Mills as applicant's counsel in this case and, therefore, will not conduct a formal hearing on 6/17/2011 as advised in my letter to you dated 5/27/2011. I did not receive a consent from Mr. Blume and, therefore, assume that he does not consent to his appointment as counsel in this case.

Before I can appoint Ms. Paavola and Mr. Mills as counsel in this case, the following must be submitted to me:

1. Affidavits from Ms. Paavola and Mr. Mills attesting to their qualifications as counsel in this case.
2. Mr. Mills' application and order for admission *pro hac vice*.
3. The applicant's Affidavit of Indigency and Application for Counsel (SCACR VI Form 02GS).

Please submit these by 12:00 noon on 6/22/2011 as the deadline imposed by the Supreme Court for me to appoint counsel is 6/24/2011. If these are not submitted by 6/22/2011, then I will have a formal hearing on this matter at 9:30 a.m. on 6/24/2011 in the Horry County Judicial Center in Conway, SC. These affidavits and applications should be submitted to everyone involved in this case so that any opposition can be submitted to the court by 6/23/2011.

I apologize for the rush in requiring this information but, I am trying to avoid the necessity of having everyone appear in person for a hearing to appoint counsel when everyone seems to consent to the appointment.

With kindest regards, I remain

Very truly yours,

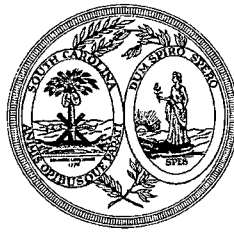


Benjamin H. Culbertson

BHC/bhc

pc: Hon. Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Motte L. Talley, S.C. Court Administration
Hon. Melanie Huggins-Ward, Horry County Clerk of Court

Louis Michael Winkler, Jr., SCDC #00006027
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472



State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
Facsimile: (843) 545-3282
Email: bculbertsonj@sccourts.org

May 27, 2011

Louis Michael Winkler, Jr., SCDC #00006027
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

Robert M. Dudek, Chief Appellate Defender
Elizabeth A. Franklin-Best, Appellate Defender
Commission on Indigent Defense, Appellate Division
P.O. Box 11589
Columbia, SC 29211

Emily C. Paavola, Esquire
Death Penalty & Defense Center
P.O. Box 11311
Columbia, SC 29211

John Blume, III, Esquire
Blume, Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211

Alan McCrory Wilson, Assistant Attorney General
Donald J. Zelenka, Assistant Deputy Attorney General
Alphonzo Simon, Jr., Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

J. Gregory Hembree, Solicitor
Office of the Solicitor, 15th Judicial Circuit
P.O. Box 1276
Conway, SC 29528

RECEIVED

JUN 01 2011

S.C. SUPREME COURT

Louis Michael Winkler, Jr., SCDC #00006027
Robert M. Dudek, Chief Appellate Defender
Elizabeth A. Franklin-Best, Appellate Defender
Emily C. Paavola, Esquire
John Blume, III, Esquire
Alan McCrory Wilson, Assistant Attorney General
Donald J. Zelenka, Assistant Deputy Attorney General
Alphonzo Simon, Jr., Assistant Attorney General
J. Gregory Hembree, Solicitor

May 27, 2011
Page Two

RE: *Louis Michael Winkler, Jr. v. State of South Carolina*
Case Number: 2011-CP-26-03907

Ladies and Gentlemen:

I have been assigned to the above referenced case for post-conviction relief (PCR) and enclose a copy of the South Carolina Supreme Court's Order to that effect.

The information I have received thus far indicates that you are either involved in this PCR case or anticipate being involved in this case. If so, please provide me with the following information (even if your address above is correct):

1. name;
2. mailing address;
3. phone number;
4. fax number;
5. email address;
6. nature of involvement in PCR case.

If I do not receive this information from you, I will assume that you are not involved in this case and need not receive any further notices. If you know of anyone else involved in this PCR case and not a recipient of this letter, please let me know or have that person contact me with the above requested information.

Ms. Paavola has agreed to serve as lead counsel for the petitioner in this case but, to date, has not been appointed. She has suggested appointment of North Carolina attorney John Mills (who will have to be admitted *pro hac vice*) or, in the alternative, John Blume as co-counsel for the petitioner. The enclosed Supreme Court Order mandates that I conduct a hearing on the petitioner's desires regarding counsel by 6/24/2011. Therefore, I am scheduling this hearing for 6/17/2011 at 9:30 a.m. in the Horry County Judicial Center in Conway, SC. If you consent to the appointment of Ms. Paavola as lead counsel in this case and the appointment of John Mills or

Louis Michael Winkler, Jr., SCDC #00006027
Robert M. Dudek, Chief Appellate Defender
Elizabeth A. Franklin-Best, Appellate Defender
Emily C. Paavola, Esquire
John Blume, III, Esquire
Alan McCrory Wilson, Assistant Attorney General
Donald J. Zelenka, Assistant Deputy Attorney General
Alphonzo Simon, Jr., Assistant Attorney General
J. Gregory Hembree, Solicitor

May 27, 2011
Page Three

John Blume as co-counsel, please sign the enclosed consent and return it to me when you provide the above requested information. If I receive consents from everyone involved in the PCR case prior to 6/17/2011, then a hearing will not be necessary. Otherwise, if you are involved in this case, you will need to appear at the hearing on the petitioner's desires regarding counsel.

As you can see from the Supreme Court Order, time is of the essence in this case. Therefore, your prompt attention to these matters is requested.

I look forward to working with everyone in this case.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc

pc: Hon. Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Motte L. Talley, S.C. Court Administration
Hon. Melanie Huggins-Ward, Horry County Clerk of Court

The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

ORDER

Appellant was convicted of murder, first-degree burglary, and assault and battery of a high and aggravated nature. He was sentenced to death. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010). Appellant's petition for rehearing was denied on September 22, 2010. The United States Supreme Court denied certiorari on April 25, 2011.

Appellant now seeks a stay of execution, pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he can pursue post-conviction relief (PCR). The State does not oppose the motion.

The request for a stay of execution is granted. The stay shall remain in effect to the extent provided by this Court in In re Stays of Execution in Capital Cases.

The Honorable Benjamin H. Culbertson is hereby assigned to the

PCR action appellant has filed. Judge Culbertson shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled.

Judge Culbertson shall conduct a hearing on appellant's desires regarding counsel within thirty days of the date of this order. Within sixty days of the date of this order, Judge Culbertson shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits. The scheduling order may be amended as necessary. A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court and Court Administration. In addition to appellant's obligation to notify the Clerk of this Court of the status of this matter every sixty days under In re Stays of Execution in Capital Cases, supra, Judge Culbertson is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days.

IT IS SO ORDERED.



FOR THE COURT

J.

Columbia, South Carolina

May 25, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NUMBER: 2011-CP-26-03907
Louis Michael Winkler, Jr.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CONSENT TO APPOINTMENT OF COUNSEL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

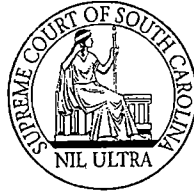
The undersigned hereby consents to the following appointments of counsel for the petitioner in this case:

Lead Counsel: Emily C. Paavola, Esquire
Death Penalty & Defense Center
P.O. Box 11311
Columbia, SC 29211

Co-Counsel:	John Blume, III, Esquire		John Mills, Esquire
	Blume, Weyble & Norris, LLC	or	(address unknown)
	P.O. Box 11744		
	Columbia, SC 29211		

Date: _____ (Signature) _____

Type or Print: Name: _____
Position: _____



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 25, 2011

Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Winkler, Louis Michael Jr.

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

By copy of this letter and order, we are advising all interested parties of the action by the Court.

Very truly yours,

CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General Alphonso Simon, Jr.
The Honorable J. Gregory Hembree
The Honorable Benjamin H. Culbertson
Motte L. Talley, South Carolina Court Administration

The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

ORDER

Appellant was convicted of murder, first-degree burglary, and assault and battery of a high and aggravated nature. He was sentenced to death. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010). Appellant's petition for rehearing was denied on September 22, 2010. The United States Supreme Court denied certiorari on April 25, 2011.

Appellant now seeks a stay of execution, pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he can pursue post-conviction relief (PCR). The State does not oppose the motion.

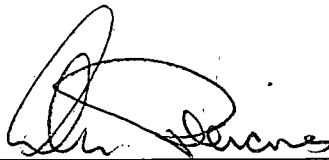
The request for a stay of execution is granted. The stay shall remain in effect to the extent provided by this Court in In re Stays of Execution in Capital Cases.

The Honorable Benjamin H. Culbertson is hereby assigned to the

PCR action appellant has filed. Judge Culbertson shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled.

Judge Culbertson shall conduct a hearing on appellant's desires regarding counsel within thirty days of the date of this order. Within sixty days of the date of this order, Judge Culbertson shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits. The scheduling order may be amended as necessary. A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court and Court Administration. In addition to appellant's obligation to notify the Clerk of this Court of the status of this matter every sixty days under In re Stays of Execution in Capital Cases, supra, Judge Culbertson is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days.

IT IS SO ORDERED.



J.

FOR THE COURT

Columbia, South Carolina

May 25, 2011



ALAN WILSON
ATTORNEY GENERAL

April 28, 2011

RECEIVED

APR 28 2011

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

S.C. Supreme Court

Re: *The State v. Louis Michael Winkler, Jr.*

Dear Mr. Shearouse:

Please find enclosed an original and six (6) copies of a Return to Motion for a Stay of Execution and for the Appointment of a Post-Conviction Relief Judge, together with Certificate of Service regarding the above matter.

Please feel free to contact me if you have any questions.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

Enclosures

cc: Robert M. Dudek, Esq. (w/2 copies of encls.)
Elizabeth Franklin-Best, Esq. (w/2 copies of encls.)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
The Honorable James E. Lockemy, Circuit Court Judge

THE STATE,

Respondent, **RECEIVED**
APR 28 2011

v.

LOUIS MICHAEL WINKLER, JR.,

S.C. Supreme Court

Appellant.

RETURN TO MOTION FOR A STAY OF EXECUTION AND FOR THE
APPOINTMENT OF A POST-CONVICTION RELIEF JUDGE

The Respondent State of South Carolina, through undersigned counsel, hereby makes a Return to the Motion for Stay of Execution and for the Appointment of a Post-Conviction Relief Judge filed April 26, 2011. Respondent does not oppose the request for a stay pursuant to the mandates of this Court in In Re Stays of Execution In Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), and Respondent does not oppose the request for appointment of a judge for the post-conviction relief action. In support of this Return, Respondent would show this Court the following:

I.

The Supreme Court of South Carolina affirmed the convictions and death sentence in State v. Louis Michael Winkler, Jr., Op. No. 26857, 388 S.C. 574,

698 S.E.2d 596 (August 16, 2010). A petition for rehearing was made on August 31, 2010. It was denied September 22, 2010. The remittitur was issued the same date.

II.

On September 24, 2010, Appellant, through counsel Robert M. Dudek and Elizabeth Franklin-Best, made a petition for a stay of execution. Respondent filed a Return on October 4, 2010, and did not oppose the stay because Appellant set forth four issues that warranted the stay under In Re Stays of Execution In Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996). In an Order filed October 20, 2010, this Court granted the petition for stay of execution.

On February 11, 2011, Appellant subsequently timely filed in the United States Supreme Court a Petition for Writ of Certiorari to the Supreme Court of South Carolina. Respondent filed its Brief in Opposition on March 28, 2011. Appellant filed a Reply Brief on April 12, 2011. By Order filed April 25, 2011, the Petition for Writ of Certiorari was denied. Thus, Appellant's direct appeal process has been exhausted.

III.

This Court in its Order concerning capital cases, In Re Stays, supra, stated it will issue a stay to allow a defendant to pursue state post-conviction relief if the defendant timely files "a motion to stay with this Court, setting forth the issues intended to be raised in the application for post-conviction relief." Appellant has met the requirements for a stay in his Petition. Appellant notes

that he has already started the process of filing an application for post-conviction relief by drafting and submitting an initial application.¹ Appellant also outlines in the Motion that he intends to raise at least three allegations of ineffective assistance of counsel:

- (a) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they did not retain a crime scene investigator to explore the drop of blood identified in a photograph, and situated on the kitchen countertop in the victim's apartment, and which would have supported Applicant's defense that someone else murdered the victim;
- (b) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they mounted a mitigation case completely at odds with Applicant's wishes;
- (c) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they did not object to the Clerk of Court [for] Horry County, Melony Huggin's, participation in any aspect of this trial when she was the victim's friend.

Motion at pp. 2-3. Appellant also attached a copy of the application for post-conviction relief that was being filed. Ineffective assistance of counsel claims are of "the general nature of issues appropriate for post-conviction relief" actions. See, e.g., Strickland v. Washington, 466 U.S. 668 (1984); Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998). This Motion is timely; it was filed before a Notice of Execution was issued by this Court. Further, Appellant has set forth

¹ Respondent would note that as of the date of this Return, the Horry County Clerk's Office has not filed the Application submitted by Appellant. However, the filing of an application for post-conviction relief is not necessary to seek the stay. S.C. Code Ann. § 17-27-160(A) states "[t]he filing of the application does not automatically stay any sentence of death." To maintain a stay for post-conviction relief, an application for post-conviction relief needs to be timely filed "within sixty (60) days of the date of the order regarding counsel" In re Stays, 321 S.C. at 546, 471 S.E.2d 140.

issues he intends to raise in his post-conviction relief action. Thus, a stay would be appropriate under In Re Stays.

IV.

Respondent also requests the appointment of a circuit judge for the post-conviction relief action. Respondent has no objection to Appellant's request as this would follow the procedure outlined in In re Stays, supra.

WHEREFORE having made Return, Respondent does not oppose the issuance of a stay of execution or the appointment of a circuit judge for the post-conviction relief action.

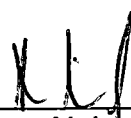
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General
ATTORNEYS FOR RESPONDENT

By: 

Alphonso Simon Jr.
P.O. Box 11549
Columbia, South Carolina 29211

April 28, 2011.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
The Honorable James E. Lockemy, Circuit Court Judge

THE STATE,

Respondent, **RECEIVED**

v.

APR 28 2011

LOUIS MICHAEL WINKLER, JR.,

S.C. Supreme Court

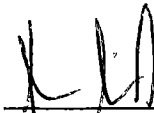
Appellant.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., hereby certify that I have served the *Return to the Motion for Stay of Execution and for the Appointment of a Post-Conviction Relief Judge* in the foregoing action by depositing two (2) copies in the U.S. mail to the following:

Robert M. Dudek
Chief Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Ste. 401
Columbia, SC 29201

Elizabeth Franklin-Best
Assistant Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Ste. 401
Columbia, SC 29201



ALPHONSO SIMON, JR.
Assistant Attorney General

April 28, 2011

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

RECEIVED

APR 26 2011

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

MOTION FOR A STAY OF EXECUTION AND
FOR THE APPOINTMENT OF A
POST-CONVICTION RELIEF JUDGE

Counsel for Louis Michael Winkler, Jr. moves this Court for a stay of execution and to appoint a post-conviction relief judge so that post-conviction counsel can be appointed by the post-conviction relief judge.

I.

This Court affirmed petitioner's murder conviction and death sentence in State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010).

II.

Petitioner filed a petition for rehearing. This Court denied that petition on September 22, 2010.

III.

A petition for writ of certiorari to the United States Supreme Court, *Louis Winkler v. State of South Carolina*, No. 10-9125, was then filed on February 18, 2011. The Court denied certiorari in its order dated April 25, 2011. A copy of that order is attached to this motion.

IV.

Petitioner now can and will raise numerous grounds of ineffective assistance of counsel in an application for post-conviction relief. Lauren Cruse of this office yesterday, April 25, 2011, overnight mailed petitioner's application for post-conviction relief to the Horry County Court of Common Pleas for filing. In that application for post-conviction relief, petitioner raised fifteen allegations of ineffective assistance of counsel while reserving the right to amend once counsel is appointed. A copy of that post-conviction relief application is attached. The first three allegations of ineffective assistance counsel in that attached application are that:

- (a) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they did not retain a crime scene investigator to explore the drop of blood identified in a photograph, and situated on the kitchen countertop in the victim's apartment, and which would have supported Applicant's defense that someone else murdered the victim;
- (b) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they mounted a mitigation case completely at odds with Applicant's wishes;
- (c) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they

did not object to the Clerk of Court [for] Horry County, Melony Huggin's, participation in any aspect of this trial when she was the victim's friend;

The attached post-conviction relief allegations is not meant to be exhaustive, and will likely expand, once appointed post-conviction counsel has had the opportunity to investigate. The above grounds, and those grounds contained in the attached post-conviction relief application are offered to show that numerous issues of ineffective assistance of counsel exist in this case.

V.

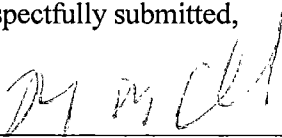
Present counsel cannot take a position on the issue of ineffective assistance of appellate counsel. That is a matter for post-conviction counsel and the post-conviction court to determine.

VI.

Based on the above, petitioner requests that this Court issue a stay of execution and appoint a post-conviction relief judge so that the appointed post-conviction relief judge can hold a hearing to appoint post-conviction counsel. See, In Re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140, 141 (1996) This will allow petitioner to pursue his state court post-conviction relief action in the Horry County Court of Common Pleas.

WHEREFORE, counsel for Louis Michael Winkler, Jr. requests that this Court issue a stay of execution and appoint a post-conviction relief judge so that the appointed post-conviction relief judge can hold a hearing to appoint post-conviction counsel so that petitioner can pursue post-conviction relief with the assistance of counsel in the Horry County Court of Common Pleas upon the grounds of ineffective assistance of counsel, and any other grounds that may arise from post-conviction counsel's investigation of this case.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

April 26, 2011

Westlaw.

Page 1

--- S.Ct. ----, 2011 WL 664175 (U.S.S.C.)
(Cite as: 2011 WL 664175 (U.S.S.C.))

H

Only the Westlaw citation is currently available.

Supreme Court of the United States
WINKLER, LOUIS M. V. SOUTH CAROLINA.

No. 10-9125.
April 25, 2011.

*1 The petition for writ of certiorari is denied.

U.S.,2011.
Winkler v. South Carolina
--- S.Ct. ----, 2011 WL 664175 (U.S.S.C.)

END OF DOCUMENT

FORM 5

COPY

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
	)	
Louis Michael Winkler, Jr. #6027	)	APPLICATION FOR
Full name and prison number (if any) of Applicant	)	POST-CONVICTION RELIEF
	)	
	)	
v.	)	
	)	
State of South Carolina	)	

INSTRUCTIONS- READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention: Lieber Correctional Institution
2. Name and location o Court which imposed sentence: Horry County Court of General Sessions
3. Name(s) of co-defendant(s) (if any): _____
4. The indictment number or numbers (if known) upon which the offense for which sentence was imposed:

- (a.) 2006-GS-26-2101
- (b.) _____
- (c.) _____

5. The date upon which sentence was imposed and the terms of the sentence:
- (a.) February 8, 2008 (Death Penalty)
- (b.) _____
- (c.) _____
6. Check whether a finding of guilty was made:
- (a.) after a plea of guilty: _____
- (b.) after a plea of not guilty: X
- (c.) after a plea of nolo contendere: _____
7. Did you appeal from the judgment of conviction of the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Supreme Court
- ii. United States Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed: *State v. Louis Michael Winkler, Jr.* (2010)
- ii. Certiorari denied: *Louis Michael Winkler, Jr. v. South Carolina*
- iii. _____
- (c) the date of each such result:
- i. August 16, 2010
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596 (2010)
- ii. _____
- iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
 - (b) _____
 - (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of counsel in violation of the Sixth Amendment
 - (b) _____
 - (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they did not retain a crime scene investigator to explore the drop of blood identified in a photograph, and situated on the kitchen countertop in the victim's apartment, and which would have supported Applicant's defense that someone else murdered the victim;
 - (b) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they mounted a mitigation case completely at odds with Applicant's wishes;
 - (c) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they did not object to the Clerk of Court at Horry County, Melony Huggin's, participation in any aspect of this trial when she was the victim's friend;
 - (d) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to use Jeff Naylor, a retained expert prepared to testify to the contents of the victim's computer which would have revealed the victim's involvement with other people who may have killed her;

- (e) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by failing to move DVDs into evidence that were found at the scene;
- (f) The state committed a Brady violation when it failed to turn over, until trial, a photograph that showed the blinds in the apartment were open when a statement was made by law enforcement that the blinds were closed, and when the state's failure to produce relevant and probative evidence demonstrates its desire to have secured a conviction at all costs;
- (g) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they failed to retain a crime scene expert who could have effectively challenged the state's theory of the murder and shown that police officers tampered with the scene;
- (h) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they did not move to change venue in light of the high profile nature of this case and the significant contacts between the jurors and the victim;
- (i) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by failing to call the victim's estranged husband, Roger Granger, to the stand when Applicant's defense was that Granger killed the victim;
- (j) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by not introducing evidence of Jonathan Granger's demon worship and penchant for weapons when such evidence would have been relevant for impeaching his testimony that he witnessed Applicant kill the victim.
- (k) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by not informing the jury that Applicant worked at Tillman Lakes by the Sea for 10 years and was

highly liked by homeowners and families in the resort community.

- (l) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by failing to interview Mildred when Mildred would have testified that the victim was scared of her estranged husband and when this testimony would have been necessary for Applicant to present a complete defense.
- (m) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to secure a copy of the victim's diary when the diary would have offered evidence that the victim was scared of her estranged husband's violent tendencies.
- (n) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to identify whose glasses were located on the back of the couch at the crime scene. Trial counsel was also ineffective for failing to have the DNA on the bullet tested.
- (o) Petitioner may also raise issues relating to possible prosecutorial misconduct, juror issues, and Brady claims. Appellate counsel cannot be more specific regarding these grounds because no investigation was conducted on direct appeal.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? None other than the mandatory appeal to the State Supreme Court
- (b) any petition in State or Federal Courts for habeas corpus or post-conviction relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions, or applications in this or any other Court?

No _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a _____

(b) the name and location of the Court in which each was filed:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a _____

(c) the disposition thereof:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a _____

(d) the date of each such dispositions:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. n/a

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. n/a

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is the first PCR

(b) _____

(c) _____

17. Where you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Ralph J. Wilson, Esquire, P.O. Box 1827, Conway, South Carolina 29526
 - ii. Paul Elbert Rathbun, Esquire, 203 Laurel Street, Conway, South Carolina 29526-5125
 - iii. Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211-1589
 - iv. Elizabeth Franklin-Best, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211-1589
 - (b) the proceedings at which each attorney presented you:
 - i. Mr. Wilson and Mr. Rathbun- trial
 - ii. Mr. Dudek and Ms. Franklin-Best - appeal
 - iii. _____
19. State clearly the relief you seek in filing this application.
New Trial
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA)
)
COUNTY OF Horry) VERIFICATION

I, Louis Michael Winkler, Jr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Louis M. Winkler Jr

SUBSCRIBED AND SWORN TO before me
this 21st day of April, 2011.

Sylvia Jones (L.S.)
Notary Public for South Carolina
My Commission Expires: 11/24/2018

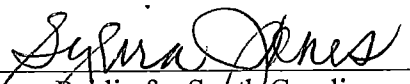
**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT IN SUPPORT THERE OF**

I, Louis Michael Winkler, Jr., hereby apply for leave to proceed in this action without prepayment of fees or costs or security, therefore. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SUBSCRIBED AND SWORN TO before me
this 21st day of April, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 1/24/2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

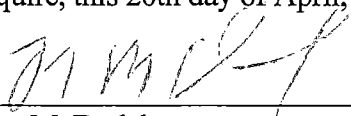
V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

CERTIFICATE OF SERVICE

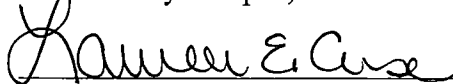
The undersigned attorney hereby certifies that a true copy of the motion for a stay of execution and to appoint a post-conviction relief judge in the above-referenced case has been served upon opposing counsel, Alphonso Simon, Jr., Esquire, this 26th day of April, 2011.



Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 26th day of April, 2010.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

April 25, 2011

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Louis Michael Winkler
v. South Carolina
No. 10-9125
(Your No. 26857)

RECEIVED

APR 28 2011

S.C. SUPREME COURT

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



William K. Suter, Clerk



ALAN WILSON
ATTORNEY GENERAL

March 28, 2011

The Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, N.E.
Washington, DC 20543

Re: *The State v. Louis Michael Winkler*

Dear Mr. Suter:

Enclosed for filing please find the original and ten (10) copies of the Brief in Opposition to Petition for Writ of Certiorari, along with proof of service in the above-referenced case.

Thank you for your assistance in this matter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd
Enclosures

cc: Robert M. Dudek, Esq. (w/two (2) copies of encls.)
The Honorable Daniel E. Shearouse, Clerk, South Carolina Supreme Court
(w/copy of encls.)
Sandi Wofford, Director, Victims Services (w/copies of encls.)

RECEIVED

MAR 30 2011

S.C. SUPREME COURT

No. 10-9125

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

LOUIS MICHAEL WINKLER,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of South Carolina

BRIEF IN OPPOSITION

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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RECEIVED

MAR 30 2011

S.C. SUPREME COURT

* Counsel of Record

ATTORNEYS FOR RESPONDENT

CAPITAL CASE

PETITIONER'S QUESTION PRESENTED

Does a defendant charged with a capital crime who proceeds with appointed counsel during the guilt phase of trial and is convicted have a Sixth Amendment right under Faretta v. California, 422 U.S. 806 (1975) to represent himself during the penalty phase?

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Respondent, the State of South Carolina, through the Attorney General, hereby makes a brief in opposition to the petition for a writ of certiorari filed by Petitioner, Louis Michael Winkler, who has been convicted of one count of murder, one count of first-degree burglary, and one count of assault and battery of a high and aggravated nature, and sentenced to death. Respondent respectfully submits the petition is without merit and must be denied for the reasons set forth herein.

CITATION TO THE OPINION BELOW

The South Carolina Supreme Court entered its opinion affirming the convictions on August 16, 2010. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010). (See also Petitioner's Appendix, pp. A1-A7). The Order denying the Petition for Rehearing filed on September 22, 2010 was unpublished. (Petitioner's Appendix, pp. A24-25).

JURISDICTION

The South Carolina Supreme Court issued its opinion on August 16, 2010, and rehearing was denied on September 22, 2010. Petitioner contends this Court has jurisdiction over the questions presented pursuant to 28 U.S.C. § 1257, in that he asserted below and asserts in his petition a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner asserts that this case involves the Sixth Amendment right "to have the Assistance of Counsel for his defense," and the Fourteenth Amendment rights to due process and equal protection.

RESPONDENT'S STATEMENT OF THE CASE

The State filed its Notice of Intent to Seek the Death Penalty on March 12, 2007. (R. p. 1976). In the Notice, the statutory aggravating circumstances asserted were that the murder was committed during the commission of a burglary, S.C. CODE ANN. § 16-3-20(C)(a)(8); and that the murder was of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime under S.C. CODE ANN. § 16-3-20(C)(a)(11). (R. p. 1977).

On January 28 – February 8, 2008, Petitioner Louis Michael Winkler (“Petitioner”) was tried by a jury for murder, first-degree burglary, and assault and battery of a high and aggravated nature. He was tried in the Horry County Court of General Sessions before the Honorable James E. Lockemy, Circuit Court Judge. Ralph J. Wilson, Esquire, and Assistant Public Defender Paul Elbert Rathbun, Esquire, represented Petitioner. Solicitor J. Gregory Hembree, Esquire, Deputy Solicitor Francis A. Humphries, Jr., Esquire, and Assistant Solicitor Scott R. Hixson, Esquire, all of the Fifteenth Judicial Circuit, represented the State. On February 2, 2008, the jury convicted Petitioner on all three charges. (R. p. 1903).

On February 8, 2008, the jury found there was evidence of both asserted aggravating circumstances beyond a reasonable doubt, and recommended that Petitioner be sentenced to death. (R. p. 2940). Judge Lockemy sentenced Petitioner to thirty years confinement on the burglary conviction, and ten years confinement

on the ABHAN conviction, both to be served concurrently with a death sentence for the murder. (R. p. 2949). Petitioner filed a timely notice of intent to appeal.

Robert M. Dudek, Chief Appellate Defender of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, and Elizabeth Franklin-Best, Appellate Defender of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Petitioner on appeal. Appellate counsel filed a Final Brief of Appellant in the Supreme Court of South Carolina on April 5, 2010, and raised seven issues:

1. Whether the court erred by admitting a tape recording, as a prior consistent statement under Rule 801(b)(1)(B), SCRE, of an interview wherein the decedent's son, Jonathan G., told Detective Ann Pitts that his "stepfather," appellant, shot his mother since this statement was not admissible as a prior consistent statement because all of the elements of Rule 801(b)(1)(B), SCRE were not met, and the fact Officer Knochs testified that Jonathan told him immediately following the murders that his "Dad" shot his mother did not make this subsequent statement admissible since there was no accusation of a recent fabrication, improper influence or motive?
2. Whether the court erred by allowed the transcript of the 911 tape to be given to the jury when it asked to "read over the 911 transcript" during deliberations since the transcript was not in evidence, and it was not an accurate transcription of the interview?
3. Whether the court abused its discretion by refusing to allow appellant to represent himself during the penalty phase of his capital trial particularly where his attorneys agreed appellant was ready to represent himself and that no delay in the trial was necessary?
4. Whether the court erred, alternatively, by refusing to allow appellant to represent himself during the penalty stage of the trial since appellant had the right to represent himself during the penalty phase under the reasoning of Farett, and his case

was not governed by the State v. Brewer abuse of discretion standard?

5. Whether the court erred by failing to properly provide appellant with Fareta warnings, during a focused waiver hearing, when appellant invoked his right to represent himself, and his attorneys told the court that appellant was ready and willing to represent himself and that no delay in the trial was necessary?
6. Whether the court erred alternatively by allowing defense counsel to present mitigating social history evidence and call appellant's family members as mitigation witnesses over his objection since appellant still had the right to control the case in mitigation and waive mitigation evidence he did not want the jury to consider even where the judge denied appellant the right to represent himself?
7. Whether the court erred by refusing to direct a verdict on the aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime aggravator since there was a lack of evidence to support it?

The State, through Assistant Attorney General Alphonso Simon Jr., filed its Final Brief of Respondent on April 14, 2010. The Supreme Court of South Carolina heard oral arguments on the issue on June 24, 2010, and subsequently issued its opinion affirming the convictions and sentence on August 16, 2010. Petitioner filed a timely petition for rehearing that was denied on September 22, 2010. Petitioner now seeks certiorari review by this Court.

RESPONDENT'S STATEMENT OF FACTS

On October 11, 2005, Petitioner Louis Michael Winkler ("Petitioner") was charged with the kidnapping, criminal sexual conduct in the first degree, and assault and battery with intent to kill of his estranged wife, Rebekah Grainger

Winkler. (R. p. 2227). Those charges stemmed from the kidnapping which occurred on the night October 10, 2005.

On March 6, 2006, Petitioner broke into his estranged wife's condo in North Myrtle Beach, SC. (R. pp. 1430-31). He knocked her son, Jonathan G., off of a stool and onto the ground. (R. pp. 1431, 1433). Petitioner then shot the victim, Rebekah Grainger Winkler, once in the face at point blank range. (R. p. 1436). Shortly thereafter, Petitioner left the condo. (R. p. 1440).

According to Dr. Edward Leroy Proctor, Jr., the forensic pathologist who conducted the victim's autopsy, the victim received a very close range gunshot wound that entered her left cheek, penetrated her brain stem, and exited through the rear right side of her brain. (R. p. 1634). Dr. Proctor noted that the shot was probably fired within a distance of 12 to 18 inches, and no more than 24 inches of the victim. (R. p. 1634). Dr. Proctor further testified there was stippling around the wound that caused by the burning gunpowder coming from the end of the gun. (R. p. 1634). Dr. Proctor testified that death would have been instant. (R. p. 1637).

Police were unable to find and arrest Petitioner in the days immediately after the homicide. (R. p. 1645-46). On March 13, 2006, law enforcement formed a task force to apprehend Petitioner. (R. p. 1646). On March 20, 2006, two weeks after the homicide, Petitioner was spotted in the wood line of a hole at the Eagle Nest Golf Course in North Myrtle Beach, South Carolina. (R. p. 1647). The police set up a perimeter around the area where Petitioner was last seen on the golf course. (R. p. 1651). Boyd spotted Petitioner moving inside the perimeter. (R. p. 1652). He

testified that Petitioner was wearing a dark pullover. Boyd requested that the helicopter assisting with the search scan the area. (R. p. 1652). The helicopter had to refuel. As the helicopter returned to the scene of the search, Boyd saw Petitioner in the wood line. (R. p. 1653). Police were able to apprehend Petitioner without any problems. (R. p. 1653). Boyd noted that Petitioner appearance was consistent with someone who had been outside for a period of time. (R. p. 1657).

Prior to trial, Petitioner had conflicts with appointed counsel. At a July 3, 2007 hearing, Petitioner indicated that Rathbun, the second chair, was telling him to take a plea, plead guilty. (R. p. 3264). Petitioner interpreted that to mean that Rathbun thought he was guilty. (R. p. 3264). Rathbun responded that he believed Petitioner heard what he wanted to hear and didn't hear what counsel was saying. (R. p. 3265). Rathbun affirmed to the court that he would do his utmost to represent Petitioner in a trial. (R. p. 3265). At that hearing, Wilson indicated that when there have been disagreements between Rathbun and Petitioner, Wilson had been able to sit down with Petitioner and decide on the correct course of action with Petitioner's consent. (R. p. 3262).

During an ex parte hearing held just prior to jury selection for Petitioner's trial, Petitioner again complained to the trial judge about trial counsel. Petitioner asserted that Rathbun got in his face, put his finger in Appellant's face, and touched his face. (R. p. 33). Petitioner also complained that Wilson was calling Petitioner's sister a liar. (R. p. 33). In response, Wilson informed the court that he had done everything he knew to do to represent Petitioner in the best fashion he knew. (R. p.

34). He also indicated that Petitioner is antagonistic, and has been so since the first day. (R. p. 34). Wilson further noted that they had made every effort to protect every right, hired every expert they could think to hire, and have tried to talk with every witness they could possibly find. (R. p. 34). He informed the court they were prepared for trial. (R. p. 34). The fact that Petitioner's personality got on Wilson's last nerve would not affect him and his ability to represent him.

Petitioner continually complained that counsel was advising his family that Petitioner was likely going to be convicted. (R. pp. 41-2). The Court responded that it could not chastise counsel for giving him an honest opinion. (R. p. 42).

Any event, we're going to proceed then. There's no request for you to represent yourself. You're requesting another attorney. Since that's the case, I will not grant your motion. Now, you always have that option to represent yourself, which would be very inadvisable at this stage, but we will continue on with the case.

(R. p. 42, ll 12-17).

Prior to the start of the sentencing phase, Petitioner initially indicated that he wanted to cross-examine some of the witnesses scheduled to testify for the State. (R. p. 1915-19). Eventually, Petitioner requested to waive counsel and proceed pro se. After lengthy discussions with Petitioner, prosecutors, one of Petitioner's treating psychiatrists, and defense counsel, the trial court found Petitioner's request to proceed pro se was untimely. (R. pp. 1919-68). Thus, it was in the trial court's discretion whether to allow Petitioner to represent himself for the sentencing phase. (R. pp. 1966-70). After balancing several factors, the trial court denied Petitioner's request to waive counsel and proceed pro se. (R. pp. 1970-71).

REASONS WHY THE WRIT SHOULD BE DENIED

Certiorari is not warranted in this case. Contrary to Petitioner's assertions in the Petition, the South Carolina Supreme Court has not declared that a capital defendant's decision to represent himself during the sentencing phase of his trial is subject to an abuse of discretion standard on appeal. Instead, the South Carolina Supreme Court held that it is within the discretion of the trial court whether to allow a defendant to proceed pro se when **the request is untimely**. Petitioner's request at trial was not timely because he did not make his request until shortly before the sentencing phase was set to begin. Since the guilt-or-innocence phase and sentencing phase of a capital trial in South Carolina together constitute a single trial, Petitioner would have needed to have made his request before the beginning of the guilt phase to be timely.

A. This ruling is consistent with those of other jurisdictions that have addressed the issue, and this ruling is not inconsistent with this Court's precedent.

The South Carolina Supreme Court addressed the trial court's handling of Petitioner's request to proceed pro se as follows:

An accused may waive the right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, "[a] defendant's right to waive the assistance of counsel is not unlimited." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). "The request to proceed pro se must be clearly asserted by the defendant prior to trial." Id. (citation omitted). "If the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge." Id. (citing United States v. Singleton, 107 F.3d 1091 (4th Cir.1997); United States v. Lawrence, 605 F.2d 1321 (4th Cir.1979)).

"Once trial commences, that right [to proceed pro se] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." U.S. v. Wesley, 798 F.2d 1155, 1155-56 (8th Cir.1986) (citations omitted); see also U.S. v. Stevens, 83 F.3d 60, 66-67 (2d Cir.1996) ("[O]nce a trial has begun, a defendant's right to represent himself 'is sharply curtailed,' and the judge considering the motion must weigh 'the prejudice to the legitimate interests of the defendant' against the 'potential disruption of proceedings already in progress.' "). The sentencing phase of a capital trial does not constitute a separate trial. See S.C.CODE ANN. § 16-3-20(B) (2003); see also State v. Stewart, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

Appellant did not make his request to proceed pro se at the beginning of trial. Appellant made his request to proceed pro se at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

Winkler, 388 S.C. at 586, 698 S.E.2d at 602-03. The South Carolina Supreme Court further found the trial court did not abuse its discretion in denying Petitioner's request to represent himself during the sentencing phase. Id. at 586-87, 698 S.E.2d at 603. This ruling was both narrow and consistent with the holdings of other jurisdictions that have addressed whether a trial court has discretion to deny an untimely request from a defendant to waive counsel and proceed pro se.

It is well-established that an accused may waive the right to counsel and proceed pro se. Faretta, 422 U.S. 806, 95 S.Ct. 2525. Although a defendant's decision to proceed pro se may be to the defendant's own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. at 834, 95 S.Ct. at 2541 (internal quotation omitted). However,

[a]s the Faretta opinion recognized, the right to self-representation is not absolute. The defendant must “voluntarily and intelligently” elect to conduct his own defense, 422 U.S., at 835, 95 S.Ct. 2525 (quoting Johnson v. Zerbst, 304 U.S. 458, 464-465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)), and most courts require him to do so in a timely manner.

Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 161-62, 120 S. Ct. 684, 691, 145 L. Ed. 2d 597 (2000).

B. There is a common agreement among courts across the United States that when a defendant makes an untimely request to represent himself, waiver of counsel is left to the discretion of the trial court.

Courts that have addressed the issue of whether an untimely request to waive counsel should be granted have consistently found it is within the trial court's discretion.¹ The jurisdictions of the cases upon which Petitioner relies all recognize that a defendant does not have an absolute right to represent himself at trial if his request to waive counsel and proceed pro se is untimely. People v. Gorga, 396 Ill. App. 3d 406, 410, 920 N.E.2d 535, 540 (Ill. App. Ct. 2009) appeal denied, 236 Ill. 2d 520, 930 N.E.2d 412 (2010) (citing (People v. Burton, 184 Ill.2d 1, 24, 703 N.E.2d 49 (1998)). United States v. Oakey, 853 F.2d 551, 553 (7th Cir.1988)(once trial commences, the district court retains discretion to balance the interests of the

¹ See generally Robards v. Rees, 789 F.2d 379 (6th Cir. 1986) (finding trial court did not abuse its discretion in denying request to waive counsel and proceed pro se on eve of trial); United States v. Mackovich, 209 F.3d 1227, 1236 (10th Cir. 2000)(noting defendant must timely assert intention to represent himself to exercise the right); United States v. Betancourt-Arretuche, 933 F.2d 89, 95-6 (1st Cir. 1991)(finding defendant waived right to represent self by waiting until after jury selected and sworn before making request); United States v. Young, 287 F.3d 1352, 1353-54 (11th Cir. 2002); People v. Halvorsen, 42 Cal.4th 379, 165 P.3d 512 (2007).

defendant against the potential disruption of the proceedings already in progress); see Gregory v. State, 628 P.2d 384 (Okla. Crim. App. 1981)(finding no violation of Faretta right because request was equivocal and untimely); Gowter v. State, 589 P.2d 682, 688 (Okla. Crim. App. 1978)(“ In order to proceed pro se, the right must be timely asserted, and accompanied by a valid waiver of counsel.”); Soto v. Com., 139 S.W.3d 827, 857 (Ky. 2004)(“[A] defendant who wishes to waive his constitutional right to counsel (or, as here, make a limited waiver) must do so in a timely manner so as not to cause a delay in the proceedings.”); Thomas v. State, 958 So. 2d 995, 996 (Fla. Dist. Ct. App. 2007) (“In Florida, it has been held that after a trial has begun with the defendant being represented by counsel, the decision of whether to allow a defendant to proceed pro se rests in the sound discretion of the trial court.”).

Petitioner has pointed to no authority where a court found a defendant had an absolute right to represent himself when his request was untimely. Instead, he relies upon cases whose procedural postures are incongruent to the facts in Petitioner’s case.

For instance, Petitioner relies upon the Fifth Circuit Court of Appeals decision in United States v. Davis, 285 F.3d 378 (5th Cir. 2002). In Davis, the defendant had been granted a new sentencing trial due to an error in his original trial. Id. at 380. The defendant had requested to proceed pro se in his new sentencing trial. Id. After a Faretta hearing, the trial court found that the defendant’s decision to represent himself was knowingly and intelligently made. Id. However, the district court concluded that the right to self representation did not

extend to sentencing, and that even if it did, Davis's interest were outweighed by the Eighth Amendment requirement that the death penalty not be applied arbitrarily or capriciously. Id. The Fifth Circuit Court of Appeals overturned the trial court's decision when the defendant filed for a writ of mandamus to require the district court to allow him to proceed pro se. Id. at 380. Unlike Petitioner's case, there was no question that the defendant in Davis timely requested to represent himself in his new sentencing hearing.

The timeliness of the defendant's request in Davis was never an issue before either the district court or the Fifth Circuit. Since the defendant in Davis had timely moved to represent himself in his new sentencing trial, it was not within the trial court's discretion whether the defendant could proceed pro se. Further, the district court's denial in Davis was based upon its belief that the Eighth Amendment requirement that the death penalty not be applied arbitrarily or capriciously trumped the defendant's right to represent himself. That issue was not presented to the South Carolina Supreme Court in Petitioner's case.

Other cases in the Fifth Circuit Court of Appeals are consistent with the South Carolina Supreme Court's ruling in Petitioner's case. For example, the Fifth Circuit recognized that a trial court has the discretion to decide whether to grant a defendant permission to proceed pro se when the request to do so is untimely. United States v. Long, 597 F.3d 720, 727 (5th Cir. 2010); Wood v. Quarterman, 491 F.3d 196, 201-02 (5th Cir. 2007)(citing Martinez v. Court of Appeal, 528 U.S. 152, 162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000); United States v. Davis, 269 F.3d 514,

520 (5th Cir.2001) ("The district court was not obliged to honor Davis's mid-trial request to represent himself.") (citing Moreno v. Estelle, 717 F.2d 171, 176 (5th Cir.1983)); see also Haynes v. Cain, 298 F.3d 375, 384 (5th Cir.2002) (en banc) (Dennis, J., concurring)).

In Wood, the Fifth Circuit found that the state court did not unreasonably apply federal law when it found the trial court had the discretion to deny a motion to proceed pro se when the defendant made the motion after the guilt phase and immediately before the sentencing phase in his capital trial. 491 F.3d at 202. The state habeas court in Wood held the trial court had the discretion because the motion was not timely. Id. at 201-02.

The timeliness of the defendant's request to represent himself was also not an issue in any of the cases upon which Petitioner relies in support of his claim. In Chapman v. Commonwealth, 265 S.W.3d 156 (Ky. 2007), the defendant moved to fire his attorneys and proceed pro se well before his trial. Id. at 161. Thus, there was no issue of whether the trial court had the discretion to either grant or deny the request before either the trial or appellate court. The issue in Hojan v. State, 3 So.3d 1204 (Fla. 2009), was whether a defendant could waive the presentation of mitigation evidence. Id. at 1211. As acknowledged by Petitioner, there was no issue of whether the defendant could represent himself. In Lay v. State, 179 P.3d 615 (Okla. Crim. App. 2008), the defendant represented himself in both the guilt-or-innocence phase and the sentencing phase of his trial. In Lay, the defendant only challenged his right to represent himself during the sentencing phase on appeal. Id.

at 619. Thus, there was no question regarding the timeliness of his request to represent himself during the sentencing phase.

In Commonwealth v. Davido, 582 Pa. 52, 65, 868 A.2d 431, 438 (2005), the Supreme Court of Pennsylvania noted that in its previous decision in Commonwealth v. Owens, 496 Pa. 16, 436 A.2d 129 (1981), it had

noted that “[w]here the accused does not request to represent himself before trial, the constitutional right to self-representation recognized in Faretta is not implicated. When, during the course of trial, an accused wishes to dismiss counsel and either represent himself or obtain new counsel, his request is addressed to the sound discretion of the trial court.” Owens, 436 A.2d at 133 n. 6 (citations omitted); see also United States v. McKenna, 327 F.3d 830, 844 (9th Cir.2003); Commonwealth v. Jermyn, 551 Pa. 96, 709 A.2d 849, 863 (1998).

Davido, 582 Pa. at 65, 868 A.3d at 438. And in both Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990), and People v. Coleman, 168 Ill.2d 509, 660 N.E.2d 919 (1995), there were no challenges to the timeliness of the defendants’ request to proceed pro se. Indeed, both defendants were allowed to represent themselves during the sentencing phase. The South Carolina Supreme Court’s decision is not akin to the decision made by the New Jersey Supreme Court in State v. Reddish, 181 N.J. 553, 859 A.2d 1173 (2004). Since Petitioner was not allowed to waive counsel for the sentencing phase of the trial, the powers of and/or limitations on standby counsel were not addressed in Petitioner’s case.² Furthermore, neither the

² Also, Petitioner’s argument that the South Carolina Supreme Court’s finding Petitioner’s request was untimely is analogous to the New Jersey Supreme Court’s finding that the right to a fair trial in a capital proceeding takes priority to the right of self-representation in Reddish is both unfounded and untimely. Petitioner did not raise this argument until he filed his Petition for Rehearing. The two arguments are not similar.

trial court nor the South Carolina Supreme Court delved into whether Petitioner would have been required to represent himself in the guilt phase of his trial had he made a timely motion to represent himself during the sentencing phase.

Altogether, the South Carolina Supreme Court's finding that Petitioner's request to proceed pro se was untimely and subject to the trial court's discretion was correct, proper, and consistent with the decisions of other courts that have addressed the same issue. The South Carolina Supreme Court's decision neither conflicts with the decision of another state court of last resort or United States court of appeal, nor decided an important question of federal law that has not been, but should be, settled by this Court, nor decided an important federal question in a way that conflicts with relevant decisions of this Court. Thus, this Petition should be denied.

CONCLUSION

For all the foregoing reasons the petition for a writ of certiorari must be denied.

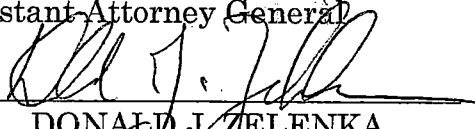
Respectfully Submitted,

ALAN WILSON
Attorney General

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Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General

By: 
DONALD J. ZELENKA

ATTORNEYS FOR RESPONDENT

March 28, 2011.

* Counsel of Record

No. 10-9125

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

LOUIS MICHAEL WINKLER,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

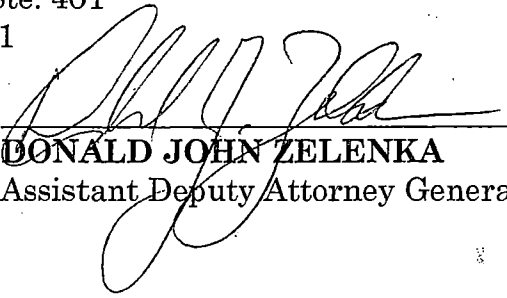
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of South Carolina

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Brief in Opposition* in the foregoing action by depositing two (2) copies in the U.S. mail, first class, postage prepaid to the following:

Robert M. Dudek, Esq.
SCCID/Division of Appellate Defense
Division of Appellate Defense
1330 Lady Street, Ste. 401
Columbia, SC 29201



DONALD JOHN ZELENKA
Assistant Deputy Attorney General

March 28, 2011.

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-3011

February 24, 2011

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RECEIVED

FEB 28 2011

Re: Louis Michael Winkler
v. South Carolina
No. 10-9125
(Your No. 26857)

S.C. Supreme Court

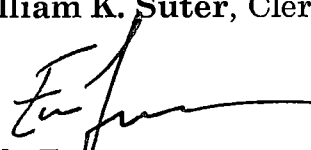
Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on February 18, 2011 and placed on the docket February 24, 2011 as No. 10-9125.

Sincerely,

William K. Suter, Clerk

by



Erik Fossum
Case Analyst



Division of Appellate Defense
1330 Lady Street, Suite 401
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Columbia, South Carolina 29211-1589
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

FEB 18 2011

February 18, 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Louis Michael Winkler v. State of South Carolina

Dear Mr. Shearouse:

Please be advised that I have filed a petition for writ of certiorari in this case with the United States Supreme Court today. I have attached a copy of that petition.

Please contact me if you have any questions.

Sincerely,

Robert M. Dudek
Chief Attorney

RMD/lec
Enclosure

cc: Alphonso Simon, Jr., Esquire



SCCID

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 18, 2011

RECEIVED

FEB 18 2011

S.C. Supreme Court

Honorable William K. Suter
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: Louis Winkler v. State of South Carolina

Dear Mr. Suter:

Enclosed are the petition for writ of certiorari, a motion for leave to proceed *in forma pauperis*, and an affidavit of Louis Winkler in support of motion to proceed *in forma pauperis*. The certificate of service is attached to the original petition. Representing the State of South Carolina is Alphonso Simon, Jr., Esquire, of the Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549. His phone number is (803) 734-3727. I represent petitioner Louis Michael Winkler. The other information required by Rule 29.5 is contained above. If additional information is desired, please contact me.

Sincerely,

Robert M. Dudek
Attorney at Law

RMD\lec

Enclosure

cc: Honorable Daniel E. Shearouse
Alphonso Simon, Jr., Esquire



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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 18, 2011

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, DC 20543

Re: Louis Michael Winkler v. South Carolina

Dear Mr. Suter:

Enclosed is petitioner's Certificate of Filing by Mail in the above-referenced case.

Sincerely,

Robert M. Dudek
Attorney at Law

RMD:lec

Enclosure

cc: Alphonso Simon, Jr., Esquire
Honorable Daniel E. Shearouse, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

No. A-

LOUIS MICHAEL WINKLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

*ROBERT M. DUDEK
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* Counsel of Record

CAPITAL CASE

QUESTION PRESENTED

Does a defendant charged with a capital crime who proceeds with appointed counsel during the guilt phase of trial and is convicted have a Sixth Amendment right under *Faretta v. California*, 422 U.S. 806 (1975) to represent himself during the penalty phase?

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IN THE SUPREME COURT OF THE UNITED STATES

February Term, 2011

No. A-

LOUIS MICHAEL WINKLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

Counsel for Louis Michael Winkler petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court affirming his conviction for murder and his death sentence.

CITATION TO OPINION BELOW

The South Carolina Supreme Court's opinion is reported as State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010) and is reproduced in the Appendix to this petition at pages A1-A7 .

JURISDICTION

The final judgment of the South Carolina Supreme Court in this case was entered August 16, 2010. The Supreme Court denied rehearing on September 22, 2010. The petition for rehearing and order denying rehearing appear in the Appendix at pages A8- A24. On December 3, counsel filed an application to extend the time to file this petition for writ of certiorari. The Chief Justice extended the time in which to file this petition for writ of certiorari until February 18, 2011.

The Court has jurisdiction pursuant to 28 U.S.C §1257(a), since Winkler is asserting the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments which provide, in pertinent part:

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Amendment XIV: No State "shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Louis Michael Winkler was tried for murder, burglary, and assault and battery of a high and aggravated nature in Horry County, South Carolina and was convicted. Deeply dissatisfied with his attorneys for a number of months prior to trial, he attempted to invoke his right pursuant to *Faretta* to represent himself during the penalty phase. The judge denied his request, and defense counsel proceeded to present a mitigation case that petitioner found deeply offensive.

At the start of the penalty phase of his capital trial, petitioner made his unequivocal request:

COURT: If you're saying that you want to represent yourself with Mr. Wilson and Mr. Rathburn to stay there as consultants for you to consult with during the course of this phase of the trial, but not to be your attorneys who ask questions or make closing arguments to the jury, is that what you're requesting?

A: Yes, sir.

R. 1928, ll. 11-17; R. 1930, ll. 19-24.

After a lengthy discussion with the attorneys, and defense counsel's vigorous argument that petitioner should be allowed to represent himself, the trial court judge refused petitioner's request. R. 1964, l. 8- R. 1972, l. 7. Counsel argued that the penalty phase of petitioner's capital trial was a separate and distinct proceeding.

Defense counsel argued:

[T]he courts have on many, many occasions reversed the sentencing phase and let the trial phase stay intact, and you come back and you get a new chance to go forward. And the defendant would certainly at that point decide whether or not he wanted to represent himself, which simply is saying that -- that having been said, well, we can't -- he doesn't have that right simply because we are at this particular stage.

This is a, this is a separate and distinct proceeding from the original proceeding. This is the sentencing proceeding. This is the beginning of the sentencing proceeding as opposed to the beginning of the trial. . . .

And I think that, that this is different, and I think it is distinct, and I do think that he has the right to defend himself if that's what he wants to do, provided the court believes and understands that this defendant has voluntarily making that decision.

Tr. 1941, l. 7- 1942, l. 5.

Trial counsel continued to enthusiastically argue appellant's right to represent himself. R. 1941, l. 7- 1942, l. 5; 1943, ll. 15-20; 1944, ll.8-20; 1955, l. 6- 1956, l. 8; 1972, l. 11- 1975, l. 23. The state also acknowledged appellant had the right to proceed *pro se*. R. 1922, ll. 2-13. The state asked the trial judge to review the *Faretta* factors with petitioner. R. 1937, ll. 18-23. Later, however, the state vacillated and stated it believed the judge could exercise his discretion on this issue. R. 1940, ll. 12-15.

The trial court judge disagreed with counsel, and the state's first position, and concluded petitioner's capital trial did not constitute "two trials" or "two proceedings." R. 1966, ll.22-23. The trial court judge reasoned then that since petitioner's request was made "in the midst of the trial" that the proper standard to employ was an abuse of discretion. R. 1967, l. 25- R. 1969, l. 5.

The South Carolina Supreme Court agreed with the trial court judge's analysis, and has determined that the sentencing phase of a capital trial does not constitute a separate trial for purposes of invoking one's right to represent oneself. State v. Winkler, 698 S.E.2d 596 at 602. The court found that, although an accused may waive the right to counsel and proceed *pro se*, pursuant to *Faretta*, this right is very strongly limited since the sentencing phase is not a separate trial. Id. at 586, 602.

Appellant did not make his request to proceed *pro se* at the beginning of trial. Appellant made his request to proceed *pro se* at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

Id. at 586, 602-603.

Petitioner was categorically opposed to the mitigation case that counsel was determined to present on his behalf. Defense counsel presented a mitigation case that focused exclusively on petitioner's family history. Petitioner did not want his family "dragged through the mud." R. 2789, l. 4. After trial counsel put up this evidence, defense counsel put "on the record":

Mr. Wilson: As you know, the record will reflect that I put a social, social history through a sociologist, Ms. Oehler, in - - regarding the defendant and his history and his family. And the defendant wants me to let the court know that he had asked me not to put up any social history and that I put that up in spite of his objections. And for the record, I'm noting that he did ask me not to put any social history in because he didn't want anything derogatory said about his family. But in my judgment as a lawyer, I felt it was the appropriate thing to do and I did it.

The Court: All right. That's noted. Be noted. Thank y'all very much. All right.

R. 2788, ll. 5 -25.

With the judge's approval for placing "mitigation evidence" before the jury over petitioner's objection, trial counsel then called a number of petitioner's family members to testify over his objection—two sisters, a brother, and petitioner's mother. One of his sisters, apparently, was crying. R. 2750, ll.5-7; R. 2795, ll.15-16; R. 2795, ll. 16-18; R. 2796, ll. 17-18; R. 2801, ll. 23-24; R. 2804, ll. 17-21; R. 2805, ll. 13-14; R. 2808, ll. 18-24.

Regarding this issue, the South Carolina Supreme Court held that trial counsel made a

“tactical decision” introducing this evidence, and thus found no error:

The introduction of the mitigation evidence at issue was a tactical decision made by appellant's trial counsel and is reviewed on a case-by-case basis. The mitigation evidence presented served the purpose of humanizing appellant to the jury. We find the introduction of this mitigation evidence was a tactical decision made by trial counsel and the trial court committed no error in admitting mitigation evidence that appellant did not want to be introduced.

Id. at 587, 603.

Petitioner's dissatisfaction with his attorneys was long-standing and justified. He attempted to have new attorneys appointed prior to the guilt phase. R. 42. The judge denied the request. R. 42, ll. 12-18. During an earlier pre-trial hearing, counsel informed the trial judge that petitioner had indicated “on several occasions” that he was dissatisfied with his co-counsel, Paul Rathbun. R. 3260, ll. 8-15. Petitioner informed the court he was concerned because his attorney was telling him to plead guilty. R. 3263, l. 25- 3265, l. 2. During an earlier hearing, one attorney, Paul Rathbun, disclosed that his wife was a sheriff's deputy in the county where this case was tried. R. 3253, ll. 2-4.

Petitioner's case was initially scheduled to be tried on July 16, 2007. On July 12, 2007 the court was notified by conference call that the defense was having difficulty communicating with their mitigation investigator. On that late date—one business day before the scheduled start of their client's capital trial-- they were concerned that “little or no work in preparation for mitigation” had been completed. Defense was asking for a continuance at the 11th hour. Yet, according to the Order, dated August 20, 2007 and memorializing the events of the hearing, counsel knew of these problems since late May. R. 3548. On Friday, July 13, 2007, *the state* requested a hearing on the matter. Among other findings, the Court noted:

[N]umerous hearings and conferences had been held in this matter since late May and never had the Court been advised for the defense that any problem existed in reference to the mitigation investigator or counsels' readiness to adequately represent the defendant in either the "trial phase" or the "sentencing phase" of the case until July 12, 2007, one business day from the start of the trial in this matter.

A new trial date was set for January 28, 2008. R. 3549. Counsel for petitioner was also ordered to have contact with the Court "at a minimum every two weeks until trial to insure appropriate progress is being made in the preparation of the defendant's defense and mitigation of sentence." R. 3551.

At the start of his trial, on January 28, 2008, defense counsel informed the court that petitioner wanted to have *both* Wilson and Rathbun relieved. R. 30, ll. 13-24. Petitioner reiterated that he had attempted to have Rathbun relieved eight months earlier, but the request had been denied. R. 32, l. 24 - 33, l. 6.

Petitioner also informed the court that a physical altercation occurred between himself and Wilson a couple of days earlier. R. 33, ll. 2 -19. During a hearing on January 24, 2008, petitioner informed the trial court of the nature of this altercation, and also complained that he had not seen his attorneys for the week prior to the start of his death penalty trial. R. 25, ll.11-24. Petitioner said:

"[Wilson] turned towards me, put his finger in my face, touched my face, and said she [appellant's sister] is a f'ing liar. At that time I swatted his hand away from my face, officers came in, and they acted like it was my fault. But it was Mr. Wilson's. And there's no way I can see where I'm gonna get a fair trial with this man, my attorney, when he has called me and my family liars over the past month."

R. 3409, ll. 4-10.

Petitioner also informed the judge that he wanted to press criminal charges against Wilson. He was thwarted in his efforts to secure a warrant for lead counsel's arrest. R. 3409, l. 23 - 3410, l. 4.

The judge informed petitioner that these were matters that could be addressed at a later date. R. 3410, ll. 16-17. "There's no urgency about that." R. 3410, l. 17. Wilson was quick to point out that there were witnesses to these events and that he hoped there was a video of the incident. R. 3411, ll. 5-10.

Petitioner continued to express his extreme dissatisfaction with Wilson. R. 3413, ll. 5-18. The trial court told Winkler --3 times-- that he could "address this further" on Monday, the start date of his capital trial. R. 3413, ll. 23-25; R. 3414, l. 5, R. 3414, ll. 12-13. On Monday, the judge stated these events were not "significant enough" to remove Wilson, and the trial began. R. 3419, ll. 22-25.

Indeed, prior to the start of trial, trial counsel and the mitigation specialist, Carolyn Graham, convened a Special Meeting of the Counsel for Louis M. Winkler at the J. Reuben Long detention center. They brought a court reporter with them who transcribed a conversation between defense counsel and petitioner on Saturday, January 26, 2008, from 11:57am- 12:29pm. R. 3418-3457. Counsel wanted to "put on" the record his understanding of why petitioner was placed in maximum security after the court hearing held that Thursday before. Counsel referenced the physical altercation he had with petitioner. R. 3420. Counsel also wanted to "make the record clear" that the evidence against petitioner was overwhelming, and that there was a "great likelihood" he was going to be convicted if he took the stand and advanced his theory of the defense. Counsel, on the record, wanted petitioner to understand that his defense

was “inconsistent with every fact that we are aware of.” R. 3426. Petitioner was well aware that counsel was holding this recorded meeting for purposes of protecting themselves. R. 3425 (“So you got a court reporter in just to, just for this”); R. 3431 (“So you're just covering your butt by having the court reporter here.” And “So you're just—And that's the only reason you have the court reporter here, is to cover your own butt, right?); R. 3445 (“You guys are just covering your own butt – “); Counsel explained his “reason” for conducting this privileged communication with a court reporter present:

MR. WINKLER: So you can let the judge hear that you're not backing me anymore.

MR. WILSON: -- an opportunity to understand me. No. This record will be sealed. When this court reporter types this, she will put it in a sealed envelope. It will be sealed, and the only time it will be opened is if you are convicted. If you are convicted, then it will be opened at the appellate level, but it will not be opened at trial. Nobody else other than the people in this room will be privy to this conversation whatsoever. But I do want that to be made a part of this record. And so that it is clear that if you do these things that you're doing them against my advice and over my objections, but that I am your lawyer, and if you decide that you're going to do it, then I'm going to facilitate you in every way I know how to make sure that you are allowed to do it, and we'll do it as effectively and in the best manner that we know how to represent you.

R. 3421-3433.

Rathbun was also asked if he wanted to put anything on the record, and he replied: “I just want to say that I concur with what Ralph said, that we have tried to get across to Mick what the strategy is and how his testifying could hurt the mitigation phase and that we are trying desperately to save Mr. Winkler's life.” R. 3454-55.

Petitioner put his thoughts “on the record” too:

What kind of chance do I have when they're not working towards acquittal, all they're working for is, I don't know, you know, backing themselves. I ask questions. They dodge them, they lawyer me to death on it. But I have no support. All they're doing with the court reporter here is covering their own butts, and that's the only thing I can get out of this, and he just said, you know, Mr. Rathbun says that he concurs with, with Mr. Wilson. So, you know, that's both lawyers, and neither one of them had said anything about an acquittal, nobody.

R. 3455-56.

It is against this backdrop that petitioner made his request to represent himself during the penalty phase of his death penalty trial. Petitioner should have been allowed the right to proceed *pro se* during this critical proceeding when he was justifiably dissatisfied with this attorneys and personally opposed to the mitigation case that they insisted be presented to the jury on his behalf. Even if petitioner had received imminently competent assistance of counsel during the guilt phase of his trial, petitioner still should have been allowed to exercise this fundamental right of self-representation during the penalty phase. In any event, having been convicted of capital murder, petitioner should not have been forced to proceed to the penalty phase with attorneys who were derelict in preparing a mitigation case at all, who he was trying to criminally prosecute, and who were clearly only interested in protecting themselves from future claims of ineffectiveness as evidenced by their conduct the weekend before the start of trial.

REASONS FOR GRANTING THE WRIT

I. WITHOUT THIS COURT'S INTERVENTION SOUTH CAROLINA WILL REMAIN AMONG THE JURISDICTIONS THAT IMPROPERLY DENY A CAPITAL DEFENDANT THE RIGHT TO PROCEED *PRO SE* DURING THE PENALTY PHASE OF TRIAL, AND THEREBY BIND THE DEFENDANT WITH THE "TACTICAL DECISIONS" OF HIS ATTORNEYS THAT HE FINDS OFFENSIVE.

Respectfully, petitioner asks this Court to grant his petition for writ of certiorari to review the South Carolina Supreme Court's declaration that a capital defendant's decision to represent himself during the penalty phase of his capital trial is subject to an abuse of discretion standard. The South Carolina Supreme Court, South Carolina's court of last resort, has decided an important federal question in a way that conflicts with the decision of other state courts of last resort and of United States courts of appeal. In addition to resolving a split among the states and courts of appeal, petitioner's issue is important because the issue arises in two distinct situations. First, the issue presents itself in just this kind of case -- where the claim is that the defendant has the right, under *Faretta*, to represent himself during the penalty phase of his capital trial. But also this issue arises when the claim on appellate review is that an appellant should not have been allowed to represent himself. Given the variety of factual circumstances which give rise to an analysis of a defendant's right to represent himself at his capital trial, petitioner respectfully submits this is an issue of wide-ranging importance.

Additionally, the South Carolina Supreme Court's decision is inconsistent with this Court's holding in Bullington v. Missouri, 451 U.S. 430 (1981), that a capital trial is two proceedings for purposes of invoking the proscription against double jeopardy, and Lockett v. Ohio, 438 U.S. 586 (1978) which holds that the sentencer in a capital case cannot be precluded from considering, as a mitigation factor, any aspect of a defendant's character or record and any

of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

There is a great need to provide guidance on this fundamental question of *pro se* representation with the context of a capital trial. A capital trial is a unique creature because the jury is asked to take into account the individual characteristics of the defendant in rendering its decision to impose death as the ultimate penalty. Lockett; Williams v. New York, 337 U.S. 241 (1949). A capital trial, therefore, is personal and revealing in the sense that a regular trial is not. Matters of a highly personal and individual nature become relevant when the State asks jurors to impose a death sentence. A personal appeal from a capital defendant could have an effect on a juror that could result in a life sentence. Wiggins v. Smith, 539 U.S. 510 (2003). It follows, given the irrevocable penalty that may be imposed, a defendant should be allowed to plead his case, personally, to the arbiters of his sentence. As *Faretta* makes clear, the Sixth Amendment grants the accused personally the right to make his defense. Id. at 819.

To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master, and the right to make a defense is stripped of the personal character upon which the amendment insists.

Id. at 820.

Such a fundamental right then should not be subject to a judge's discretion.

The South Carolina Supreme Court erred because it failed to appreciate the strength of the right of self representation. In four paragraphs, South Carolina eviscerated petitioner's right to personally offer the mitigation case that he wanted to put forward for the jury's consideration.

Petitioner had the right to represent himself during the penalty phase of his capital trial

pursuant to the reasoning of *Faretta*. Instead of being bound by the mitigation case defense counsel presented on his behalf, petitioner had the right to personally defend his life. Respectfully, this Court should grant petitioner's petition for writ of certiorari.

II. THE COURTS ARE DIVIDED, AND THE ISSUE RAISED IS IMPORTANT

The courts of various jurisdictions have addressed the issue of a capital defendant's right to represent himself during the penalty phase of a capital trial, and opinion is divided.

A. Fifth Circuit, Seventh Circuit, Florida, Illinois, Kentucky, Oklahoma, and Pennsylvania

The following cases hold that a defendant has the right to represent himself during the penalty phase of a capital trial and thus can either control or waive the mitigation evidence offered on his behalf.

In United States v. Davis, 285 F.3d 378 (5th Cir. 2002), the court of appeals reversed the district court when the district court appointed an independent counsel to represent appellant during the penalty phase of his capital murder trial, and when the appellant sought to argue residual doubt instead of presenting traditional mitigation evidence. The court found that appellant's right to self representation encompasses the right to direct trial strategy. For that reason the district court's decision to impose an independent counsel was overturned. Id. at 384-385. The court of appeals noted that the district court failed to consider the strength and nature of the right of self- representation. Id. at 384. And the court further noted that "the Framers 'always conceived of the right to counsel as an assistance for the accused, to be used at his option, in defending himself.'" Id. at 384 (quoting *Faretta*, 422 U.S. at 832). Davis

acknowledges what other jurisdictions do not—that a capital defendant has the right to be heard, in his own person, before the jury that assigns his sentence. Davis recognizes the strong *Faretta* right.

The defendant in Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990) elected to represent himself during his capital sentencing hearing. On appeal, he complained of his right to do so. In denying this assignment of error, the court concluded that *Faretta* grants a capital defendant the right to represent himself during his penalty phase hearing: “If an individual in a capital sentencing hearing wishes to proceed *pro se*, *Faretta* grants him the right to do so.” Id. at 1007. The court also rejected petitioner's claim that the nature of the defense he wished to present during the penalty phase hearing should preclude his right to represent himself. Petitioner's argument was that since he chose to waive the presentation of mitigation evidence, his right to represent himself was subservient to the societal interest in ensuring that death was the appropriate sentence. Ake v. Oklahoma, 470 U.S. 68 (1985). The court concluded that petitioner mischaracterized the scope of the Sixth amendment right guaranteed in *Faretta*. Id. at 1007. According to the court, *Faretta* does not impose any restriction upon a defendant's right to refuse the assistance of counsel except to state that the right must be “knowingly and intelligently waived.” Id. at 1007 (quoting *Faretta* at 422 U.S. at 835). Silagy, too, recognizes the strength of the *Faretta* right, and the importance of this right in relation to the mitigation case a capital defendant either chooses to present, or chooses not to present. This case, too, illustrates the many ways in which this issue can arise during capital litigation.

While the issue raised in this Florida Supreme Court case, Hojan v. Florida, 3 So.3d 1204 (2009), is narrow—appellant argued that the trial court improperly concluded that his waiver of

the right to present mitigation evidence during his penalty phase was also a waiver of presentation of post-trial motions—the court, in resolving the issue, implicitly adopts the position that a defendant has the right to dispense with counsel and proceed *pro se* during the penalty phase of his capital trial. The court held that appellant, “like any competent defendant, could have discharged his counsel and proceeded *pro se* . . . at which point he could have personally withdrawn the motions.” *Id.* at 1212.

The claim on appeal in People v. Coleman, 168 Ill.2d 509, 660 N.E.2d 919 (1995), was that appellant should not have been allowed to represent himself during the penalty phase of his capital trial. Appellant argued that the Eighth amendment requires heightened reliability of the process by which capital punishment may be imposed, and that the demands of increased reliability require that an accused be represented by counsel notwithstanding his desire to conduct his defense *pro se*. *Id.* at 544-545. The court rejected that argument and found *Faretta* grants a defendant the right to represent himself, and that “[t]his reasoning applies with no less force in a capital case than in other cases.” *Id.* 545.

In this death penalty “volunteer” case, Chapman v. Kentucky, 265 S.W.3d 156 (2007), the Supreme Court of Kentucky found that the trial court did not err when it refused to consider mitigation evidence submitted to it by stand-by counsel when the defendant did not wish for any mitigation to be put forward on his behalf. The Court concluded that “[o]nce the trial court allowed Chapman to proceed *pro se*, Chapman himself became the arbiter of what, if any, evidence he wanted to offer, including a right to waive his right to present mitigation evidence.” *Id.* At 169. This case, again, acknowledges the strength of the *Faretta* right, and its importance to a defendant in directing the mitigation case offered on his behalf.

The Oklahoma Court of Criminal Appeals, in Lay v. State, 179 P.3d 615 (2008), and referencing both United States v. Davis and Silagy v. Peters, found that the appellant, who argued on appeal that he should not have been granted the right to represent himself during the penalty phase of his capital trial, in fact was guaranteed that right pursuant to *Faretta*. The court determined there was no “principled reason” to deny a death-eligible defendant his *Faretta* right to proceed without the assistance of counsel, and appellant’s conviction and sentence were upheld. Id. at 618.

The appellant in Pennsylvania v. Davido, 582 Pa. 52, 868 A.2d 431 (2005), a Pennsylvania Supreme Court case—illustrates the dual nature of this particular claim—appellant raised the issue on appeal that the trial court erred in not allowing him to proceed *pro se* during the guilt phase of his capital trial. The court, finding that appellant's request was equivocal, found that the trial court judge did not abuse his discretion in not granting that request. However, appellant also complained that the trial court erred in allowing him to proceed *pro se* during the penalty phase of his capital trial. At trial, appellant waived the introduction of any mitigating evidence. The court found that appellant knowingly, intelligently, and voluntarily waived his right to be represented during the penalty phase of his capital trial, and his right to present mitigating evidence. Id. at 444.

The common thread that runs through the preceding cases is that a capital defendant has a strong right to represent himself, pursuant to the reasoning of *Faretta*, for purposes of advancing or not advancing a particular mitigation strategy on his own behalf.

B. Fourth Circuit, Fifth Circuit, California, Maryland, New Jersey, and South Carolina

These following cases hold that a defendant does not have the right to represent himself at the penalty phase of his capital trial because either that right can be outweighed by the state's interest in a fully informed jury, because the trial court judge retains the discretion to refuse the defendant that right if it is untimely, or, having invoked his right to represent himself before trial started, a defendant is not allowed to have counsel reinstated for the penalty phase.

I. State's interest outweighs defendant's right

In State v. Reddish, 181 N.J. 553, 859 A.2d 1173 (2004), the Supreme Court of New Jersey undertook to detail the approach its state would take towards analyzing *Faretta* issues within the capital trial context. The appellant was denied the right to represent himself during his capital trial. The court "accept[s] the principle that defendants have that right." Id. at 1192. However, the court also found that the state's interest in fair trials permits courts to ensure that their judgments meet the high level of reliability demanded by the Constitution, and therefore a defendant's right to represent himself is subservient to the state's larger interest in the conduct of its capital trials. Id. 1193. "The right to a fair trial in a capital proceeding is paramount to the right of self-representation." Id. at 1203. In this case, the highest court of New Jersey mandated standby defense counsel in capital cases. Id. at 1198-1999. Additionally, the court reiterated its position that a defendant cannot block the presentation of mitigating evidence at a capital sentencing. Id. at 1202. As the court noted: "the State has an "interest in a reliable penalty determination."" Id. at 1202 (*quoting State v. Koedatich I*, 112 N.J. 225, 330, 548 A.2d 939, 939).

In this opinion, the court expressly disagrees with U.S. v. Davis, 285 F.3d 378 (5th Cir.

2002) that held that standby counsel may not present mitigation evidence over a *pro se* defendant's objection. Instead, the court finds relies on what it perceives to be this Court's mandate in Gregg v. Georgia, 428 U.S. 153 (1976) and Eddings v. Oklahoma, 436 U.S. 921 (1978) that a jury cannot be deprived of an opportunity to make an individualized judgment based on a fair presentation of mitigating evidence. Id. at 605.

II. Trial judge retains discretion if the request is "untimely."

In Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), the court of appeals implicitly adopts the claim, found in State v. Winkler, 698 S.E.2d 596 at 602, that capital trial is "one trial" for purposes of analyzing a *Faretta* claim. In denying appellant's argument that he was entitled to make a make the closing argument (which the court construed as appellant's attempt to either "become co-counsel with his two appointed counsel" or "proceed *pro se*" Id. at 941), the court held that the Sixth Amendment right of self-representation may be waived or limited if not raised before trial. Id. at 941. The court found that "*Faretta* does not deal with the situation of a defendant attempting to proceed *pro se* after trial has begun." Id. 942.

Under the highly deferential AEDPA standard, the 5th Circuit Court of Appeals did not find, in Wood v. Quarterman, 491 F.3d 196 (2007), that the state habeas court's holding that petitioner was not entitled to relief because his motion to proceed *pro se* was untimely was neither contrary to, nor an unreasonable application of federal law. In Wood, petitioner moved to be allowed to proceed *pro se* after the jury returned the verdict of guilty, but before sentencing began. Petitioner informed the judge that he did not want to present any evidence or cross-examine any witnesses. Id. at 198. The trial court judge did not base his decision to not allow

petitioner the right based on a timeliness argument, but the state habeas court did make that finding. In upholding the state habeas court's finding, the Fifth Circuit court of appeals found: "Because no decision of the Supreme Court obligates state courts to permit self-representation when the defendant fails to invoke his *Faretta* right in a timely manner, we are compelled to find that the state habeas court's holding that Wood was not entitled to relief because his motion was untimely was neither contrary to, nor an unreasonable application of, federal law." *Id.* at 202.

The California Supreme Court, in *People v. Bloom*, 48 Cal.3d 1194, 774 P.2d 698 (1989), implicitly adopted the "one proceeding" approach, now adopted in *Winkler*, and found that appellant's request to represent himself during the penalty phase of his capital trial was a decision firmly within the discretion of the trial court judge. The court holds that "[a] request for self representation asserted for the first time after trial has commenced . . . is "based on nonconstitutional grounds" and is addressed to the sound discretion of the trial court. *Id.* 1219-1220. The court further found that appellant's mid trial motion for self representation-- in which he expressly intended not to present any mitigation evidence but rather wanted to assist the prosecution in securing a death sentence-- did not contravene the policy against state aided suicide. *Id.* at 1223.

III. The court will not allow counsel to be reinstated during the penalty phase of trial because invocation of the right to represent oneself flows through the entire trial.

In *Grandison v. Maryland*, 305 Md. 685, 506 A.2d 580 (1986), appellant argued that, having represented himself during the guilt phase of his capital trial, he was entitled to counsel during the penalty phase. The court held that appellant's waiver of the right to counsel extended

through both parts of the trial and thus the court denied appellant the right to counsel during the penalty phase. In this analysis, the court implicitly adopts the claim that a capital trial is “one trial” for purposes of analyzing a defendant's right to represent himself, and stated “[w]e find nothing in *Faretta* which supports Grandison’s argument.” *Id.* at 613.

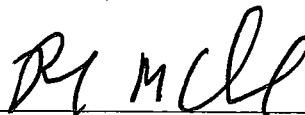
Also, in *State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998), another South Carolina Supreme Court case, the trial court judge found that, having waived his right to counsel during the guilt phase of the proceedings, the defendant was not entitled to the re-assignment of counsel during the sentencing proceeding.

As a review of the preceding cases illustrate, opinion is divided on this very critical question. This issue can only be expected to continue to arise in each case a capital defendant, having been convicted of capital murder, then attempts to personally advance a mitigation strategy on his own behalf. In this case, petitioner was vocally and categorically opposed to the mitigation case his attorneys presented to the jury. It is difficult to conceive of a situation in which the right to represent oneself, pursuant to *Faretta*, is more forceful than when a capital defendant seeks to personally address the decision-makers of this irrevocable penalty. The South Carolina Supreme Court trivializes the inherent strength of this right when it subsumes it under an abuse of discretion standard. Even the most competent and well-intentioned attorneys should not be able to direct a mitigation strategy at odds with the wishes of their client, and when that client wants to personally address his jurors. In the end, as *Faretta* reminds, “[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.” *Id.* at 819-820. Respectfully, petitioner asks this Court to grant his petition for writ of certiorari.

CONCLUSION

For the preceding reasons, petitioner respectfully asks this Court to grant his petition for writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', is written over a horizontal line.

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ATTORNEY FOR PETITIONER

February 18, 2011

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

No. A-

LOUIS MICHAEL WINKLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

A P P E N D I X

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APPENDIX

1.	OPINION OF SOUTH CAROLINA SUPREME COURT	A1
2.	PETITION FOR REHEARING.....	A8
3.	DENYING PETITION FOR REHEARING	A24
4.	S.C. CODE §16-3-20 (1976)	A26

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Louis Michael Winkler, Jr., Appellant.

Appeal from Horry County
James E. Lockemy, Circuit Court Judge

Opinion No. 26857
Heard June 24, 2010 – Filed August 16, 2010

AFFIRMED

Chief Appellate Defender Robert M. Dudek and Appellate
Defender Elizabeth A. Franklin-Best, both of Columbia, for
Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney
General John W. McIntosh, Assistant Deputy Attorney
General Donald J. Zelenka, and Assistant Attorney General
Alphonso Simon, Jr., all of Columbia, and Solicitor J.
Gregory Hembree, of Conway, for Respondent.

CHIEF JUSTICE TOAL: In this capital murder case, Louis Michael Winkler, Jr. (Appellant) appeals his sentence of death.[1]

FACTS/PROCEDURAL HISTORY

Appellant kidnapped and sexually assaulted Rebekah Grainger Winkler (Victim) on October 10, 2005, five months before Victim was murdered.[2] That evening, Appellant's car was spotted behind the Seacoast Medical Center (Seacoast). Victim's car was found off the road in some trees and appeared to have been wrecked. There was blood on both of Victim's car seats, around the center console, and on the interior panel of the passenger's side door. The Horry County Police Department activated its dog team in an attempt to locate two missing persons. Victim was later found next to Stephen's Crossroads, which is where the magistrate's complex and library is located.

Phyllis Richardson (Richardson) lived at the parking lot at Stephen's Crossroads around 7:30 a.m. on October 11, 2005, and saw a woman walking in the parking lot being followed by a man. Richardson noted the woman looked distraught and was acting confused, and that the man's hands were in the air as if he were raging and irritated. Shortly after Richardson entered her office, she saw the woman from the parking lot on the phone in her office building. The woman's hair was matted and tangled with some bald spots. Richardson later learned the woman making the call was Victim. Curtis Thompson was the first officer to arrive at the building, and noticed some of Victim's hair looked like it had been ripped out, and she had black eyes, abrasions, and other scratches.

Victim was transported to Seacoast by EMS where Lisa Gore (Gore), a nurse at Seacoast, tended to Victim and noted her injuries to the left eye, some swelling in the jaw area, bruising around the neck, a fractured nose, an upper lip injury, redness under her right eye, corneal abrasions, multiple bruises and contusions, a bite mark to the face, and a large amount of hair removed from her head. A sexual assault kit was collected from Victim. The DNA found in the rectal and vaginal swabs from the sexual assault kit matched Appellant's DNA.

On October 11, 2005, Appellant was arrested for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping. Bond was initially denied; however, at a second bond hearing, Appellant's bond was set at \$150,000 and he was required to wear an electronic monitor while out on bond. At a third bond hearing, Appellant's bond was amended to allow him to remove his electronic monitor for two hours so he could seek employment between the hours of 4 p.m. and 6 p.m. Appellant was out of jail on bond on the day Victim was murdered.

At around 5:30 p.m. March 6, 2006, Appellant kicked in the door to Victim's condominium. Appellant knocked Victim's son, Jonathan G. (Jonathan), onto the ground and then shot Victim once in the face at point blank range. According to the forensic pathologist who conducted Victim's autopsy, death occurred instantly. Appellant then walked over and pointed the gun at Jonathan. Shortly thereafter, Appellant left the condominium.

Appellant hid in the woods for two weeks. When police apprehended Appellant,[3] they recovered a Jennings .380 pistol from his right front pants pocket. Five live rounds were found in the pistol, but there was not a live round in the port. During a full search of Appellant, police recovered eighteen rounds of .380 ammunition, a guard lock blade knife, and a wallet. In the wallet, there was a newspaper clipping about the shooting and murder.

Appellant was tried and found guilty of murder, first-degree burglary, and assault and battery of a high and aggravated nature. At trial, the State sought to establish two statutory aggravating circumstances: (1) the murder was committed during the commission of a burglary; and (2) the murder was of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime. S.C. Code Ann. § 16-3-20(C)(a)(1)(c), (C)(a)(11) (2003 & Supp. 2009). The jury recommended that Appellant be sentenced to death.

During the guilt phase of Appellant's trial, Mary Elizabeth C. (Mary), Jonathan's friend, testified that on the evening of the murder she was on the phone with Jonathan when she heard a loud pop noise, and a voice that was not Jonathan's say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not—I'm back, I'm back. I'm never going back to jail." Mary then heard a hit and the phone went to static. Andrew Cooper (Cooper), a former crime scene technician for the Horry County Police Department, testified that it appeared there had been a forced entry because the door jamb, door frame, lock mechanism, and other parts of the door had been broken. Cooper also testified that a reddish colored liquid was collected from the kitchen countertop. Kimberly Hahn, a former State Law Enforcement Division (SLED) scientist, testified that she compared the blood swabs recovered from the counter of Victim's residence to Appellant's blood standard, and the blood from the counter matched

Appellant's blood profile. Coop testified that a projectile was recovered from the baseboard of the wall behind Victim. A firearms and toolmark examiner for SLED testified that the Jennings pistol found on Appellant when apprehended fired the bullet recovered from Victim's baseboard.

During the sentencing phase of Appellant's trial, Jill Shelley (Shelley), Victim's older daughter, testified that in September 2005, six months before the murder, she could not contact Victim on the phone so she drove to Victim's home. When she arrived at Victim's residence she saw that Victim was beat up and her arms were covered in bruises. Appellant later arrived, started kicking the door, and was screaming for Victim to let him in. Shelley threatened to call the police. Appellant responded that Victim knew what would happen if they called the police. Shelley testified that Victim moved out of Appellant's home as a result of that confrontation. One piece of evidence presented by the State was a letter sent by Appellant to Shelley while Appellant was incarcerated. In the letter Appellant asserted that had Shelley not gotten involved, Victim would still be alive.

ISSUES

- I. Did the trial court err in admitting an audio tape recording as a prior consistent statement under Rule 801(d)(1)(B), SCRE?
- II. Did the trial court err in allowing the jury to review the transcript of the 911 tape?
- III. Did the trial court err in refusing to allow Appellant to represent himself during the sentencing phase of trial?
- IV. Did the trial court err in not conducting a full *Faretta* inquiry?
- V. Did the trial court err in allowing defense counsel to present mitigation evidence to which Appellant objected?
- VI. Did the trial court err in denying Appellant's motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20 (C)(a)(11)?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* at 6, 545 S.E.2d at 829. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pittman*, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007) (citation omitted).

LAW/ANALYSIS

I. Rule 801(d)(1)(B), SCRE

Appellant argues the trial court erred in admitting as a prior consistent statement under Rule 801(d)(1)(B), SCRE an audio tape recording of Jonathan's interview with police on the evening of the murder. We

disagree.

Prior consistent statements are not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.

Rule 801(d)(1)(B), SCRE. In order for a prior consistent statement to be admissible pursuant to Rule 801(d)(1)(B), the following elements must be present:

(1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

Saltz, 346 S.C. at 121-22, 551 S.E.2d at 244.

Jonathan testified that he saw Appellant shoot and kill his mother. During cross examination, Jonathan testified that his father was Roger Grainger (Grainger). He also testified that Grainger was the only person he called "dad," and that he did not refer to Appellant as "dad." Defense counsel asked Jonathan if he remembered telling the first officer who arrived on the scene that it was his dad who shot his mother. Jonathan denied he told the officer that it was his dad, and stated he told the officer it was his stepdad. Jonathan also testified that Grainger was supposed to arrive at the condominium around 6 p.m. on the night of the murder.

Officer Thomas Knoch (Knoch), the first officer to arrive at the scene of the murder, testified that as he was heading up the steps to the condominium the following conversation took place between him and Jonathan, "He said he's gone, and I asked him. I said who. . . . He said my dad" Knoch also testified that in his report he wrote, "When I asked him who, he said my dad."

Detective Ann Pitts (Pitts) testified that she spoke with Jonathan on the evening of the shooting and recorded the conversation. The state moved to enter the tape recorded conversation into evidence. In the statement to Pitts, Jonathan identified Appellant as the man who broke into the condominium and shot Victim. Appellant objected and the court overruled Appellant's objection under Rule 801(d)(1)(B), SCRE.

We hold that Jonathan's statement to Pitts was a prior consistent statement admissible under Rule 801(d)(1)(B), SCRE. First, Jonathan testified at trial and was subject to cross-examination. Second, Appellant accused Jonathan of recently fabricating the statement. Appellant was accusing Jonathan of lying when Jonathan testified that he told Knoch it was his stepdad who shot his mother, not his dad. This alleged fabrication was necessarily recent because it happened during the trial. Third, Jonathan's statement to Pitts was consistent with his testimony at trial. Fourth, the statement to Pitts occurred before the alleged recent fabrication. Thus, all of the elements of Rule 801(d)(1)(B), SCRE are satisfied and the trial court committed no error in allowing into evidence Jonathan's statement to Pitts.

II. 911 Tape

Appellant argues the trial court erred in allowing the jury to view the transcript of the 911 tape while the

jurors were listening to the tape ing deliberations. We disagree.

"The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations." *State v. Plyler*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). "The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request." *Id.* The court is not required to submit evidence to the jury for review beyond that specifically requested but in its discretion may have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested. *Id.* In *Plyler*, the trial court allowed the jury to hear a tape of the testimony of the defendant's ex-wife in response to the jury's request to have her testimony read back to them. *Id.* In that case, this Court found there was no abuse of discretion where only the direct examination was played and the trial judge denied the defendant's motion that the jury be required to also hear the cross-examination to prevent overemphasis of the portion reheard. *Id.*

In this case, during jury deliberations, the jury sent the judge a question asking if they could read the 911 transcript. Appellant argued the transcript was not part of the trial record, was only offered as an aid to the tape recording, and was never put into evidence. The trial court replayed the 911 tape for the jury in the courtroom and the jury was allowed to review the transcript while the tape played, which mirrored the way in which the evidence was presented at trial.[4] This was done in Appellant's presence at the request of the jury. Thus, the judge exercised proper discretion and committed no error in allowing the jury to read the transcript while listening to the 911 tape.

III. Self-representation

Appellant argues the trial court abused its discretion by refusing to allow Appellant to represent himself during the sentencing phase of the trial. We disagree.[5]

An accused may waive the right to counsel and proceed *pro se*. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). However, "[a] defendant's right to waive the assistance of counsel is not unlimited." *State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). "The request to proceed *pro se* must be clearly asserted by the defendant prior to trial." *Id.* (citation omitted). "If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge." *Id.* (citing *United States v. Singleton*, 107 F.3d 1091 (4th Cir.1997); *United States v. Lawrence*, 605 F.2d 1321 (4th Cir. 1979)). "Once trial commences, that right [to proceed *pro se*] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." *U.S. v. Wesley*, 798 F.2d 1155, 1155-56 (8th Cir. 1986) (citations omitted); see also *U.S. v. Stevens*, 83 F.3d 60, 66-67 (2d Cir. 1996) ("[O]nce a trial has begun, a defendant's right to represent himself 'is sharply curtailed,' and the judge considering the motion must weigh 'the prejudice to the legitimate interests of the defendant' against the 'potential disruption of proceedings already in progress.'"). The sentencing phase of a capital trial does not constitute a separate trial. See S.C. Code Ann. § 16-3-20(B) (2003); see also *State v. Stewart*, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

Appellant did not make his request to proceed *pro se* at the beginning of trial. Appellant made his request to proceed *pro se* at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

The trial court did not abuse its discretion in denying Appellant's request to proceed *pro se* at the sentencing phase of the trial. First, the trial court noted it was concerned that Appellant's medication would affect his ability to properly and fully function as his own counsel. Second, the trial court was concerned that allowing Appellant to represent himself during the sentencing phase would require some

delay for Appellant to fully prepare. Third, the trial court was concerned the jury may be confused to have the first half of the case tried by counsel and the second half tried without counsel, especially if the jury could see counsel at Appellant's counsel table. For these reasons, the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress. Hence, the trial court's decision to not allow Appellant to proceed *pro se* during the sentencing phase of trial was not an abuse of discretion and, therefore, nor error.

IV. *Faretta* Warnings

Appellant argues the trial court erred by failing to properly provide Appellant with *Faretta* warnings when Appellant sought to proceed *pro se* at the beginning of the sentencing phase. We disagree.

As noted above, Appellant did not timely waive his right to counsel and proceed *pro se*. Hence, Appellant's reliance on *Faretta* is misplaced. Had Appellant moved to proceed *pro se* before the trial began, then *Faretta* would apply. Moreover, Appellant contends that *Fuller* requires reversal. In *Fuller*, the defendant moved to proceed *pro se* before the trial began. 337 S.C. at 241, 523 S.E.2d at 170.

However, in this case, Appellant did not seek to proceed *pro se* until the sentencing phase. Appellant's reliance on *Faretta* and *Fuller* is misplaced, and the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress.[6]

V. Mitigating Social History

Appellant contends the trial court erred by allowing defense counsel to present mitigating social history evidence and call Appellant's family members as mitigation witnesses over Appellant's objection. We disagree.

"An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 560, 160 L. Ed. 2d 565, 578 (2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984)). "That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S. Ct. 646, 657, 98 L. Ed. 2d 798, 816 (1988)). The introduction of the mitigation evidence at issue was a tactical decision made by Appellant's trial counsel and is reviewed on a case by case basis. The mitigation evidence presented served the purpose of humanizing Appellant to the jury. We find the introduction of this mitigation evidence was a tactical decision made by trial counsel and the trial court committed no error in admitting mitigating evidence that Appellant did not want to be introduced.

VI. S.C. Code Ann. § 16-3-20(C)(a)(11)

Appellant argues the trial court erred by refusing to direct a verdict on the statutory aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime. We disagree.

"In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned only with the existence of evidence, not its weight." *State v. Smith*, 298 S.C. 482, 485, 381 S.E.2d 724, 726 (1989). "The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it." *State v. Lindsey*, 372 S.C. 185, 194-95, 642 S.E.2d 557, 562 (2007).

The aggravating circumstance at issue is "[t]he murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime." S.C. Code Ann. § 16-3-20(C)(a)(11) (2003 & Supp. 2009). The State established there was an ongoing criminal process from 2005 against Appellant for criminal sexual conduct, first degree, assault and battery

with intent to kill, and kidnapping the time Victim was murdered. Victim, as the victim in the 2005 crimes, was clearly a potential witness in Appellant's trial on these three charges. There was circumstantial evidence to support a finding that Appellant murdered Victim to impede or deter prosecution of the charges listed above. Jonathan testified that Appellant stated, "you thought I was going to prison," when he broke into the condominium. Mary testified she heard a loud pop noise, and a voice that was not Jonathan's say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not—I'm back, I'm back. I'm never going back to jail." Shelley testified that Appellant warned Victim that she knew what would happen if someone called the police. Lastly, in the letter from Appellant to Shelley written while Appellant was incarcerated, Appellant asserted that Victim would still be alive had Shelley not gotten involved in Victim's life. This evidence is circumstantial evidence to support the statutory aggravating circumstance contained in section 16-3-20(C)(a)(11), and the trial court is affirmed in its denial of Appellant's motion for a directed verdict.

PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. See, e.g., *State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

CONCLUSION

For the aforementioned reasons, Appellant's conviction and sentence are affirmed.

BEATTY, KITTREDGE, HEARN, JJ., concur. PLEICONES, J., concurring in result only.

[1] This case consolidates Appellant's direct appeal and the mandatory review provisions of S.C. Code Ann. § 16-3-25 (2003).

[2] Victim was Appellant's estranged wife.

[3] Three days after the murder, police searched Appellant's residence and found a piece of paper with Victim's address on it. However, police were not able to find Appellant until March 20, 2006, two weeks after the murder.

[4] Appellant offered no objection to the introduction of the 911 transcript at trial, nor did he object to the transcript being read while the 911 tape played.

[5] Issue three condenses Appellant's third and fourth issues on appeal into one issue.

[6] Even if *Faretta* were applicable, the record reflects the trial judge met the *Faretta* standard by adequately warning Appellant of the dangers of self-representation.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

Opinion No. 26857

PETITION FOR REHEARING

Counsel for appellant respectfully petitions this Court, pursuant to Rule 221(a), SCACR, for rehearing of its decision in, State v. Winkler, Op. No. 26857, Shearouse's Adv. Sh. 32 at 16-28 (filed August 16, 2010) because this Court, in affirming his capital conviction and sentence, overlooked material facts and law relating to the case including the fact the trial judge **promised appellant prior to trial**, that he could represent himself but not at that early stage. Further, as explained infra, appellant respectfully disagrees with this Court's holding that the "sentencing phase of a capital trial does not constitute a separate trial" for purposes of Faretta v. California, 422 U.S. 806 (1975) and self-representation. State v. Winkler, Op. No. 26857, Shearouse's Adv. Sh. #32 at 24-25 (filed August 16, 2010). See Bullington v. Missouri, 451 U.S. 430 (1981).

At the last pre-trial hearing on January 24, 2010, four days before appellant's trial was to begin on Monday, January 28, 2010, defense counsel Wilson told the judge: "[M]r. Winkler wants to be heard and so I want to, [you to] hear him." Appellant then told the judge about a physical altercation he had with defense counsel Wilson at "the jailhouse" where Wilson put his finger in appellant's face, pushed him and called his sister "a f'ing liar." R. 3407, l. 121 – 3410, l. 4.

Appellant, who was always respectful to the court, informed the judge that when he told Wilson "[p]lease do not ever call my sister or anyone in my family a liar again. He [Wilson] turned towards me, put his finger in my face, touched my face, and said she is a f'ing liar. At that time I swatted his hand away from my face, officers came in, and they acted like it was my fault. But it was Mr. Wilson's. And there's no way I can see where I'm gonna get a fair trial with this man, my attorney, when he [has] called me and my family liars over the past month . . . He's the one that lost his temper and stuck his finger in my face and used the F word concerning my sister, who is a teacher in Ohio . . . I contacted Corporal Neal, who was in my pod last night, directed me to Major Johnson. Relayed my, my message that **I'd like to press charges on Mr. Wilson**, and he said back to her – I did not speak with Major Johnson. I spoke to. I spoke to Craig that, that, at the jailhouse, did not permit me to do that. **I needed a written statement from you in order to do an in-house assault charge.**" R. 3407, l. 121 – 3410, l. 4. (emphasis added).

The judge told appellant that criminal charge against Wilson "can be addressed **at a later date**. There's no urgency about it. " R. 3410, ll. 5-17. (emphasis added).

The judge asked Wilson if he thought this altercation and appellant's accusation of criminal behavior on his part would hamper his ability to represent appellant. Wilson said it would not, and appellant continued to complain about Wilson until the judge told appellant he did not want to hear "anymore about it" -- the lack of communication with Wilson. R. 3410, l. 18 – 3414, l. 14..

Appellant responded: “[I] don’t see how we can get along. We have to – we have to go through a mock trial and this man [has] just now called me a liar, and there is no way we can get along. I’ve asked him to be, to be removed . . .” The judge said, “[I]f your request is to have another attorney appointed, from what you told me, that request is denied.” R. 3410, l. 18 – 3414, l. 14. The judge stated he wanted the attorneys to do their best over the weekend and stated “I would rather address anything further about **this Monday**, and you-all just prepare in your best efforts for this weekend.” R. 3410, l. 18 – 3414, l. 14. (emphasis added).

Prior to trial, and before jury selection on Monday, January 28, 2008, the judge again heard appellant’s continuing complaints about defense counsel Wilson and the judge concluded:

[In] any event, we’re going to proceed then. There’s been no request for you to represent yourself. You’re requesting another attorney. Since that’s the case, I do not grant your motion. Now, **you always have that option to represent yourself**, which would be very inadvisable **for this stage**, but we will continue on with the case.”

R. 42, ll. 12-18 (emphasis added).

Given the judge’s pre-trial promise that appellant would always have the opportunity to represent himself the self-representation issue should not have been analyzed under the abuse of discretion “untimely request” standard of State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). In Reed, the defendant represented himself during the guilt phase, he was convicted, and he then decided he wanted his appointed counsel, Chief Public Defender Ashley Pennington, to represent him during the penalty phase. Under these very different circumstances this Court stated the trial judge did not abuse his discretion by not forcing Public Defender Pennington, who acknowledged he was not prepared immediately to go forward, to represent Reed.

This Court should grant rehearing because it applied the wrong standard of review – abuse of discretion standard – rather than the correct standard that the request of self-representation “must

be honored out of that respect for the individual “which is the lifeblood of the law” standard of Faretta v. California, 422 U.S. 806, 834 (1975). The trial court’s failure to honor its promise, and allow appellant’s request to represent himself and control his case in mitigation during the penalty stage trial constitutes a due process violation. See Knox v. Collins, 928 F.2d 657 (5th Cir. 1991)(failure to give a jury instruction as promised and relied upon by the defendant violated the essential demands of fairness despite the fact the jury charge was not required by law at that time).

However, even under an abuse of discretion standard each of the trial judge’s three purported reasons for refusing to allow appellant to represent himself were without support in this record. Trial counsel said that appellant was ready to represent himself and that there would be no delay, appellant’s very mild antidepressant medication could be managed, and the jury would not have been confused by appellant representing himself during the penalty stage trial. R. 1952, l. 14-1953, ll. 9-19. As to the possibility the jury may become confused, in State v. Reddish, 181 N.J. 553, 605, 859 A.2d 1173, 1204 (2004), the Court said this situation was easily manageable by the trial judge reminding the jury during the penalty stage that the defendant was representing himself.

Further, and respectfully, this Court should address in the opinion the highly unusual fact that appellant **wanted his attorney arrested for assaulting him** prior to the trial since it is probative of the self-representation issue.

Moreover, in this case appellant’s attorneys also wanted appellant to represent himself. After recessing for the mandatory twenty-four hour waiting period following appellant’s convictions, the parties returned to court on February 4, 2008. Defense counsel informed the court that appellant wanted to participate in the cross-examination of witnesses. R. 1915, ll. 16-23. Denying that, the trial court **reiterated to appellant its promise** that he would be allowed to represent himself:

"Well, Mr. Winkler, you always have the opportunity, sir, if you wish to represent yourself, sir. And if you want to represent yourself, we'll go through another dialogue here to make sure that's what you're doing."

R. 1917, ll. 14-18. (emphasis added).

Appellant then asked the court to allow him to proceed pro se and to allow his attorneys to remain as a resource for him. R.1925, l.14 - 1928, l. 7. Winkler's request was unequivocal:

Court: If you're saying that you want to represent yourself with Mr. Wilson and Mr. Rathbun to stay there as consultants for you to consult with during the course of this phase of the trial, but not to be your attorneys who ask questions or make closing arguments to the jury, is that what you're requesting?

A: Yes, sir.

R. 1928, ll. 11-17; R. 1930, ll. 19-24.

Trial counsel informed the judge that appellant had indicated to him **"on more than one occasion"** that this is what he wanted to do. R. 1932, ll. 7-9. Appellant made it clear that he was no longer asking for new attorneys, but to represent himself: "I already asked that eight months ago." R. 1932, ll. 15-20.

The judge then asked if appellant had reviewed the materials gathered in preparation for the trial. Appellant responded that he had, otherwise, "[w]e wouldn't be ready for trial." R. 1932, l. 25 - 1933, l.6. The judge also asked if appellant had reviewed the evidence that Wilson and Rathbun were prepared to introduce during that part of the trial. Again, appellant said he had. R. 1933, ll. 7-10.

After the trial court informed appellant again that he **"always [has] the opportunity . . . to represent himself,"** he noted it would be dangerous it would be for him to do so. R. 1917, ll. 14-23. **Appellant's attorneys asked the judge to allow appellant to represent himself.** R. 1920, l. 21 - R. 1921, l. 20. The judge again told appellant that the decision was highly inadvisable,

and that he would be bound by court rules. R. 1921, ll. 21-25. The state **conceded that appellant had the right to represent himself**. R. 1922, ll. 2-8. The judge informed appellant for the third time that he had the right to represent himself but that it was dangerous to do so. R. 1922, ll. 14-19. Appellant was insistent that he wished to represent himself. R. 1926, l. 6 - 1927, l. 25; R. 1930, l. 19 - 1931, l. 3.

The judge began to seriously engage appellant regarding his decision to represent himself. R. 1929, l.14. Wilson clarified appellant's position:

Mr. Wilson: [W]hat he what he wants to do, and he'll tell you if I'm correct. What he wants to do is to represent himself, but he wants to make sure, and you say dismiss your attorneys, and that's the other word that's confusing him.

R. 1927, ll. 21-25.

Appellant unequivocally invoked his right to represent himself. R. 1928, ll. 11-17.

The judge noted that he was reviewing Faretta, *supra*, Brewer¹, and Fuller². R. 1931, ll.1-3. The judge then discussed appellant's medications, which a nurse stated were not a serious consideration. R. 1931, ll. 4-25. Wilson again informed the judge that appellant was adamant about representing himself, even though Wilson -- as would any attorney -- did not believe it was a good idea. R. 1932, ll. 4-9. The judge asked appellant if he reviewed the mitigation materials collected by his defense team. R. 1932, l. 25 - 1933, l. 10. He asked him if he understood "the nature of the term leading question." R. 1933, ll.1-20. Appellant answered that "it's trying to get someone to say something that you want them to say, putting words in their mouth." R. 1933, ll. 11-17.

¹ 328 S.C. 117, 492 S.E.2d 97 (1997).

² 337 S.C. 236, 523 S.E.2d 168 (1999).

The judge asked if appellant had reviewed the rules of evidence for South Carolina; did he understand the various exceptions to hearsay? R. 1933, 11.18-25. Did he know what an excited utterance is? R. 1934, 11.1-5.

Appellant told the court:

Most of these witnesses that they're going to call today, what I understand, there's nobody that knows them better than myself. They were supposedly my friends who turned against me to keep me with my wife, who they only met several times. I know them better than anybody in this room, your Honor, and-- . . . Your Honor, I'm confident in taking, taking care of this, this business.

R. 1934, 1.8 - 1935, 1. 4.

The judge then asked counsel to look at Fuller, supra, and Brewer, supra to see when the decision to proceed pro se had to be made. And he asked appellant:

And let me just review these one more time. Let me—but you understand the dangers, the pitfalls? You understand it's not that, that – it's very dangerous to do this, and you understand at this phase of the trial, sir, this jury is going to decide whether or not you would receive life imprisonment or the death penalty? You understand that, sir?

Defendant: Yes, Your Honor.

R. 1925, 11.16-23.

The judge then asked appellant if he understood the danger of going forward representing himself--if it was a decision he wished to make. Appellant said he did. R. 1936, 11. 2-9.

After this, Solicitor Hembree asked the judge to “engage in a discussion of all the factors under Faretta just for the record.” R. 1937, 11. 18-23. The judge replied that he thought he had. R. 1937, 1. 24 - 1938, 1. 2.

The parties then engaged in a discussion regarding the timing of appellant's request. The judge said to appellant:

Mr. Winkler, I do want you to consider this very seriously because this is a serious decision. If ultimately, though, I determine that you've make (sic) that decision and it is a knowing, intelligent and voluntary decision and you made it pursuant to Faretta vs. California standards and reviewing Fuller and Brewer, then it's probable I'll permit you to do. Let me think further with it.

R. 1938, l. 25 - 1939, l. 7.

Defense counsel continued to enthusiastically argue appellant's right to represent himself, while maintaining that they did not personally agree with his decision. R. 1953, ll. 9 - 1954, l. 18. Defense counsel argued that Brewer allows appellant to represent himself:

The . . . test is whether [the] defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice but the defendant's understanding . . . The determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed pro se does not justify a denial of the right of self-representation. The only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to -

R. 1955, l. 9 - 1956, l. 1.

Defense counsel Wilson told the judge at one point, that "he [Appellant] wanted to be heard." The judge responded: "No. I think I have heard enough in that regard." R. 1958, ll. 20-22.

The judge asked both counsel to review State v. Fuller³ and State v. Brewer⁴ to determine when the decision to allow a defendant to represent himself must be made. As the judge noted, Brewer states that the decision must be made before trial. The judge noted, however that "one could assert this is a trial." R. 1935, ll. 10-15. The judge also gave counsel for both sides the

³ 337 S.C. 236, 523 S.E.2d 168 (1999).

⁴ 328 S.C. 117, 492 S.E.2d 97 (1997).

opportunity to make “specific requests of conversation with the defendant if you want to put that in writing.” R. 1938, ll. 19-24. The judge told appellant:

If ultimately, though, I determine that you’ve made that decision and it is knowing, intelligent and voluntary decision and you made it pursuant to Faretta v. California standards and reviewing Fuller and Brewer, then it’s probable I’ll permit you to do. Let me think further with it.

R.1939, ll. 2-7.

The judge asked whether the parties agreed, pursuant to Fuller, that the decision was now within the discretion of the judge. R.1940, ll. 5-11. The state did agree. R.1940, ll.12-15. However, defense counsel did not agree—their position was that appellant had the right to represent himself during the penalty phase of his own capital trial. R. 1940, l. 23 -- R. 1942, l. 5. Defense counsel distinguished State v. Reed⁵ from the instant case as appellant has also done above. R. 1943, l. 15 - 1945, l. 2. The trial judge ultimately ruled he was not going to allow appellant to represent himself.

As stated above, given the trial judge’s promise that appellant could later represent himself it was fundamentally unfair for the court not to honor its promise pursuant to Faretta and this Court should grant rehearing on its application of an abuse of discretion standard to these facts. Appellant also respectfully requests rehearing of this Court’s holding that “the sentencing phase of a capital trial does not constitute a separate trial.” State v. Winkler, Op. No. 26857, Shearouse’s Adv. Sh. #32 at 24-25 (filed August 16, 2010). Clearly if appellant had been sentenced to life imprisonment rather than death that sentencing phase trial verdict would constitute have constituted double jeopardy if the state again sought death at a subsequent trial. See Bullington v. Missouri, 451 U.S. 430 (1981). Missouri’s statutory procedure, like this state’s procedure, calls for a separate hearing

⁵ 332 S.C. 35, 503 S.E.2d 747 (1998).

for the same jury when the defendant has been convicted of murder. Bullington v. Missouri, 451 U.S. 430, at 433-434 (1981).

In State v. Reddish, 181 N.J. 553, 859 A.2d 1173 (2004), the Court held that a defendant had the right to represent himself during the guilt and penalty phases of a capital trial. While noting that the United States Supreme Court's opinion in Faretta predated that state's death penalty statutory complex, the Court nonetheless noted that Faretta prohibits states from haling "a person into its criminal courts and there forc[ing] a lawyer upon him, even when he insists that he wants to conduct his own defense. 422 U.S. at 807" State v. Reddish, 181 N.J. 553, 579-580, 859 A.2d 1173, 1188 (2004). "Faretta, ultimately, is about respecting a defendant's capacity to make choices for himself, whether to his benefit or to his detriment." State v. Reddish, 181 N.J. 553, 585-586, 859 A.2d 1173, 1192 (2004).

The Court in Reddish stated that it accepted the principle that a capital defendant had the right to represent himself during the sentencing phase trial. The Court noted the state's interest in assuring fairness in capital sentencing and stated for that reason it would not allow defendants to waive their direct appeal in a capital case. The Court also held that it disagreed with the Fifth Circuit's holding in United States v. Davis, 285 F.3d 378, 385 (5th Cir. 2002) that standby counsel must honor a pro se defendant's *absolute* right to waive the presentation of mitigating evidence. However, the court advised that "the court should consider dismissing the jury in order to confer with both the defendant and standby counsel in order to avoid affecting the jury's perception of the defendant's control over his defense." The Court also stated that trial courts should not hesitate to repeatedly remind the jury that the defendant is representing himself. State v. Reddish, 181 N.J. 553, 605, 859 A.2d 1173, 1204 (2004).

The issue of standby counsel is not at issue here. A defendant does not have the right to hybrid representation, and it was clear Wilson wanted appellant to represent himself and Wilson was willing to advise appellant, if desired, while appellant conducted the sentencing trial *pro se*.

In Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990), the seventh circuit rejected the argument that because Faretta was not a capital case that it not require the trial counsel to similarly honor a defendant's request to represent himself during the penalty phase trial: "If an individual in a capital sentencing hearing wishes to proceed *pro se*, Faretta grants him the right to do so." Silagy v. Peters, 905 F.2d 986, 1007 (7th Cir. 1990).

The Court in Silagy also rejected any alleged dichotomy between a defendant's right to represent himself pursuant to Faretta and the societal interest in ensuring that death is the appropriate penalty in each case in which it is imposed. See Ake v. Oklahoma, 470 U.S. 68, 83-84 (1985). The Court wrote that the "Sixth Amendment does not provide merely that a defense shall be for the accused; it grants to the accused personally the right to make his defense." Silagy v. Peters, 905 F.2d 986, 1007 (7th Cir. 1990), *citing* Faretta v. California, 422 U.S. at 819.

The Silagy Court also stated that the implication of the Supreme Court's opinion in Blystone v. Pennsylvania, 494 U.S. 299 (1990), was that a defendant can choose "to forego the presentation of mitigation evidence even over the contrary advice of counsel and the warnings of the court. It light of this fact, it would be strange indeed for this court to conclude that a decision to forego the presentation of mitigation evidence could act as a bar to a defendant's otherwise constitutional right to proceed *pro se*." Silagy v. Peters, 905 F.2d 986, 1007-1008 (7th Cir. 1990).

In Smith v. State, 407 So. 2d 894 (1981), the Florida Supreme Court also rejected the argument that it was error to allow the defendant to waive representation during the sentencing phase trial. Focusing specifically upon the defendant's right to make the closing argument to the

jury during the penalty stage the Court held the defendant was aware “that a very real result might be imposition of the death penalty.” The Court noted there was no need for it to assess how well the defendant had “mastered the intricacies of the sentencing process, for his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself. . . . Appellant was warned of the dangers of what he was doing and discouraged from doing so.” Smith v. State, 407 So. 2d 894, 899-900 (1981).

The expressly promised appellant, that he could represent himself but not during the guilt phase. Appellant should not now be blamed for taking the judge at his word. See Knox v. Collins, 928 F.2d 657 (5th Cir. 1991)(failure to give a jury instruction as promised and relied upon by the defendant violated the essential demands of fairness despite the fact the jury charge was not required by law at that time); State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001)(same principle).

When it became time for appellant to represent himself, with his attorneys’ encouragement, the judge did not honor his promise to appellant. The trial judge’s assertion that the jury would have been confused by appellant representing himself during the penalty phase reflects that fact that the Court has misapprehended and overlooked the significance of the **defendant's control** over the mitigation submitted to a jury on his behalf which naturally follows his right to represent himself during his penalty phase trial. State v. Reddish, 181 N.J. 553, 605, 859 A.2d 1173, 1204 (2004).

In its opinion, this Court now holds that trial counsel -- whom the defendant wanted arrested for assaulting him, whom appellant did not want to represent him, and where counsel to the judge as an officer of the court told the court that appellant was ready and willing to represent himself and should be allowed to represent himself -- may submit any evidence on defendant's behalf that the attorney would like to present, regardless of the express desires of the defendant. This Court has now designated mitigation as a mere “tactical decision” made on behalf of a defendant **by his**

attorney, who the defendant did not want to represent him, even though the United States Supreme Court has acknowledged the extremely personal quality of penalty phase evidence, and other jurisdictions have also recognized the unique quality of mitigation evidence. Lockett v. Ohio, 438 U.S. 586 (1978).

This Court has overlooked decisions in other jurisdictions that have granted capital defendants significantly more latitude in controlling in mitigation that is presented to a jury on their behalf, by minimizing its significance and characterizing it as a mere “tactical decision.” See State v. Fry, 125 Ohio St.3d 163, 926 N.E.2d 1239 (2010) (Waiver by defendant of opportunity to present mitigating evidence in penalty phase of capital murder trial was valid, although court did not explain all legal ramifications of guilty verdict, that waiver made death penalty more likely, or discuss low reversal rate on capital appeals; trial court conducted comprehensive inquiry, in which it considered forensic psychologist's report, conferred with counsel, questioned defendant about his educational background and mental health, determined that he was competent, and advised him of right to present mitigating evidence); Rienhardt v. Ryan, 669 F.Supp.2d 1038 (D. Ariz. 2009) (A capital defendant may waive the right to present mitigating evidence); State v. Bordelon, 33 So.3d 842 (La. 2009) (Capital defendant was authorized to make knowing and intelligent of right to present mitigating evidence at sentencing hearing); State v. Pearce, 994 So.2d 1094 (Fla. 2008) (Although a defendant may waive mitigation during the penalty phase of a capital case, he should not do so blindly; counsel must first investigate and advise the defendant so that the defendant reasonably understands what is being waived, the ramifications of the waiver, and is able to make an informed, intelligent decision); Hojan v. State of Florida, 3 So.3d 1204 (2009) (Defendant who waived mitigation evidence was barred from asserting that counsel was ineffective in investigating that evidence); Cowans v. Bagley, 624 F.Supp.2d 709

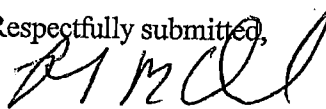
(S.D. Ohio, 2008) (defendant knowing and voluntarily waived presenting evidence in mitigation); Chapman v. Commonwealth of Kentucky, 265 S.W.3d 156, 170 (2007) (Standby counsel went beyond the scope of his role by delivering mitigating evidence to the court under seal, and the court did not err by not considering it); Lamarca v. State, 931 So.2d 838 (2006) (Defendant's inappropriate or unwise comments to the jury while representing himself during the penalty phase did not negate the fact he was properly allowed to represent himself); Commonwealth v. Davido, 582 Pa. 52, 868 A.2d 431 (2005) (Defendant waived his right to counsel during the penalty stage and his right to present evidence in mitigation); United States v. Davis, 285 F.3d 378 (5th Cir. 2002) (District Court's decision to appoint independent counsel to introduce traditional mitigation evidence over the *pro se* defendant's objection was error, and violated the Sixth Amendment). And see McKaskle v. Wiggins, 465 U.S. 168 (1984) (defendant's right to conduct his own defense was not improperly impeded by the limited actions of standby counsel where the record disclosed standby counsel's actions were kept within reasonable limits).

Appellant did not want his family members to be put through the pain of testifying about their personal family life. In addition, evidence appellant's father may have drunk too much and that his mother was depressed at times was largely unremarkable in the context of mitigation phase evidence and it was something appellant did not want to put his family through even if it were compelling. The sentencing phase jury, if it chose, could find that fact alone mitigating on appellant's behalf.

This Court should recognize, as have other jurisdictions, that a defendant can intelligently waive his right to present mitigating evidence. This is consistent with the dignity a defendant is accorded when his request to represent himself is likewise honored pursuant to

Faretta. The issue is not whether self-representation or whether waiving mitigating evidence is the most legally viable manner of obtaining an acquittal or a life sentence. This respect for the dignity of the individual through penalty phase self-representation and waiver of mitigating evidence poses no threat to the criminal justice system. Our system is fully protected because the knowing waiver of the right to counsel or to present mitigating evidence are made on-the-record, and the system is thus protected against a later collateral attack of those decisions. Respectfully, this Court should grant rehearing in this case.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Elizabeth A. Franklin-Best
Appellate Defender

This 31st day of August, 2010.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

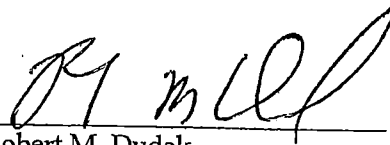
V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Alphonso Simon, Jr., Esquire, this 31st day of August, 2010.

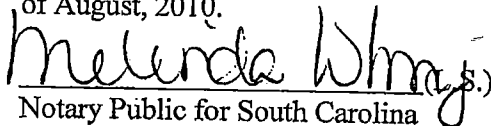


Robert M. Dudek
Chief Appellate Defender

Elizabeth A. Franklin-Best
Appellate Defender

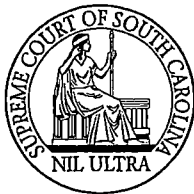
ATTORNEYS FOR APPELLANT

SWORN TO BEFORE ME this 31st day
of August, 2010.



Notary Public for South Carolina

My Commission Expires: October 30, 2018.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

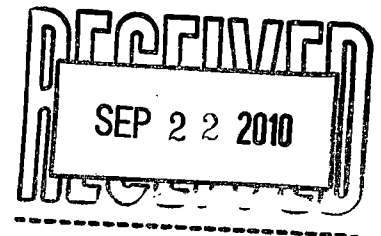
BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 22, 2010



Chief Appellate Defender Robert M. Dudek
✓ Appellate Defender Elizabeth A. Franklin-Best
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Winkler, Louis Michael Jr.

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

“Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

September 22, 2010.”

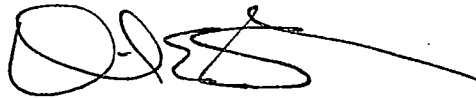
The remittitur is today being forwarded to the lower court.

The State v. Wink] Louis Michael Jr.

Page Two

September 22, 2010

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized 'L' followed by a series of loops and a long horizontal stroke extending to the right.

CLERK

DES/dmh

cc: Assistant Attorney General Alphonso Simon, Jr.
The Honorable J. Gregory Hembree

Code 1976 § 16-3-20

Code of Laws of South Carolina 1976 Annotated Currentness

Title 16. Crimes and Offenses

Chapter 3. Offenses Against the Person

Article 1. Homicide

§ 16-3-20. Punishment for murder; separate sentencing proceeding when death penalty sought.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life" or "life imprisonment" means until death of the offender without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. In cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years to life pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years to life required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14, Article IV of the Constitution of South Carolina, 1895, the commuttee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years to life. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

A26

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) trafficking in persons;

(d) burglary in any degree;

(e) robbery while armed with a deadly weapon;

(f) larceny with use of a deadly weapon;

(g) killing by poison;

(h) drug trafficking as defined in Section 44-53-370(e), 44-53-375(B), 44-53-440, or 44-53-445;

(i) physical torture;

(j) dismemberment of a person; or

(k) arson in the first degree as defined in Section 16-11-110(A).

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county or municipal detention facility employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

- (10) The murder of a child eleven years of age or under.
 - (11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.
 - (12) The murder was committed by a person deemed a sexually violent predator pursuant to the provisions of Chapter 48, Title 44, or a person deemed a sexually violent predator who is released pursuant to Section 44-48-120.
- (b) Mitigating circumstances:
- (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
 - (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.
 - (3) The victim was a participant in the defendant's conduct or consented to the act.
 - (4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.
 - (5) The defendant acted under duress or under the domination of another person.
 - (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
 - (7) The age or mentality of the defendant at the time of the crime.
 - (8) The defendant was provoked by the victim into committing the murder.
 - (9) The defendant was below the age of eighteen at the time of the crime.
 - (10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance

is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

CREDIT(S)

HISTORY: 1962 Code § 16-52; 1952 Code § 16-52; 1942 Code § 1102; 1932 Code § 1102; Cr. C. '22 § 2; Cr. C. '12 § 136; Cr. C. '02 § 109; G. S. 2454; R. S. 109; 1868 (14) 175; 1894 (21) 785; 1974 (58) 2361; 1977 Act No. 177 § 1; 1978 Act No. 555 § 1; 1985 Act No. 104, § 1; 1986 Act No. 462, § 27; 1990 Act No. 604, § 15; 1992 Act No. 488, § 1; 1995 Act No. 83, § 10; 1996 Act No. 317, § 1; 2002 Act No. 224, § 1, eff May 1, 2002 (applicable to offenses committed on or after that date); 2002 Act No. 278, § 1, eff May 28, 2002; 2006 Act No. 342, § 2, eff July 1, 2006; 2007 Act No. 101, § 1, eff June 18, 2007; 2010 Act No. 273, § 21, eff June 2, 2010; 2010 Act No. 289, § 4, eff June 11, 2010.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

No. A-

LOUIS MICHAEL WINKLER,

Petitioner,

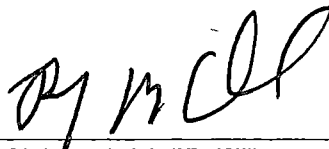
v.

STATE OF SOUTH CAROLINA,

Respondent

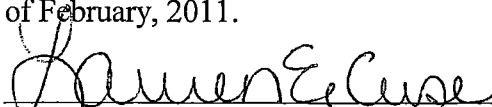
CERTIFICATE OF SERVICE

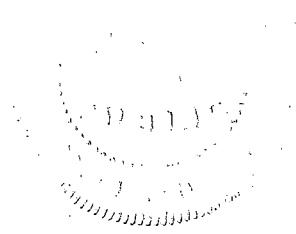
I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 18th day of February, 2011.



*ROBERT M. DUDEK
Counsel of Record

SWORN TO BEFORE me this 18th day
of February, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

No. A-

LOUIS MICHAEL WINKLER,

Petitioner,

v.

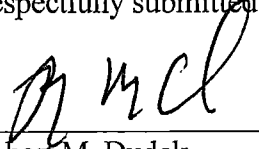
STATE OF SOUTH CAROLINA,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Louis Michael Winkler requests leave to proceed in forma pauperis, in accordance with the provisions of Title 28 U.S.C. §1915. The affidavit of Petitioner in support of this motion is attached, along with the petition for writ of certiorari.

Respectfully submitted,



Robert M. Dudek
Attorney at Law
South Carolina Commission
on Indigent Defense,
Division of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, SC 29201
(803) 734-1330

February 18, 2011

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

No. A-

LOUIS MICHAEL WINKLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

AFFIDAVIT OF LOUIS MICHAEL WINKLER
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Louis Michael Winkler, being duly sworn, state that I am the petitioner in this case; that because of my poverty I am unable to pay the costs of or give security for this proceeding; that I believe I am entitled to redress.

The responses to the questions and instructions below relating to my ability to pay costs or give security are true.

1. Are you presently employed? *No*

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

- b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

doesn't know.

2. Have you received within the past twelve months any income from a business, progression or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?

NO

- a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

N/A

3. Do you own any cash or checking or savings account? *NO*

- a. If the answer is yes, state the total value of items owned.

N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? *NO*

- a. If the answer is yes, describe the property and state its approximate value.

N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

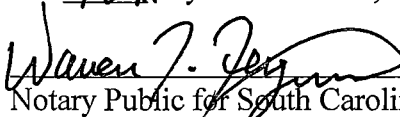
N/A

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.



LOUIS MICHAEL WINKLER

SWORN to and subscribed before me
this 16th day of December, 2010.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: Sept. 22, 2018.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Defender
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Acting Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate

RECEIVED

DEC 23 2010

December 23, 2010

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

S.C. Supreme Court

Re: Louis Michael Winkler v. South Carolina, 10A590.

Dear Mr. Shearouse:

Enclosed is a copy of the United States Supreme Court extension letter noting that I have been granted an extension in Louis Michael Winkler v. South Carolina until February 18, 2011 in which to file the petition for a writ of certiorari

Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD:lec

Enclosure

cc: Donald J. Zelenka, Esquire
Alphonso Simon, Jr., Esquire
Charles Grose, Esquire
LaNelle Durant, Esquire

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 10, 2010

Mr. Robert M. Dudek
SC Commission on Indigent Defense
Division of Appellate Defense
1330 Lady St., Suite 401
Columbia, SC 29201

Re: Louis Michael Winkler
v. South Carolina
Application No. 10A590

Dear Mr. Dudek:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on December 10, 2010 extended the time to and including February 18, 2011.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by



Erik Fossum
Case Analyst

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Robert M. Dudek
SC Commission on Indigent Defense
Division of Appellate Defense
1330 Lady St., Suite 401
Columbia, SC 29201

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

ORIGINAL



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Acting Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate

December 13, 2010

RECEIVED

DEC 13 2010

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

S.C. Supreme Court

Re: Steven V. Bixby v. South Carolina, No 10A575, Louis Michael Winkler v. South Carolina, 10A590.

Dear Mr. Shearouse:

Enclosed is a copy of the United States Supreme Court extension letter noting that I have been granted an extension in Steven V. Bixby v. South Carolina until February 18, 2011 in which to file the petition for a writ of certiorari. I have also enclosed the United States Supreme Court website page showing an extension has been granted in Louis Michael Winkler v. South Carolina until February 18, 2011 in which to file the petition for a writ of certiorari. I will forward the Court a copy of the Winkler extension letter when it is received. I see that you have already been copied on the Bixby extension order.

Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD:lec

Enclosure

cc: Donald J. Zelenka, Esquire
Alphonso Simon, Jr., Esquire
Charles Grose, Esquire
LaNelle Durant, Esquire
Elizabeth Franklin-Best, Esquire



SUPREME COURT OF THE UNITED STATES



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No. 10A590

Title:

Louis Michael Winkler, Applicant

v.

South Carolina

Docketed:

Lower Ct:

Case Nos.: (26857)

Supreme Court of South Carolina

~~~~~Date~~~~~

~~~~~Proceedings and Orders~~~~~

Dec 3 2010 Application (10A590) to extend the time to file a petition for a writ of certiorari from December 21, 2010 to February 19, 2011, submitted to The Chief Justice.

Dec 10 2010 Application (10A590) granted by The Chief Justice extending the time to file until February 18, 2011.

~~~~~Name~~~~~

~~~~~Address~~~~~

~~~~~Phone~~~~~

**Attorneys for Petitioner:**

Robert M. Dudek

SC Commission on Indigent Defense

Division of Appellate Defense

1330 Lady St., Suite 401

Columbia, SC 29201

(803) 734-1330



Party name: Louis Michael Winkler

---

December 13, 2010 | Version 2009.0

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Supreme Court of the United States



Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
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Robert M. Dudek, Acting Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender  
Joseph L. Savitz, III, Senior Appellate Defender

December 9, 2010

**RECEIVED**

DEC - 9 2010

Honorable William K. Suter  
Clerk, Supreme Court of the United States  
1 First Street, NE  
Washington, DC 20543

**S.C. Supreme Court**

Re: Louis Michael Winkler v. State of South Carolina

Dear Mr. Suter:

Enclosed please find for filing, with proof of service, the original and two (2) copies of the Motion for Extension of Time in which to File Petition for Writ of Certiorari in the above-referenced capital case that is directed to Chief Justice John G. Roberts. I sent an earlier nearly identical extension petition for Chief Justice Roberts on December 3, 2010. However, I was advised by Mr. Fossum of your office yesterday, December 8, 2010 that the petition had not yet arrived in your office. Therefore, out of an abundance of caution I have sent you the enclosed petition.

Kindly let me know if you have any questions or concerns.

Sincerely,

Robert M. Dudek  
Chief Appellate Defender

RMD:lec  
Enclosure  
cc: Alphonso Simon, Jr., Assistant Attorney General

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

\_\_\_\_\_  
No. A-  
\_\_\_\_\_

**RECEIVED**

DEC - 9 2010

S.C. Supreme Court

LOUIS MICHAEL WINKLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

\_\_\_\_\_  
APPLICATION FOR EXTENSION OF TIME IN WHICH  
TO FILE PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice  
for the Fourth Circuit:

The petitioner Louis Michael Winkler prays that an order be entered extending the time for  
filing a petition for a writ of certiorari for a period of sixty (60) days to and including February 21,  
2011. This application is submitted more than ten days prior to the scheduled filing date for the  
petition. The pertinent dates are:

August 16, 2010: The South Carolina Supreme Court affirmed the judgment of conviction  
and sentence of death. State v. Winkler, 698 S.E.2d 596 (2010).

September 22, 2010: The South Carolina Supreme Court denied Bixby's timely petition for rehearing.

December 21, 2010: Expiration of time for the filing of a petition for a writ of certiorari, unless extended.

February 21, 2010: Expiration of requested sixty-day extension of time for filing of a petition for writ of certiorari.

The petition will present two federal constitutional issues for review:

- (1) Whether the South Carolina Supreme Court erred by holding that the guilt stage and sentencing phase hearing were one trial for purposes of a self-representation analysis under Faretta v. California, 422 U.S. 806 (1975) so that a defendant's request to represent himself prior to the sentencing phase hearing could be judged untimely, since the Court's reasoning violates this Court's holding in Bullington v. Missouri, 451 U.S. 430 (1981), and
- (2) whether the South Carolina Supreme Court erred by holding petitioner's trial counsel had the authority to call petitioner's family members as mitigation witnesses over his objection after petitioner had been denied the right to represent himself, since the better reasoned extant cases hold that a capital defendant has the right to instruct trial counsel not to call family members as mitigation witnesses even when represented by counsel.

The petitioner will invoke this Court's jurisdiction under 28 U.S.C. § 1257(a).

This extension of time is requested because:

(a) This is a capital case and as such requires especially complete research and careful drafting so as to properly present the petitioner's federal constitutional claims to this Court.

(b) Petitioner's lead counsel, Robert Dudek, is the Chief Appellate Defender for

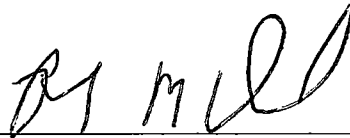
the Appellate Division of the South Carolina Office of Indigent Defense. Counsel's division normally handles between eight-hundred-and-fifty to one thousand criminal appeals a year before the South Carolina Court of Appeals and the South Carolina Supreme Court. Counsel supervises seven other Appellate Defenders and a support staff and maintains his own heavy caseload of mostly murder and death penalty cases. In the last forty-five days counsel has filed the following briefs and certiorari petitions: A petition for a writ of certiorari to the Court of Appeals in the state Supreme Court in the murder cases State v. Darian Robinson and State v. Cameron Brown on Monday, December 6, 2010. A petition for a writ of certiorari to the Court of Appeals in the state Supreme Court on December 3, 2010 in the murder case of State v. Perry Strickland. A five issue brief with the state Supreme Court on November 19, 2010 in the case of State v. Samuel Whitner. An initial brief of appellant and designation of matter in the murder case of State v. Andre Richardson with the Court of Appeals on November 17, 2010. The initial brief of appellant and designation of matter in the murder case of State v. Kenneth Smith with the Court of Appeals on November 15, 2010. A three issue petition for writ of certiorari and accompanying appendix in the death-penalty case of John Richard Wood v. State with the state Supreme Court on November 5, 2010. Counsel argued the murder case of State v. Thomas Bryant on Wednesday, November 3, 2010 before the Court of Appeals. Counsel filed a petition for writ of certiorari in Tony Rush v. State on Monday, November 1, 2010 with the state Supreme Court. Counsel also argued the murder case of State v. Yancy Thompson before the state Supreme Court on October 20, 2010.

(c) Counsel this month will be filing a petition for a writ of certiorari to the

Court of Appeals in the state Supreme Court in the murder case of State v. Brandon Johnson on December 10, 2010 and a brief in the Court of Appeals in the murder case of State v. Derek Maner on December 17, 2010. Counsel also plans to file a petition for a writ of certiorari to the Court of Appeals in the state Supreme Court in the murder case of State v. Roger Parker on December 29, 2010. Counsel also has other deadlines this month with the Court of Appeals and the state Supreme Court but he presently thinks they will need to be extended.

WHEREFORE, petitioner requests an order extending the time for filing his petition for a writ of certiorari to and including February 21, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

ROBERT M. DUDEK  
Chief Appellate Defender

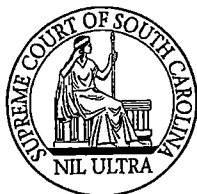
Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

ATTORNEY FOR PETITIONER.

December 9, 2010.

# EXHIBIT

## A



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

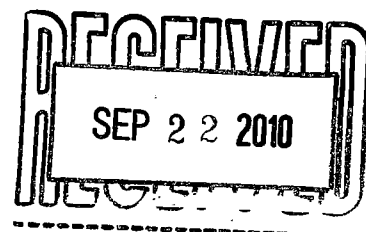
BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 22, 2010



Chief Appellate Defender Robert M. Dudek  
✓ Appellate Defender Elizabeth A. Franklin-Best  
South Carolina Commission on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Re: The State v. Winkler, Louis Michael Jr.

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

“Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

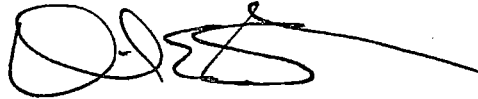
September 22, 2010.”

The remittitur is today being forwarded to the lower court.



The State v. Winkler, Louis Michael Jr.  
Page Two  
September 22, 2010

Very truly yours,



CLERK

DES/dmh

cc: Assistant Attorney General Alphonso Simon, Jr.  
The Honorable J. Gregory Hembree

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

---

The State, Respondent,

v.

Louis Michael Winkler, Jr., Appellant.

---

Appeal from Horry County  
James E. Lockemy, Circuit Court Judge

---

Opinion No. 26857  
Heard June 24, 2010 – Filed August 16, 2010

---

**AFFIRMED**

---

Chief Appellate Defender Robert M. Dudek and Appellate  
Defender Elizabeth A. Franklin-Best, both of Columbia, for  
Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney  
General John W. McIntosh, Assistant Deputy Attorney  
General Donald J. Zelenka, and Assistant Attorney General  
Alphonso Simon, Jr., all of Columbia, and Solicitor J.  
Gregory Hembree, of Conway, for Respondent.

---

**CHIEF JUSTICE TOAL:** In this capital murder case, Louis Michael Winkler, Jr. (Appellant) appeals his sentence of death.[1]

**FACTS/PROCEDURAL HISTORY**

Appellant kidnapped and sexually assaulted Rebekah Grainger Winkler (Victim) on October 10, 2005, five months before Victim was murdered.[2] That evening, Appellant's car was spotted behind the Seacoast Medical Center (Seacoast). Victim's car was found off the road in some trees and appeared to have been wrecked. There was blood on both of Victim's car seats, around the center console, and on the interior panel of the passenger's side door. The Horry County Police Department activated its dog team in an attempt to locate two missing persons. Victim was later found next to Stephen's Crossroads, which is where the magistrate's complex and library is located.

Phyllis Richardson (Richardson) arrived at the parking lot at Stephen's Crossroads around 7:30 a.m. on October 11, 2005, and saw a woman walking in the parking lot being followed by a man. Richardson noted the woman looked distraught and was acting confused, and that the man's hands were in the air as if he were raging and irritated. Shortly after Richardson entered her office, she saw the woman from the parking lot on the phone in her office building. The woman's hair was matted and tangled with some bald spots. Richardson later learned the woman making the call was Victim. Curtis Thompson was the first officer to arrive at the building, and noticed some of Victim's hair looked like it had been ripped out, and she had black eyes, abrasions, and other scratches.

Victim was transported to Seacoast by EMS where Lisa Gore (Gore), a nurse at Seacoast, tended to Victim and noted her injuries to the left eye, some swelling in the jaw area, bruising around the neck, a fractured nose, an upper lip injury, redness under her right eye, corneal abrasions, multiple bruises and contusions, a bite mark to the face, and a large amount of hair removed from her head. A sexual assault kit was collected from Victim. The DNA found in the rectal and vaginal swabs from the sexual assault kit matched Appellant's DNA.

On October 11, 2005, Appellant was arrested for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping. Bond was initially denied; however, at a second bond hearing, Appellant's bond was set at \$150,000 and he was required to wear an electronic monitor while out on bond. At a third bond hearing, Appellant's bond was amended to allow him to remove his electronic monitor for two hours so he could seek employment between the hours of 4 p.m. and 6 p.m. Appellant was out of jail on bond on the day Victim was murdered.

At around 5:30 p.m. March 6, 2006, Appellant kicked in the door to Victim's condominium. Appellant knocked Victim's son, Jonathan G. (Jonathan), onto the ground and then shot Victim once in the face at point blank range. According to the forensic pathologist who conducted Victim's autopsy, death occurred instantly. Appellant then walked over and pointed the gun at Jonathan. Shortly thereafter, Appellant left the condominium.

Appellant hid in the woods for two weeks. When police apprehended Appellant,[3] they recovered a Jennings .380 pistol from his right front pants pocket. Five live rounds were found in the pistol, but there was not a live round in the port. During a full search of Appellant, police recovered eighteen rounds of .380 ammunition, a guard lock blade knife, and a wallet. In the wallet, there was a newspaper clipping about the shooting and murder.

Appellant was tried and found guilty of murder, first-degree burglary, and assault and battery of a high and aggravated nature. At trial, the State sought to establish two statutory aggravating circumstances: (1) the murder was committed during the commission of a burglary; and (2) the murder was of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime. S.C. Code Ann. § 16-3-20(C)(a)(1)(c), (C)(a)(11) (2003 & Supp. 2009). The jury recommended that Appellant be sentenced to death.

During the guilt phase of Appellant's trial, Mary Elizabeth C. (Mary), Jonathan's friend, testified that on the evening of the murder she was on the phone with Jonathan when she heard a loud pop noise, and a voice that was not Jonathan's say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not—I'm back, I'm back. I'm never going back to jail." Mary then heard a hit and the phone went to static. Andrew Cooper (Cooper), a former crime scene technician for the Horry County Police Department, testified that it appeared there had been a forced entry because the door jamb, door frame, lock mechanism, and other parts of the door had been broken. Cooper also testified that a reddish colored liquid was collected from the kitchen countertop. Kimberly Hahn, a former State Law Enforcement Division (SLED) scientist, testified that she compared the blood swabs recovered from the counter of Victim's residence to Appellant's blood standard, and the blood from the counter matched

Appellant's blood profile. Cooper testified that a projectile was recovered from the baseboard of the wall behind Victim. A firearms and toolmark examiner for SLED testified that the Jennings pistol found on Appellant when apprehended fired the bullet recovered from Victim's baseboard.

During the sentencing phase of Appellant's trial, Jill Shelley (Shelley), Victim's older daughter, testified that in September 2005, six months before the murder, she could not contact Victim on the phone so she drove to Victim's home. When she arrived at Victim's residence she saw that Victim was beat up and her arms were covered in bruises. Appellant later arrived, started kicking the door, and was screaming for Victim to let him in. Shelley threatened to call the police. Appellant responded that Victim knew what would happen if they called the police. Shelley testified that Victim moved out of Appellant's home as a result of that confrontation. One piece of evidence presented by the State was a letter sent by Appellant to Shelley while Appellant was incarcerated. In the letter Appellant asserted that had Shelley not gotten involved, Victim would still be alive.

## ISSUES

- I. Did the trial court err in admitting an audio tape recording as a prior consistent statement under Rule 801(d)(1)(B), SCRE?
- II. Did the trial court err in allowing the jury to review the transcript of the 911 tape?
- III. Did the trial court err in refusing to allow Appellant to represent himself during the sentencing phase of trial?
- IV. Did the trial court err in not conducting a full *Faretta* inquiry?
- V. Did the trial court err in allowing defense counsel to present mitigation evidence to which Appellant objected?
- VI. Did the trial court err in denying Appellant's motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20 (C)(a)(11)?

## STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* at 6, 545 S.E.2d at 829. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pittman*, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007) (citation omitted).

## LAW/ANALYSIS

### I. Rule 801(d)(1)(B), SCRE

Appellant argues the trial court erred in admitting as a prior consistent statement under Rule 801(d)(1)(B), SCRE an audio tape recording of Jonathan's interview with police on the evening of the murder. We

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.

(1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

Jonathan testified that he saw Appellant shoot and kill his mother. During cross examination, Jonathan testified that his father was Roger Grainger (Grainger). He also testified that Grainger was the only person he called "dad," and that he did not refer to Appellant as "dad." Defense counsel asked Jonathan if he remembered telling the first officer who arrived on the scene that it was his dad who shot his mother. Jonathan denied he told the officer that it was his dad, and stated he told the officer it was his stepdad. Jonathan also testified that Grainger was supposed to arrive at the condominium around 6 p.m. on the night of the murder.

Officer Thomas Knoch (Knoch), the first officer to arrive at the scene of the murder, testified that as he was heading up the steps to the condominium the following conversation took place between him and Jonathan, "He said he's gone, and I asked him. I said who. . . . He said my dad . . . ." Knoch also testified that in his report he wrote, "When I asked him who, he said my dad."

Detective Ann Pitts (Pitts) testified that she spoke with Jonathan on the evening of the shooting and recorded the conversation. The state moved to enter the tape recorded conversation into evidence. In the statement to Pitts, Jonathan identified Appellant as the man who broke into the condominium and shot Victim. Appellant objected and the court overruled Appellant's objection under Rule 801(d)(1)(B), SCRE.

We hold that Jonathan's statement to Pitts was a prior consistent statement admissible under Rule 801(d)(1)(B), SCRE. First, Jonathan testified at trial and was subject to cross-examination. Second, Appellant accused Jonathan of recently fabricating the statement. Appellant was accusing Jonathan of lying when Jonathan testified that he told Knoch it was his stepdad who shot his mother, not his dad. This alleged fabrication was necessarily recent because it happened during the trial. Third, Jonathan's statement to Pitts was consistent with his testimony at trial. Fourth, the statement to Pitts occurred before the alleged recent fabrication. Thus, all of the elements of Rule 801(d)(1)(B), SCRE are satisfied and the trial court committed no error in allowing into evidence Jonathan's statement to Pitts.

Appellant argues the trial court erred in allowing the jury to view the transcript of the 911 tape while the

jurors were listening to the tape during deliberations. We disagree.

"The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations." *State v. Plyler*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). "The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request." *Id.* The court is not required to submit evidence to the jury for review beyond that specifically requested but in its discretion may have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested. *Id.* In *Plyler*, the trial court allowed the jury to hear a tape of the testimony of the defendant's ex-wife in response to the jury's request to have her testimony read back to them. *Id.* In that case, this Court found there was no abuse of discretion where only the direct examination was played and the trial judge denied the defendant's motion that the jury be required to also hear the cross-examination to prevent overemphasis of the portion reheard. *Id.*

In this case, during jury deliberations, the jury sent the judge a question asking if they could read the 911 transcript. Appellant argued the transcript was not part of the trial record, was only offered as an aid to the tape recording, and was never put into evidence. The trial court replayed the 911 tape for the jury in the courtroom and the jury was allowed to review the transcript while the tape played, which mirrored the way in which the evidence was presented at trial.<sup>[4]</sup> This was done in Appellant's presence at the request of the jury. Thus, the judge exercised proper discretion and committed no error in allowing the jury to read the transcript while listening to the 911 tape.

### III. Self-representation

Appellant argues the trial court abused its discretion by refusing to allow Appellant to represent himself during the sentencing phase of the trial. We disagree.<sup>[5]</sup>

An accused may waive the right to counsel and proceed *pro se*. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). However, "[a] defendant's right to waive the assistance of counsel is not unlimited." *State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). "The request to proceed *pro se* must be clearly asserted by the defendant prior to trial." *Id.* (citation omitted). "If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge." *Id.* (citing *United States v. Singleton*, 107 F.3d 1091 (4th Cir. 1997); *United States v. Lawrence*, 605 F.2d 1321 (4th Cir. 1979)). "Once trial commences, that right [to proceed *pro se*] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." *U.S. v. Wesley*, 798 F.2d 1155, 1155-56 (8th Cir. 1986) (citations omitted); see also *U.S. v. Stevens*, 83 F.3d 60, 66-67 (2d Cir. 1996) ("[O]nce a trial has begun, a defendant's right to represent himself 'is sharply curtailed,' and the judge considering the motion must weigh 'the prejudice to the legitimate interests of the defendant' against the 'potential disruption of proceedings already in progress.'"). The sentencing phase of a capital trial does not constitute a separate trial. See S.C. Code Ann. § 16-3-20(B) (2003); see also *State v. Stewart*, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

Appellant did not make his request to proceed *pro se* at the beginning of trial. Appellant made his request to proceed *pro se* at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

The trial court did not abuse its discretion in denying Appellant's request to proceed *pro se* at the sentencing phase of the trial. First, the trial court noted it was concerned that Appellant's medication would affect his ability to properly and fully function as his own counsel. Second, the trial court was concerned that allowing Appellant to represent himself during the sentencing phase would require some

delay for Appellant to fully prepare. Third, the trial court was concerned the jury may be confused to have the first half of the case tried by counsel and the second half tried without counsel, especially if the jury could see counsel at Appellant's counsel table. For these reasons, the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress. Hence, the trial court's decision to not allow Appellant to proceed *pro se* during the sentencing phase of trial was not an abuse of discretion and, therefore, nor error.

#### **IV. *Faretta* Warnings**

Appellant argues the trial court erred by failing to properly provide Appellant with *Faretta* warnings when Appellant sought to proceed *pro se* at the beginning of the sentencing phase. We disagree.

As noted above, Appellant did not timely waive his right to counsel and proceed *pro se*. Hence, Appellant's reliance on *Faretta* is misplaced. Had Appellant moved to proceed *pro se* before the trial began, then *Faretta* would apply. Moreover, Appellant contends that *Fuller* requires reversal. In *Fuller*, the defendant moved to proceed *pro se* before the trial began. 337 S.C. at 241, 523 S.E.2d at 170.

However, in this case, Appellant did not seek to proceed *pro se* until the sentencing phase. Appellant's reliance on *Faretta* and *Fuller* is misplaced, and the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress.[6]

#### **V. Mitigating Social History**

Appellant contends the trial court erred by allowing defense counsel to present mitigating social history evidence and call Appellant's family members as mitigation witnesses over Appellant's objection. We disagree.

"An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 560, 160 L. Ed. 2d 565, 578 (2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984)). "That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S. Ct. 646, 657, 98 L. Ed. 2d 798, 816 (1988)). The introduction of the mitigation evidence at issue was a tactical decision made by Appellant's trial counsel and is reviewed on a case by case basis. The mitigation evidence presented served the purpose of humanizing Appellant to the jury. We find the introduction of this mitigation evidence was a tactical decision made by trial counsel and the trial court committed no error in admitting mitigating evidence that Appellant did not want to be introduced.

#### **VI. S.C. Code Ann. § 16-3-20(C)(a)(11)**

Appellant argues the trial court erred by refusing to direct a verdict on the statutory aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime. We disagree.

"In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned only with the existence of evidence, not its weight." *State v. Smith*, 298 S.C. 482, 485, 381 S.E.2d 724, 726 (1989). "The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it." *State v. Lindsey*, 372 S.C. 185, 194-95, 642 S.E.2d 557, 562 (2007).

The aggravating circumstance at issue is "[t]he murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime." S.C. Code Ann. § 16-3-20(C)(a)(11) (2003 & Supp. 2009). The State established there was an ongoing criminal process from 2005 against Appellant for criminal sexual conduct, first degree, assault and battery

with intent to kill, and kidnapping at the time Victim was murdered. Victim, as the victim in the 2005 crimes, was clearly a potential witness in Appellant's trial on these three charges. There was circumstantial evidence to support a finding that Appellant murdered Victim to impede or deter prosecution of the charges listed above. Jonathan testified that Appellant stated, "you thought I was going to prison," when he broke into the condominium. Mary testified she heard a loud pop noise, and a voice that was not Jonathan's say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not—I'm back, I'm back. I'm never going back to jail." Shelley testified that Appellant warned Victim that she knew what would happen if someone called the police. Lastly, in the letter from Appellant to Shelley written while Appellant was incarcerated, Appellant asserted that Victim would still be alive had Shelley not gotten involved in Victim's life. This evidence is circumstantial evidence to support the statutory aggravating circumstance contained in section 16-3-20(C)(a)(11), and the trial court is affirmed in its denial of Appellant's motion for a directed verdict.

### PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. See, e.g., *State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

### CONCLUSION

For the aforementioned reasons, Appellant's conviction and sentence are affirmed.

**BEATTY, KITTREDGE, HEARN, JJ., concur. PLEICONES, J., concurring in result only.**

---

[1] This case consolidates Appellant's direct appeal and the mandatory review provisions of S.C. Code Ann. § 16-3-25 (2003).

[2] Victim was Appellant's estranged wife.

[3] Three days after the murder, police searched Appellant's residence and found a piece of paper with Victim's address on it. However, police were not able to find Appellant until March 20, 2006, two weeks after the murder.

[4] Appellant offered no objection to the introduction of the 911 transcript at trial, nor did he object to the transcript being read while the 911 tape played.

[5] Issue three condenses Appellant's third and fourth issues on appeal into one issue.

[6] Even if *Faretta* were applicable, the record reflects the trial judge met the *Faretta* standard by adequately warning Appellant of the dangers of self-representation.



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

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No. A -

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STEVEN VERNON BIXBY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

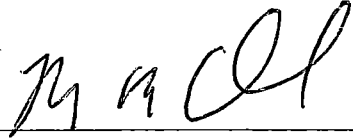
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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Motion for Extension in Which to File Petition for Writ of Certiorari has been served upon opposing counsel by mailing one (1) copy in an envelope properly addressed with postage prepaid this 9th day of December, 2010, to:

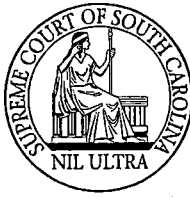
Mr. Alphonso Simon, Jr.  
Assistant Attorney General  
Office of the Attorney General  
PO Box 11549  
Columbia, SC 29211



---

ROBERT M. DUDEK  
Chief Appellate Defender

ATTORNEY FOR PETITIONER.



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 20, 2010

Chief Appellate Defender Robert M. Dudek  
Appellate Defender Elizabeth A. Franklin-Best  
South Carolina Commission on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Re: The State v. Winkler, Louis Michael Jr.

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,



CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka  
Assistant Attorney General Alphonso Simon, Jr.  
The Honorable J. Gregory Hembree

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Petitioner.

---

## ORDER

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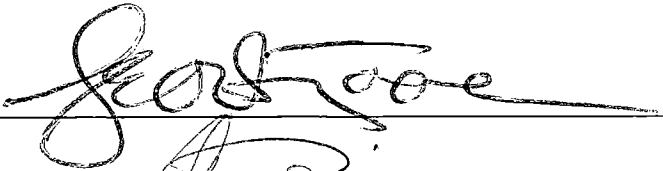
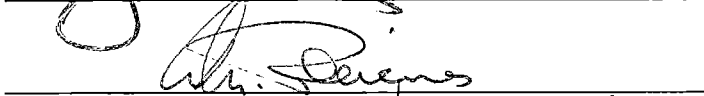
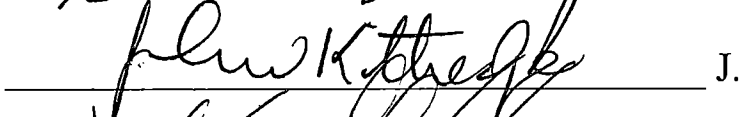
This Court recently affirmed petitioner's death sentence in State v. Winkler, Op. No. 26857 (S.C. Sup. Ct. filed August 16, 2010). Petitioner's petition for rehearing was denied and the remittitur sent on September 22, 2010. A notice of execution has not been issued.

Petitioner now requests a stay of execution to allow him to file a petition for a writ of certiorari in the United States Supreme Court. The State has filed a return stating it does not oppose the petition for a stay of execution because petitioner has set forth at least four issues that satisfy the conditions precedent for a stay.

Because petitioner intends to raise to the United States Supreme Court at least one federal question that is preserved for review, we grant the petition for a stay of execution pursuant to In re Stays of Execution in Capital

Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), and the stay shall remain in effect to the extent provided by this Court therein.

IT IS SO ORDERED.

 C. J.  
 J.  
 J.  
 J.  
 J.

Columbia, South Carolina

October 20, 2010



HENRY McMASTER  
ATTORNEY GENERAL

October 4, 2010

RECEIVED  
OCT - 4 2010  
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
P.O. Box 11330  
Columbia, South Carolina 29211

Re: *The State v. Louis Michael Winkler*

Dear Mr. Shearouse:

Please find enclosed an original and six (6) copies of a Return to Petition for Stay of Execution, together with Certificate of Service regarding the above matter.

Please feel free to contact me if you have any questions.

Sincerely,

Alphonso Simon, Jr.  
Assistant Attorney General

AS:dmd

Enclosures

cc: Robert M. Dudek, Esq. (w/2 copies of encls.)  
Elizabeth Franklin-Best, Esq. (w/2 copies of encls.)

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Horry County  
The Honorable James E. Lockemy, Circuit Court Judge

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THE STATE,

Respondent,

v.

LOUIS MICHAEL WINKLER, JR.,

Appellant

---

RETURN TO PETITION FOR STAY OF EXECUTION

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The Respondent State of South Carolina, through undersigned counsel, hereby makes a Return to the Petition for Stay of Execution pending a petition for writ of certiorari in the United States Supreme Court due to be filed within ninety (90) days of the denial of rehearing on September 22, 2010 which is December 21, 2010. Respondents do not oppose the stay request pursuant to the mandates of this Court in In Re Stays of Execution In Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996) because questions two, four, five, and six satisfy the conditions precedent. Respondent will show this Court the following reasons:

I.

The Supreme Court of South Carolina affirmed the convictions and death sentence in State v. Louis Michael Winkler, Jr., Op. No. 26857, 2010 WL 3219334, -- S.C. -- , --

RECEIVED  
OCT - 4 2010  
S.C. SUPREME COURT

S.E.2d -- (August 16, 2010). A petition for rehearing was made on August 31, 2010. It was denied September 22, 2010. The remittitur was issued the same date.

II.

On September 24, 2010, Petitioner, through counsel Robert M. Dudek and Elizabeth Franklin-Best, made a petition for a stay of execution. In the petition, he asserted that he intended to seek certiorari and raise in a petition the following issues:

- I. Whether the South Carolina Supreme Court erred by holding that the sentencing phase of a capital trial does not constitute a separate trial for purposes of Faretta v. California, 422 U.S. 806 (1975) and self-representation?
- II. Whether the South Carolina Supreme Court erred by holding that petitioner's right to represent himself during the penalty stage of the trial was properly analyzed under an "abuse of discretion" standard where the trial judge promised petitioner prior to jury selection and the guilt phase that he would be allowed to represent himself if he desired during a subsequent phase, the penalty stage of the trial, and then refused to allow him to do so, since this was constituted an error of law and the judge's ruling violated due process and the essential demands of fairness?
- III. Whether the South Carolina Supreme Court erred by holding petitioner did not have the right to represent himself during the penalty stage, because his request was untimely, since the Court's holding that the penalty stage was not a separate proceeding was an error of law under Bullington v. Missouri, 451 U.S. 430 (1981)?

- IV. Whether the South Carolina Supreme Court erred by ruling the judge did not abuse his discretion by refusing to allow petitioner to represent himself during the penalty phase since his attorney had assaulted him, petitioner was attempting to have his lead counsel arrested, his attorneys told the judge petitioner was ready and willing to represent himself, since the refusal to allow petitioner to represent himself under these circumstances violated the mandate of Faretta v. California, 422 U.S. 806 (1975)?
- V. Whether the South Carolina Supreme Court erred by ruling the trial judge was not obligated to properly conduct a Faretta colloquy with petitioner because his request to represent himself was untimely, where petitioner was promised prior to trial that he could represent himself, and the request therefore was not untimely, since this ruling violated petitioner's right to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975)?
- VI. Whether the South Carolina Supreme Court erred by holding that trial counsel controlled the case in mitigation, and that petitioner did not have the right to forego the presentation of mitigation evidence his family members were asked to give at the behest of his trial counsel, and over his objection, since this violated petitioner's right to conduct his own defense pursuant to Faretta v. California, 422 U.S. 806 (1975)?

Petition, p. 2-4.

### III.

This Court in its Order concerning capital cases, In Re Stays of Execution In Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), stated that the Court will issue a stay in the



direct appeal setting for filing certiorari, if the Petitioner files a stay motion setting forth the questions and "as long as the federal questions asserted have been adequately preserved under state law so that it can be reviewed by the United States Supreme Court," this Court will grant a stay of execution for ninety (90) days from the date of the remittitur.

A review of the record before this Court reveals that some of the issues were preserved at trial and on appeal. Therefore, under In Re Stays, Respondent concedes the stay is appropriate, although there is no likelihood of success on the merits on certiorari for the reasons set forth in this Court's Opinion.

#### ISSUE ONE - Sentencing Phase Not a Separate Trial.

In the initial claim, petitioner asserts that the Court erred in holding that the sentencing phase of a trial does not constitute a separate trial for the purposes of Faretta.

In the Opinion, the Court noted:

The sentencing phase of a capital trial does not constitute a separate trial. See S.C. Code Ann. § 16-3-20(B) (2003); see also State v. Stewart, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

Appellant did not make his request to proceed pro se at the beginning of trial. Appellant made his request to proceed pro se at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

State v. Winkler, *supra*.

This issue is not proper for certiorari consideration because there is no federal constitutional basis in the decision in this Court. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas corpus court to reexamine state-court determinations on state-law questions."). State courts "are the ultimate expositors of state

law.” Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

Question one is purely an interpretation of state law. It fails to provide a basis for relief under the federal constitution and was not raised below as a federal constitutional claim.

This does not provide a basis for a stay under In Re Stays, supra.

#### ISSUE TWO, THREE, and FOUR - Self-Representation

In his second question, Petitioner asserts that the Court erred in applying an abuse of discretion standard in analyzing whether Petitioner had a right to represent himself in sentencing. In his third question, Petitioner takes issue with the Court’s holding he did not have the right to represent himself because his request was untimely due to the fact the penalty stage was not a separate proceeding. In his fourth question, Petitioner asserts that the Court erred in holding he did not have the right to represent himself. These issues were raised by Petitioner in the Final Brief of Appellant as follows:

Whether the court abused its discretion by refusing to allow appellant to represent himself during the penalty phase of his capital trial particularly where his attorneys agreed appellant was ready to represent himself and that no delay in the trial was necessary?

Whether the court erred, alternatively, by refusing to allow appellant to represent himself during the penalty stage of the trial since appellant had the right to represent himself during the penalty phase under the reasoning of Faretta, and his case was not governed by the State v. Brewer abuse of discretion standard?

*Final Brief of Appellant*, pgs. 1-2. This Court addressed these issues in the following manner:

Appellant argues the trial court abused its discretion by refusing to allow Appellant to represent himself during the sentencing phase of the trial. We disagree.<sup>1</sup>

An accused may waive the right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, "[a] defendant's right to waive the assistance of counsel is not unlimited." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). "The request to proceed pro se must be clearly asserted by the defendant prior to trial." Id. (citation omitted). "If the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge." Id. (citing United States v. Singleton, 107 F.3d 1091 (4th Cir.1997); United States v. Lawrence, 605 F.2d 1321 (4th Cir.1979)). "Once trial commences, that right [to proceed pro se] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." U.S. v. Wesley, 798 F.2d 1155, 1155-56 (8th Cir.1986) (citations omitted); see also U.S. v. Stevens, 83 F.3d 60, 66-67 (2d Cir.1996) ("[O]nce a trial has begun, a defendant's right to represent himself 'is sharply curtailed,' and the judge considering the motion must weigh 'the prejudice to the legitimate interests of the defendant' against the 'potential disruption of proceedings already in progress.'"). The sentencing phase of a capital trial does not constitute a separate trial. See S.C. Code Ann. § 16-3-20(B) (2003); see also State v. Stewart, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

Appellant did not make his request to proceed pro se at the beginning of trial. Appellant made his request to proceed pro se at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

The trial court did not abuse its discretion in denying Appellant's request to proceed pro se at the sentencing phase of the trial. First, the trial court noted it was concerned that Appellant's medication would affect his ability to properly and fully function as his own counsel. Second, the trial court was concerned that allowing Appellant to represent himself during the sentencing phase would require some delay for Appellant to fully prepare. Third, the trial court was concerned the jury may be confused to have the first half of the case tried by counsel and the second half tried without counsel, especially

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<sup>1</sup>Issue three condenses Appellant's third and fourth issues on appeal into one issue.

if the jury could see counsel at Appellant's counsel table. For these reasons, the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress. Hence, the trial court's decision to not allow Appellant to proceed pro se during the sentencing phase of trial was not an abuse of discretion and, therefore, nor error.

State v. Winkler, *supra*.

Respondent submits that it appears that Petitioner, as to proposed questions two and four, that Petitioner has met the condition precedent for a stay of ""as long as the federal questions asserted have been adequately preserved under state law so that it can be reviewed by the United States Supreme Court." As to proposed question five, Respondent submits that this issue was not properly presented to the Court. There was no argument asserting that the sentencing phase of a trial is a separate proceeding in either the Final Brief of Appellant or the Final Reply Brief of Appellant. The potential question fails to satisfy the condition precedent "as long as the federal questions asserted have been adequately preserved under state law so that it can be reviewed by the United States Supreme Court," this Court will grant a stay of execution. This does not provide a basis for a stay under In Re Stays, *supra*.

#### ISSUE FIVE - Faretta Colloquy

In his fifth proposed issue, Petitioner asserts that the South Carolina Supreme Court erred in finding a Faretta colloquy was not warranted because the request to proceed pro se was untimely. In raising this claim in his Final Brief of Appellant, he asserted as the statement of the issue:

Whether the court erred by failing to properly provide appellant with Faretta warnings, during a focused waiver hearing, when appellant invoked his right to represent himself, and his attorneys told the court that appellant was ready and willing to represent himself and that no delay in the trial was necessary?

*Final Brief of Appellant*, p. 2. The Court addressed this issue in the following manner:

Appellant argues the trial court erred by failing to properly provide Appellant with Faretta warnings when Appellant sought to proceed pro se at the beginning of the sentencing phase. We disagree.

As noted above, Appellant did not timely waive his right to counsel and proceed pro se. Hence, Appellant's reliance on Faretta is misplaced. Had Appellant moved to proceed pro se before the trial began, then Faretta would apply. Moreover, Appellant contends that Fuller requires reversal. In Fuller, the defendant moved to proceed pro se before the trial began. 337 S.C. at 241, 523 S.E.2d at 170. However, in this case, Appellant did not seek to proceed pro se until the sentencing phase. Appellant's reliance on Faretta and Fuller is misplaced, and the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress.<sup>2</sup>

State v. Winkler, *supra*.

Respondent submits that it appears that as to proposed question five, Petitioner has met the condition precedent for a stay of ""as long as the federal questions asserted have been adequately preserved under state law so that it can be reviewed by the United States Supreme Court."

#### ISSUE SIX - Control of Presentation of Mitigation Evidence

In his sixth proposed issue, Petitioner asserts the Court erred in holding that trial counsel controlled the case in mitigation, and Petitioner did not have the right to forego the presentation of certain mitigation evidence. In the Final Brief of Appellant, this issue was raised as follows:

Whether the court erred alternatively by allowing defense counsel to present mitigating social history evidence and call appellant's family members as mitigation witnesses over his objection, since appellant still had the right to

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<sup>2</sup>Even if Faretta were applicable, the record reflects the trial judge met the Faretta standard by adequately warning Appellant of the dangers of self-representation.

control the case in mitigation and waive mitigation evidence he did not want the jury to consider, even where the judge denied appellant the right to represent himself?

*Final Brief of Appellant*, pg. 2. The Court addressed this issue in the following manner:

Appellant contends the trial court erred by allowing defense counsel to present mitigating social history evidence and call Appellant's family members as mitigation witnesses over Appellant's objection. We disagree.

"An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." Florida v. Nixon, 543 U.S. 175, 187, 125 S.Ct. 551, 560, 160 L.Ed.2d 565, 578 (2004) (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984)). "That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" Id. (quoting Taylor v. Illinois, 484 U.S. 400, 418, 108 S.Ct. 646, 657, 98 L.Ed.2d 798, 816 (1988)). The introduction of the mitigation evidence at issue was a tactical decision made by Appellant's trial counsel and is reviewed on a case by case basis. The mitigation evidence presented served the purpose of humanizing Appellant to the jury. We find the introduction of this mitigation evidence was a tactical decision made by trial counsel and the trial court committed no error in admitting mitigating evidence that Appellant did not want to be introduced.

State v. Winkler, supra. Respondent submits that it appears that as to proposed question six, Petitioner has met the condition precedent for a stay of "'as long as the federal questions asserted have been adequately preserved under state law so that it can be reviewed by the United States Supreme Court.'"

#### IV.

WHEREFORE having made Return, Respondent respectfully requests this Court to take appropriate steps to issue a stay to allow a timely petition for writ of certiorari, where the condition precedent has been satisfied by propounded questions two, four, five, and six.

Respectfully submitted,

HENRY D. McMASTER  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.  
Assistant Attorney General

J. GREGORY HEMBREE  
Solicitor, Fifteenth Judicial Circuit

ATTORNEYS FOR RESPONDENT

By:  \_\_\_\_\_

October 4, 2010

P.O. Box 11549  
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Horry County  
The Honorable James E. Lockemy, Circuit Court Judge

---

THE STATE,

Respondent,

v.

LOUIS MICHAEL WINKLER, JR.,

Appellant

---

CERTIFICATE OF SERVICE

---

I, Alphonso Simon, Jr., hereby certify that I have served the ***Return to Petition for Stay of Execution*** in the foregoing action by depositing one (1 ) copy in the U.S. mail to the following:

Robert M. Dudek  
Chief Appellate Defender  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
1330 Lady Street, Ste. 401  
Columbia, SC 29201

Elizabeth Franklin-Best  
Assistant Appellate Defender  
1330 Lady Street, Ste. 401  
Columbia, SC 29201



---

ALPHONSO SIMON, JR.  
Assistant Attorney General

October 4, 2010





# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

RECEIVED

September 23, 2010

SEP 23 2010

S.C. SUPREME COURT

Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

Re: The State v. Louis Michael Winkler, Jr. (Capital Case)

Dear Mr. Shearouse:

Enclosed please find an original and six copies of the petition for stay of execution along with a certificate of service.

Sincerely,

Robert M. Dudek  
Deputy Chief Attorney for Capital Appeals

RMD/lc

Enclosure

cc: Alphonso Simon, Jr., Esquire

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Appeal from Horry County

James E. Lockemy, Circuit Court Judge  
\_\_\_\_\_

ORIGINAL

RECEIVED

SEP 23 2010

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

PETITIONER.

\_\_\_\_\_  
PETITION FOR STAY OF EXECUTION  
\_\_\_\_\_

Counsel for Louis Michael Winkler, Jr., petitions this Court for a stay of execution to allow him to file a petition for writ of certiorari with the United States Supreme Court.

I.

This Court affirmed petitioner's convictions and death sentence in State v. Louis Michael Winkler, Jr., Op. No. 26857, Shearouse's Adv. Sh. #32 at 16-28 (filed August 16, 2010). This Court denied rehearing on September 22, 2010.

II.

A petition for rehearing was filed on August 31, 2010. As stated, this Court denied

rehearing on September 22, 2010.

### III.

A petition for writ of certiorari to the United States Supreme Court is now petitioner's proper avenue for relief from the judgment of this Court affirming his murder conviction, and sentence of death. Supreme Court Rule 13.1. Pursuant to *In re STAYS OF EXECUTION IN CAPITAL CASES*, 321 S.C. 544, 471 S.E.2d 544 (1996), this Court is the proper Court to issue the stay pending the disposition of petitioner's case in the United States Supreme Court.

### IV.

Petitioner can raise any and all of the following federal issues, preliminarily framed, in the United States Supreme Court:

#### 1.

Whether the South Carolina Supreme Court erred by holding that the sentencing phase of a capital trial does not constitute a separate trial for purposes of Faretta v. California, 422 U.S. 806 (1975) and self-representation?

#### 2.

Whether the South Carolina Supreme Court erred by holding that petitioner's right to represent himself during the penalty stage of the trial was properly analyzed under an "abuse of discretion" standard where the trial judge promised petitioner prior to jury selection and the guilt phase that he would be allowed to represent himself if he desired during a subsequent phase, the penalty stage of the trial, and then refused to allow him to do so, since this was constituted an error

of law and the judge's ruling violated due process and the essential demands of fairness?

3.

Whether the South Carolina Supreme Court erred by holding petitioner did not have the right to represent himself during the penalty stage, because his request was untimely, since the Court's holding that the penalty stage was not a separate proceeding was an error of law under Bullington v. Missouri, 451 U.S. 430 (1981)?

4.

Whether the South Carolina Supreme Court erred by ruling the judge did not abuse his discretion by refusing to allow petitioner to represent himself during the penalty phase since his attorney had assaulted him, petitioner was attempting to have his lead counsel arrested, his attorneys told the judge petitioner was ready and willing to represent himself, since the refusal to allow petitioner to represent himself under these circumstances violated the mandate of Faretta v. California, 422 U.S. 806 (1975)?

5.

Whether the South Carolina Supreme Court erred by ruling the trial judge was not obligated to properly conduct a Faretta colloquy with petitioner because his request to represent himself was untimely, where petitioner was promised prior to trial that he could represent himself, and the request therefore was not untimely, since this ruling violated petitioner's right to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975)?

6.

Whether the South Carolina Supreme Court erred by holding that trial counsel controlled

the case in mitigation, and that petitioner did not have the right to forego the presentation of mitigation evidence his family members were asked to give at the behest of his trial counsel, and over his objection, since this violated petitioner's right to conduct his own defense pursuant to Faretta v. California, 422 U.S. 806 (1975)?

WHEREFORE, counsel for Louis Michael Winkler, Jr., requests a ninety day stay of execution from September 22, 2010, in which to file a petition for writ of certiorari in the United States Supreme Court.

Respectfully submitted,

By: \_\_\_\_\_

Robert M. Dudek  
Chief Appellate Defender

Elizabeth Franklin-Best  
Appellate Defender  
ATTORNEYS FOR PETITIONER.

September 23, 2010

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Lexington County  
John C. Few, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

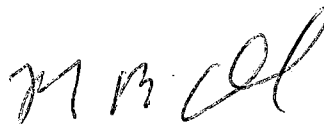
PETITIONER.

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CERTIFICATE OF SERVICE

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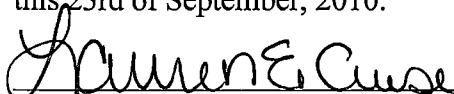
The undersigned attorney hereby certifies that a true copy of the Petition for Stay of Execution in the above-referenced case has been served upon opposing counsel, Alphonso Simon, Jr., Esquire, this 23rd day of September, 2010.

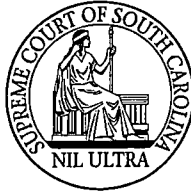


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Robert M. Dudek  
Deputy Chief Attorney for Capital Appeals

SUBSCRIBED AND SWORN TO before me  
this 23rd of September, 2010.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: August 23, 2014.



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 22, 2010

## REMITTITUR

The Honorable Melanie Huggins  
Clerk of Court, Horry County  
Government & Justice Center  
PO Box 677  
Conway, SC 29528-0677

Re: The State v. Winkler, Louis Michael Jr.  
2006-GS-26-02101

Dear Ms. Huggins:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

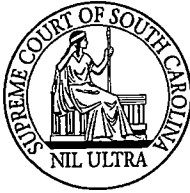
Very truly yours,

CLERK

DES/dmh

Enclosure

cc: Chief Appellate Defender Robert M. Dudek  
Appellate Defender Elizabeth A. Franklin-Best  
Assistant Attorney General Alphonso Simon, Jr.  
The Honorable J. Gregory Hembree



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 22, 2010

Chief Appellate Defender Robert M. Dudek  
Appellate Defender Elizabeth A. Franklin-Best  
South Carolina Commission on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Re: The State v. Winkler, Louis Michael Jr.

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

“Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

September 22, 2010.”

The remittitur is today being forwarded to the lower court.



The State v. Winkler, Louis Michael Jr.

Page Two

September 22, 2010

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a series of loops and a long horizontal stroke extending to the right.

CLERK

DES/dmh

cc: Assistant Attorney General Alphonso Simon, Jr.  
The Honorable J. Gregory Hembree

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

---

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

---

Opinion No. 26857

---

PETITION FOR REHEARING

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Counsel for appellant respectfully petitions this Court, pursuant to Rule 221(a), SCACR, for rehearing of its decision in, State v. Winkler, Op. No. 26857, Shearouse's Adv. Sh. 32 at 16-28 (filed August 16, 2010) because this Court, in affirming his capital conviction and sentence, overlooked material facts and law relating to the case including the fact the trial judge **promised appellant prior to trial**, that he could represent himself but not at that early stage. Further, as explained infra, appellant respectfully disagrees with this Court's holding that the "sentencing phase of a capital trial does not constitute a separate trial" for purposes of Faretta v. California, 422 U.S. 806 (1975) and self-representation. State v. Winkler, Op. No. 26857, Shearouse's Adv. Sh. #32 at 24-25 (filed August 16, 2010). See Bullington v. Missouri, 451 U.S. 430 (1981).

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AUG 31 2010

S.C. SUPREME COURT

At the last pre-trial hearing on January 24, 2010, four days before appellant's trial was to begin on Monday, January 28, 2010, defense counsel Wilson told the judge: "[M]r. Winkler wants to be heard and so I want to, [you to] hear him." Appellant then told the judge about a physical altercation he had with defense counsel Wilson at "the jailhouse" where Wilson put his finger in appellant's face, pushed him and called his sister "a f'ing liar." R. 3407, l. 121 – 3410, l. 4.

Appellant, who was always respectful to the court, informed the judge that when he told Wilson "[p]lease do not ever call my sister or anyone in my family a liar again. He [Wilson] turned towards me, put his finger in my face, touched my face, and said she is a f'ing liar. At that time I swatted his hand away from my face, officers came in, and they acted like it was my fault. But it was Mr. Wilson's. And there's no way I can see where I'm gonna get a fair trial with this man, my attorney, when he [has] called me and my family liars over the past month . . . He's the one that lost his temper and stuck his finger in my face and used the F word concerning my sister, who is a teacher in Ohio . . . I contacted Corporal Neal, who was in my pod last night, directed me to Major Johnson. Relayed my, my message that **I'd like to press charges on Mr. Wilson**, and he said back to her – I did not speak with Major Johnson. I spoke to. I spoke to Craig that, that, at the jailhouse, did not permit me to do that. **I needed a written statement from you in order to do an in-house assault charge.**" R. 3407, l. 121 – 3410, l. 4. (emphasis added).

The judge told appellant that criminal charge against Wilson "can be addressed **at a later date**. There's no urgency about it. " R. 3410, ll. 5-17. (emphasis added).

The judge asked Wilson if he thought this altercation and appellant's accusation of criminal behavior on his part would hamper his ability to represent appellant. Wilson said it would not, and appellant continued to complain about Wilson until the judge told appellant he did not want to hear "anymore about it" -- the lack of communication with Wilson. R. 3410, l. 18 – 3414, l. 14.

Appellant responded: “[I] don’t see how we can get along. We have to – we have to go through a mock trial and this man [has] just now called me a liar, and there is no way we can get along. I’ve asked him to be, to be removed . . .” The judge said, “[I]f your request is to have another attorney appointed, from what you told me, that request is denied.” R. 3410, l. 18 – 3414, l. 14. The judge stated he wanted the attorneys to do their best over the weekend and stated “I would rather address anything further about **this Monday**, and you-all just prepare in your best efforts for this weekend.” R. 3410, l. 18 – 3414, l. 14. (emphasis added).

Prior to trial, and before jury selection on Monday, January 28, 2008, the judge again heard appellant’s continuing complaints about defense counsel Wilson and the judge concluded:

[In] any event, we’re going to proceed then. There’s been no request for you to represent yourself. You’re requesting another attorney. Since that’s the case, I do not grant your motion. Now, **you always have that option to represent yourself**, which would be very inadvisable **for this stage**, but we will continue on with the case.”

R. 42, ll. 12-18 (emphasis added).

Given the judge’s pre-trial promise that appellant would always have the opportunity to represent himself the self-representation issue should not have been analyzed under the abuse of discretion “untimely request” standard of State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). In Reed, the defendant represented himself during the guilt phase, he was convicted, and he then decided he wanted his appointed counsel, Chief Public Defender Ashley Pennington, to represent him during the penalty phase. Under these very different circumstances this Court stated the trial judge did not abuse his discretion by not forcing Public Defender Pennington, who acknowledged he was not prepared immediately to go forward, to represent Reed.

This Court should grant rehearing because it applied the wrong standard of review – abuse of discretion standard – rather than the correct standard that the request of self-representation “must

be honored out of that respect for the individual “which is the lifeblood of the law” standard of Faretta v. California, 422 U.S. 806, 834 (1975). The trial court’s failure to honor its promise, and allow appellant’s request to represent himself and control his case in mitigation during the penalty stage trial constitutes a due process violation. See Knox v. Collins, 928 F.2d 657 (5<sup>th</sup> Cir. 1991)(failure to give a jury instruction as promised and relied upon by the defendant violated the essential demands of fairness despite the fact the jury charge was not required by law at that time).

However, even under an abuse of discretion standard each of the trial judge’s three purported reasons for refusing to allow appellant to represent himself were without support in this record. Trial counsel said that appellant was ready to represent himself and that there would be no delay, appellant’s very mild antidepressant medication could be managed, and the jury would not have been confused by appellant representing himself during the penalty stage trial. R. 1952, l. 14-1953, ll. 9-19. As to the possibility the jury may become confused, in State v. Reddish, 181 N.J. 553, 605, 859 A.2d 1173, 1204 (2004), the Court said this situation was easily manageable by the trial judge reminding the jury during the penalty stage that the defendant was representing himself.

Further, and respectfully, this Court should address in the opinion the highly unusual fact that appellant **wanted his attorney arrested for assaulting him** prior to the trial since it is probative of the self-representation issue.

Moreover, in this case appellant’s attorneys also wanted appellant to represent himself. After recessing for the mandatory twenty-four hour waiting period following appellant’s convictions, the parties returned to court on February 4, 2008. Defense counsel informed the court that appellant wanted to participate in the cross-examination of witnesses. R. 1915, ll. 16-23. Denying that, the trial court **reiterated to appellant its promise** that he would be allowed to represent himself:

**“Well, Mr. Winkler, you always have the opportunity, sir, if you wish to represent yourself, sir. And if you want to represent yourself, we’ll go through another dialogue here to make sure that’s what you’re doing.”**

R. 1917, ll. 14-18. (emphasis added).

Appellant then asked the court to allow him to proceed pro se and to allow his attorneys to remain as a resource for him. R.1925, l.14 - 1928, l. 7. Winkler’s request was unequivocal:

Court: If you’re saying that you want to represent yourself with Mr. Wilson and Mr. Rathbun to stay there as consultants for you to consult with during the course of this phase of the trial, but not to be your attorneys who ask questions or make closing arguments to the jury, is that what you’re requesting?

A: Yes, sir.

R. 1928, ll. 11-17; R. 1930, ll. 19-24.

Trial counsel informed the judge that appellant had indicated to him “on **more than one occasion**” that this is what he wanted to do. R. 1932, ll. 7-9. Appellant made it clear that he was no longer asking for new attorneys, but to represent himself: “I already asked that eight months ago.” R. 1932, ll. 15-20.

The judge then asked if appellant had reviewed the materials gathered in preparation for the trial. Appellant responded that he had, otherwise, “[w]e wouldn’t be ready for trial.” R. 1932, l. 25 - 1933, l.6. The judge also asked if appellant had reviewed the evidence that Wilson and Rathbun were prepared to introduce during that part of the trial. Again, appellant said he had. R. 1933, ll. 7-10.

After the trial court informed appellant again that he “always [has] the opportunity . . . to represent himself,” he noted it would be dangerous it would be for him to do so. R. 1917, ll. 14-23. **Appellant’s attorneys asked the judge to allow appellant to represent himself.** R. 1920, l. 21 – R. 1921, l. 20. The judge again told appellant that the decision was highly inadvisable,

and that he would be bound by court rules. R. 1921, ll. 21-25. The state **conceded that appellant had the right to represent himself**. R. 1922, ll. 2-8. The judge informed appellant for the third time that he had the right to represent himself but that it was dangerous to do so. R. 1922, ll. 14-19. Appellant was insistent that he wished to represent himself. R. 1926, l. 6 - 1927, l. 25; R. 1930, l. 19 - 1931, l. 3.

The judge began to seriously engage appellant regarding his decision to represent himself. R. 1929, l. 14. Wilson clarified appellant's position:

Mr. Wilson: [W]hat he what he wants to do, and he'll tell you if I'm correct. What he wants to do is to represent himself, but he wants to make sure, and you say dismiss your attorneys, and that's the other word that's confusing him.

R. 1927, ll. 21-25.

Appellant unequivocally invoked his right to represent himself. R. 1928, ll. 11-17.

The judge noted that he was reviewing Faretta, *supra*, Brewer<sup>1</sup>, and Fuller<sup>2</sup>. R. 1931, ll. 1-3. The judge then discussed appellant's medications, which a nurse stated were not a serious consideration. R. 1931, ll. 4-25. Wilson again informed the judge that appellant was adamant about representing himself, even though Wilson -- as would any attorney -- did not believe it was a good idea. R. 1932, ll. 4-9. The judge asked appellant if he reviewed the mitigation materials collected by his defense team. R. 1932, l. 25 - 1933, l. 10. He asked him if he understood "the nature of the term leading question." R. 1933, ll. 1-20. Appellant answered that "it's trying to get someone to say something that you want them to say, putting words in their mouth." R. 1933, ll. 11-17.

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<sup>1</sup> 328 S.C. 117, 492 S.E.2d 97 (1997).

<sup>2</sup> 337 S.C. 236, 523 S.E.2d 168 (1999).

The judge asked if appellant had reviewed the rules of evidence for South Carolina; did he understand the various exceptions to hearsay? R. 1933, ll.18-25. Did he know what an excited utterance is? R. 1934, ll.1-5.

Appellant told the court:

Most of these witnesses that they're going to call today, what I understand, there's nobody that knows them better than myself. They were supposedly my friends who turned against me to keep me with my wife, who they only met several times. I know them better than anybody in this room, your Honor, and-- . . . Your Honor, I'm confident in taking, taking care of this, this business.

R. 1934, l.8 - 1935, l. 4.

The judge then asked counsel to look at Fuller, supra, and Brewer, supra to see when the decision to proceed pro se had to be made. And he asked appellant:

And let me just review these one more time. Let me—but you understand the dangers, the pitfalls? You understand it's not that, that – it's very dangerous to do this, and you understand at this phase of the trial, sir, this jury is going to decide whether or not you would receive life imprisonment or the death penalty? You understand that, sir?

Defendant: Yes, Your Honor.

R. 1925, ll.16-23.

The judge then asked appellant if he understood the danger of going forward representing himself--if it was a decision he wished to make. Appellant said he did. R. 1936, ll. 2-9.

After this, Solicitor Hembree asked the judge to “engage in a discussion of all the factors under Faretta just for the record.” R. 1937, ll. 18-23. The judge replied that he thought he had.

R. 1937, l. 24 - 1938, l. 2.

The parties then engaged in a discussion regarding the timing of appellant's request. The judge said to appellant:



Mr. Winkler, I do want you to consider this very seriously because this is a serious decision. If ultimately, though, I determine that you've make (sic) that decision and it is a knowing, intelligent and voluntary decision and you made it pursuant to Faretta vs. California standards and reviewing Fuller and Brewer, then it's probable I'll permit you to do. Let me think further with it.

R. 1938, l. 25 - 1939, l.7.

Defense counsel continued to enthusiastically argue appellant's right to represent himself, while maintaining that they did not personally agree with his decision. R. 1953, ll.9 - 1954, l. 18. Defense counsel argued that Brewer allows appellant to represent himself:

The . . . test is whether [the] defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice but the defendant's understanding . . . The determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed pro se does not justify a denial of the right of self-representation. The only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to --

R. 1955, l. 9 - 1956, l. 1.

Defense counsel Wilson told the judge at one point, that "he [Appellant] wanted to be heard." The judge responded: "No. I think I have heard enough in that regard." R. 1958, ll. 20-22.

The judge asked both counsel to review State v. Fuller<sup>3</sup> and State v. Brewer<sup>4</sup> to determine when the decision to allow a defendant to represent himself must be made. As the judge noted, Brewer states that the decision must be made before trial. The judge noted, however that "one could assert this is a trial." R.1935, ll.10-15. The judge also gave counsel for both sides the

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<sup>3</sup> 337 S.C. 236, 523 S.E.2d 168 (1999).

<sup>4</sup> 328 S.C. 117, 492 S.E.2d 97 (1997).

opportunity to make “specific requests of conversation with the defendant if you want to put that in writing.” R. 1938, ll. 19-24. The judge told appellant:

If ultimately, though, I determine that you’ve made that decision and it is knowing, intelligent and voluntary decision and you made it pursuant to Faretta v. California standards and reviewing Fuller and Brewer, then it’s probable I’ll permit you to do. Let me think further with it.

R.1939, ll. 2-7.

The judge asked whether the parties agreed, pursuant to Fuller, that the decision was now within the discretion of the judge. R.1940, ll. 5-11. The state did agree. R.1940, ll.12-15. However, defense counsel did not agree—their position was that **appellant had the right to represent himself during the penalty phase of his own capital trial**. R. 1940, l. 23 -- R. 1942, l. 5. Defense counsel distinguished State v. Reed<sup>5</sup> from the instant case as appellant has also done above. R. 1943, l. 15 - 1945, l. 2. The trial judge ultimately ruled he was not going to allow appellant to represent himself.

As stated above, given the trial judge’s promise that appellant could later represent himself it was fundamentally unfair for the court not to honor its promise pursuant to Faretta and this Court should grant rehearing on its application of an abuse of discretion standard to these facts. Appellant also respectfully requests rehearing of this Court’s holding that “the sentencing phase of a capital trial does not constitute a separate trial.” State v. Winkler, Op. No. 26857, Shearouse’s Adv. Sh. #32 at 24-25 (filed August 16, 2010). Clearly if appellant had been sentenced to life imprisonment rather than death that sentencing phase trial verdict would constitute have constituted double jeopardy if the state again sought death at a subsequent trial. See Bullington v. Missouri, 451 U.S. 430 (1981). Missouri’s statutory procedure, like this state’s procedure, calls for a separate hearing

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<sup>5</sup> 332 S.C. 35, 503 S.E.2d 747 (1998).

for the same jury when the defendant has been convicted of murder. Bullington v. Missouri, 451 U.S. 430, at 433-434 (1981).

In State v. Reddish, 181 N.J. 553, 859 A.2d 1173 (2004), the Court held that a defendant had the right to represent himself during the guilt and penalty phases of a capital trial. While noting that the United States Supreme Court's opinion in Faretta predated that state's death penalty statutory complex, the Court nonetheless noted that Faretta prohibits states from haling "a person into its criminal courts and there forc[ing] a lawyer upon him, even when he insists that he wants to conduct his own defense. 422 U.S. at 807" State v. Reddish, 181 N.J. 553, 579-580, 859 A.2d 1173, 1188 (2004). "Faretta, ultimately, is about respecting a defendant's capacity to make choices for himself, whether to his benefit or to his detriment." State v. Reddish, 181 N.J. 553, 585-586, 859 A.2d 1173, 1192 (2004).

The Court in Reddish stated that it accepted the principle that a capital defendant had the right to represent himself during the sentencing phase trial. The Court noted the state's interest in assuring fairness in capital sentencing and stated for that reason it would not allow defendants to waive their direct appeal in a capital case. The Court also held that it disagreed with the Fifth Circuit's holding in United States v. Davis, 285 F.3d 378, 385 (5<sup>th</sup> Cir. 2002) that standby counsel must honor a pro se defendant's *absolute* right to waive the presentation of mitigating evidence. However, the court advised that "the court should consider dismissing the jury in order to confer with both the defendant and standby counsel in order to avoid affecting the jury's perception of the defendant's control over his defense." The Court also stated that trial courts should not hesitate to repeatedly remind the jury that the defendant is representing himself. State v. Reddish, 181 N.J. 553, 605, 859 A.2d 1173, 1204 (2004).

The issue of standby counsel is not at issue here. A defendant does not have the right to hybrid representation, and it was clear Wilson wanted appellant to represent himself and Wilson was willing to advise appellant, if desired, while appellant conducted the sentencing trial *pro se*.

In Silagy v. Peters, 905 F.2d 986 (7<sup>th</sup> Cir. 1990), the seventh circuit rejected the argument that because Faretta was not a capital case that it not require the trial counsel to similarly honor a defendant's request to represent himself during the penalty phase trial: "If an individual in a capital sentencing hearing wishes to proceed *pro se*, Faretta grants him the right to do so." Silagy v. Peters, 905 F.2d 986, 1007 (7<sup>th</sup> Cir. 1990).

The Court in Silagy also rejected any alleged dichotomy between a defendant's right to represent himself pursuant to Faretta and the societal interest in ensuring that death is the appropriate penalty in each case in which it is imposed. See Ake v. Oklahoma, 470 U.S. 68, 83-84 (1985). The Court wrote that the "Sixth Amendment does not provide merely that a defense shall be for the accused; it grants to the accused personally the right to make his defense." Silagy v. Peters, 905 F.2d 986, 1007 (7<sup>th</sup> Cir. 1990), *citing* Faretta v. California, 422 U.S. at 819.

The Silagy Court also stated that the implication of the Supreme Court's opinion in Blystone v. Pennsylvania, 494 U.S. 299 (1990), was that a defendant can choose "to forego the presentation of mitigation evidence even over the contrary advice of counsel and the warnings of the court. It light of this fact, it would be strange indeed for this court to conclude that a decision to forego the presentation of mitigation evidence could act as a bar to a defendant's otherwise constitutional right to proceed *pro se*." Silagy v. Peters, 905 F.2d 986, 1007-1008 (7<sup>th</sup> Cir. 1990).

In Smith v. State, 407 So. 2d 894 (1981), the Florida Supreme Court also rejected the argument that it was error to allow the defendant to waive representation during the sentencing phase trial. Focusing specifically upon the defendant's right to make the closing argument to the

jury during the penalty stage the Court held the defendant was aware “that a very real result might be imposition of the death penalty.” The Court noted there was no need for it to assess how well the defendant had “mastered the intricacies of the sentencing process, for his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself. . . . Appellant was warned of the dangers of what he was doing and discouraged from doing so.” Smith v. State, 407 So. 2d 894, 899-900 (1981).

The expressly promised appellant, that he could represent himself but not during the guilt phase. Appellant should not now be blamed for taking the judge at his word. See Knox v. Collins, 928 F.2d 657 (5<sup>th</sup> Cir. 1991)(failure to give a jury instruction as promised and relied upon by the defendant violated the essential demands of fairness despite the fact the jury charge was not required by law at that time); State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001)(same principle).

When it became time for appellant to represent himself, with his attorneys’ encouragement, the judge did not honor his promise to appellant. The trial judge’s assertion that the jury would have been confused by appellant representing himself during the penalty phase reflects that fact that the Court has misapprehended and overlooked the significance of the **defendant’s control** over the mitigation submitted to a jury on his behalf which naturally follows his right to represent himself during his penalty phase trial. State v. Reddish, 181 N.J. 553, 605, 859 A.2d 1173, 1204 (2004).

In its opinion, this Court now holds that trial counsel -- whom the defendant wanted arrested for assaulting him, whom appellant did not want to represent him, and where counsel to the judge as an officer of the court told the court that appellant was ready and willing to represent himself and should be allowed to represent himself -- may submit any evidence on defendant's behalf that the attorney would like to present, regardless of the express desires of the defendant. This Court has now designated mitigation as a mere “tactical decision” made on behalf of a defendant **by his**

**attorney**, who the defendant did not want to represent him, even though the United States Supreme Court has acknowledged the extremely personal quality of penalty phase evidence, and other jurisdictions have also recognized the unique quality of mitigation evidence. Lockett v. Ohio, 438 U.S. 586 (1978).

This Court has overlooked decisions in other jurisdictions that have granted capital defendants significantly more latitude in controlling in mitigation that is presented to a jury on their behalf, by minimizing its significance and characterizing it as a mere “tactical decision.” See State v. Fry, 125 Ohio St.3d 163, 926 N.E.2d 1239 (2010) (Waiver by defendant of opportunity to present mitigating evidence in penalty phase of capital murder trial was valid, although court did not explain all legal ramifications of guilty verdict, that waiver made death penalty more likely, or discuss low reversal rate on capital appeals; trial court conducted comprehensive inquiry, in which it considered forensic psychologist's report, conferred with counsel, questioned defendant about his educational background and mental health, determined that he was competent, and advised him of right to present mitigating evidence); Rienhardt v. Ryan, 669 F.Supp.2d 1038 (D. Ariz. 2009) (A capital defendant may waive the right to present mitigating evidence); State v. Bordelon, 33 So.3d 842 (La. 2009) (Capital defendant was authorized to make knowing and intelligent of right to present mitigating evidence at sentencing hearing); State v. Pearce, 994 So.2d 1094 (Fla. 2008) (Although a defendant may waive mitigation during the penalty phase of a capital case, he should not do so blindly; counsel must first investigate and advise the defendant so that the defendant reasonably understands what is being waived, the ramifications of the waiver, and is able to make an informed, intelligent decision); Hojan v. State of Florida, 3 So.3d 1204 (2009) (Defendant who waived mitigation evidence was barred from asserting that counsel was ineffective in investigating that evidence); Cowans v. Bagley, 624 F.Supp.2d 709

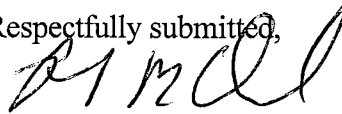
(S.D. Ohio, 2008) (defendant knowing and voluntarily waived presenting evidence in mitigation); Chapman v. Commonwealth of Kentucky, 265 S.W.3d 156, 170 (2007) (Standby counsel went beyond the scope of his role by delivering mitigating evidence to the court under seal, and the court did not err by not considering it); Lamarca v. State, 931 So.2d 838 (2006) (Defendant's inappropriate or unwise comments to the jury while representing himself during the penalty phase did not negate the fact he was properly allowed to represent himself); Commonwealth v. Davido, 582 Pa. 52, 868 A.2d 431 (2005) (Defendant waived his right to counsel during the penalty stage and his right to present evidence in mitigation); United States v. Davis, 285 F.3d 378 (5<sup>th</sup> Cir. 2002) (District Court's decision to appoint independent counsel to introduce traditional mitigation evidence over the *pro se* defendant's objection was error, and violated the Sixth Amendment). And see McKaskle v. Wiggins, 465 U.S. 168 (1984) (defendant's right to conduct his own defense was not improperly impeded by the limited actions of standby counsel where the record disclosed standby counsel's actions were kept within reasonable limits).

Appellant did not want his family members to be put through the pain of testifying about their personal family life. In addition, evidence appellant's father may have drunk too much and that his mother was depressed at times was largely unremarkable in the context of mitigation phase evidence and it was something appellant did not want to put his family through even if it were compelling. The sentencing phase jury, if it chose, could find that fact alone mitigating on appellant's behalf.

This Court should recognize, as have other jurisdictions, that a defendant can intelligently waive his right to present mitigating evidence. This is consistent with the dignity a defendant is accorded when his request to represent himself is likewise honored pursuant to

Faretta. The issue is not whether self-representation or whether waiving mitigating evidence is the most legally viable manner of obtaining an acquittal or a life sentence. This respect for the dignity of the individual through penalty phase self-representation and waiver of mitigating evidence poses no threat to the criminal justice system. Our system is fully protected because the knowing waiver of the right to counsel or to present mitigating evidence are made on-the-record, and the system is thus protected against a later collateral attack of those decisions. Respectfully, this Court should grant rehearing in this case.

Respectfully submitted,



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Robert M. Dudek  
Chief Appellate Defender

Elizabeth A. Franklin-Best  
Appellate Defender

This 31st day of August, 2010.



STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Horry County  
James E. Lockemy, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

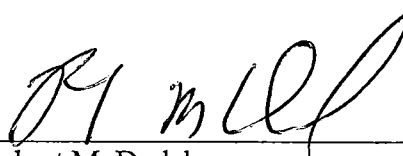
APPELLANT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Alphonso Simon, Jr., Esquire, this 31st day of August, 2010.

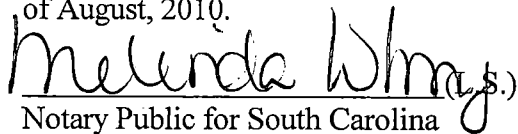


Robert M. Dudek  
Chief Appellate Defender

Elizabeth A. Franklin-Best  
Appellate Defender

ATTORNEYS FOR APPELLANT

SWORN TO BEFORE ME this 31st day  
of August, 2010.



Melinda W. May (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2018.

Petition for rehearing is denied.

~~Robert Lee~~ c.g.

~~John Jones~~ J.

~~Donald A. Brady~~ J.

~~Jim Little~~ J.

~~James J. Jones~~ J.

September 22, 2010

**THE STATE OF SOUTH CAROLINA**  
**In The Supreme Court**

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

Appeal from Horry County  
James E. Lockemy, Circuit Court Judge

Opinion No. 26857  
Heard June 24, 2010 – Filed August 16, 2010

**AFFIRMED**

Chief Appellate Defender Robert M. Dudek and Appellate Defender Elizabeth A. Franklin-Best, both of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Alphonso Simon, Jr., all of Columbia, and Solicitor J. Gregory Hembree, of Conway, for Respondent.

**CHIEF JUSTICE TOAL:** In this capital murder case, Louis Michael Winkler, Jr. (Appellant) appeals his sentence of death.<sup>1</sup>

### **FACTS/PROCEDURAL HISTORY**

Appellant kidnapped and sexually assaulted Rebekah Grainger Winkler (Victim) on October 10, 2005, five months before Victim was murdered.<sup>2</sup> That evening, Appellant's car was spotted behind the Seacoast Medical Center (Seacoast). Victim's car was found off the road in some trees and appeared to have been wrecked. There was blood on both of Victim's car seats, around the center console, and on the interior panel of the passenger's side door. The Horry County Police Department activated its dog team in an attempt to locate two missing persons. Victim was later found next to Stephen's Crossroads, which is where the magistrate's complex and library is located.

Phyllis Richardson (Richardson) arrived at the parking lot at Stephen's Crossroads around 7:30 a.m. on October 11, 2005, and saw a woman walking in the parking lot being followed by a man. Richardson noted the woman looked distraught and was acting confused, and that the man's hands were in the air as if he were raging and irritated. Shortly after Richardson entered her office, she saw the woman from the parking lot on the phone in her office building. The woman's hair was matted and tangled with some bald spots. Richardson later learned the woman making the call was Victim. Curtis Thompson was the first officer to arrive at the building, and noticed some of Victim's hair looked like it had been ripped out, and she had black eyes, abrasions, and other scratches.

Victim was transported to Seacoast by EMS where Lisa Gore (Gore), a nurse at Seacoast, tended to Victim and noted her injuries to the left eye, some swelling in the jaw area, bruising around the neck, a fractured nose, an upper lip injury, redness under her right eye, corneal abrasions, multiple

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<sup>1</sup> This case consolidates Appellant's direct appeal and the mandatory review provisions of S.C. Code Ann. § 16-3-25 (2003).

<sup>2</sup> Victim was Appellant's estranged wife.

bruises and contusions, a bite mark to the face, and a large amount of hair removed from her head. A sexual assault kit was collected from Victim. The DNA found in the rectal and vaginal swabs from the sexual assault kit matched Appellant's DNA.

On October 11, 2005, Appellant was arrested for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping. Bond was initially denied; however, at a second bond hearing, Appellant's bond was set at \$150,000 and he was required to wear an electronic monitor while out on bond. At a third bond hearing, Appellant's bond was amended to allow him to remove his electronic monitor for two hours so he could seek employment between the hours of 4 p.m. and 6 p.m. Appellant was out of jail on bond on the day Victim was murdered.

At around 5:30 p.m. March 6, 2006, Appellant kicked in the door to Victim's condominium. Appellant knocked Victim's son, Jonathan G. (Jonathan), onto the ground and then shot Victim once in the face at point blank range. According to the forensic pathologist who conducted Victim's autopsy, death occurred instantly. Appellant then walked over and pointed the gun at Jonathan. Shortly thereafter, Appellant left the condominium.

Appellant hid in the woods for two weeks. When police apprehended Appellant,<sup>3</sup> they recovered a Jennings .380 pistol from his right front pants pocket. Five live rounds were found in the pistol, but there was not a live round in the port. During a full search of Appellant, police recovered eighteen rounds of .380 ammunition, a guard lock blade knife, and a wallet. In the wallet, there was a newspaper clipping about the shooting and murder.

Appellant was tried and found guilty of murder, first-degree burglary, and assault and battery of a high and aggravated nature. At trial, the State sought to establish two statutory aggravating circumstances: (1) the murder was committed during the commission of a burglary; and (2) the murder was of a witness or potential witness committed at any time during the criminal

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<sup>3</sup> Three days after the murder, police searched Appellant's residence and found a piece of paper with Victim's address on it. However, police were not able to find Appellant until March 20, 2006, two weeks after the murder.

process for the purpose of impeding or deterring prosecution of any crime. S.C. Code Ann. § 16-3-20(C)(a)(1)(c), (C)(a)(11) (2003 & Supp. 2009). The jury recommended that Appellant be sentenced to death.

During the guilt phase of Appellant's trial, Mary Elizabeth C. (Mary), Jonathan's friend, testified that on the evening of the murder she was on the phone with Jonathan when she heard a loud pop noise, and a voice that was not Jonathan's say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not—I'm back, I'm back. I'm never going back to jail." Mary then heard a hit and the phone went to static. Andrew Cooper (Cooper), a former crime scene technician for the Horry County Police Department, testified that it appeared there had been a forced entry because the door jamb, door frame, lock mechanism, and other parts of the door had been broken. Cooper also testified that a reddish colored liquid was collected from the kitchen countertop. Kimberly Hahn, a former State Law Enforcement Division (SLED) scientist, testified that she compared the blood swabs recovered from the counter of Victim's residence to Appellant's blood standard, and the blood from the counter matched Appellant's blood profile. Cooper testified that a projectile was recovered from the baseboard of the wall behind Victim. A firearms and toolmark examiner for SLED testified that the Jennings pistol found on Appellant when apprehended fired the bullet recovered from Victim's baseboard.

During the sentencing phase of Appellant's trial, Jill Shelley (Shelley), Victim's older daughter, testified that in September 2005, six months before the murder, she could not contact Victim on the phone so she drove to Victim's home. When she arrived at Victim's residence she saw that Victim was beat up and her arms were covered in bruises. Appellant later arrived, started kicking the door, and was screaming for Victim to let him in. Shelley threatened to call the police. Appellant responded that Victim knew what would happen if they called the police. Shelley testified that Victim moved out of Appellant's home as a result of that confrontation. One piece of evidence presented by the State was a letter sent by Appellant to Shelley while Appellant was incarcerated. In the letter Appellant asserted that had Shelley not gotten involved, Victim would still be alive.

## ISSUES

- I. Did the trial court err in admitting an audio tape recording as a prior consistent statement under Rule 801(d)(1)(B), SCRE?
- II. Did the trial court err in allowing the jury to review the transcript of the 911 tape?
- III. Did the trial court err in refusing to allow Appellant to represent himself during the sentencing phase of trial?
- IV. Did the trial court err in not conducting a full *Faretta* inquiry?
- V. Did the trial court err in allowing defense counsel to present mitigation evidence to which Appellant objected?
- VI. Did the trial court err in denying Appellant's motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20 (C)(a)(11)?

## STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* at 6, 545 S.E.2d at 829. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pittman*, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007) (citation omitted).

## **LAW/ANALYSIS**

### **I. Rule 801(d)(1)(B), SCRE**

Appellant argues the trial court erred in admitting as a prior consistent statement under Rule 801(d)(1)(B), SCRE an audio tape recording of Jonathan's interview with police on the evening of the murder. We disagree.

Prior consistent statements are not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.

Rule 801(d)(1)(B), SCRE. In order for a prior consistent statement to be admissible pursuant to Rule 801(d)(1)(B), the following elements must be present:

(1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

*Saltz*, 346 S.C. at 121-22, 551 S.E.2d at 244.

Jonathan testified that he saw Appellant shoot and kill his mother. During cross examination, Jonathan testified that his father was Roger Grainger (Grainger). He also testified that Grainger was the only person he called "dad," and that he did not refer to Appellant as "dad." Defense counsel



asked Jonathan if he remembered telling the first officer who arrived on the scene that it was his dad who shot his mother. Jonathan denied he told the officer that it was his dad, and stated he told the officer it was his stepdad. Jonathan also testified that Grainger was supposed to arrive at the condominium around 6 p.m. on the night of the murder.

Officer Thomas Knoch (Knoch), the first officer to arrive at the scene of the murder, testified that as he was heading up the steps to the condominium the following conversation took place between him and Jonathan, "He said he's gone, and I asked him. I said who. . . . He said my dad . . . ." Knoch also testified that in his report he wrote, "When I asked him who, he said my dad."

Detective Ann Pitts (Pitts) testified that she spoke with Jonathan on the evening of the shooting and recorded the conversation. The state moved to enter the tape recorded conversation into evidence. In the statement to Pitts, Jonathan identified Appellant as the man who broke into the condominium and shot Victim. Appellant objected and the court overruled Appellant's objection under Rule 801(d)(1)(B), SCRE.

We hold that Jonathan's statement to Pitts was a prior consistent statement admissible under Rule 801(d)(1)(B), SCRE. First, Jonathan testified at trial and was subject to cross-examination. Second, Appellant accused Jonathan of recently fabricating the statement. Appellant was accusing Jonathan of lying when Jonathan testified that he told Knoch it was his stepdad who shot his mother, not his dad. This alleged fabrication was necessarily recent because it happened during the trial. Third, Jonathan's statement to Pitts was consistent with his testimony at trial. Fourth, the statement to Pitts occurred before the alleged recent fabrication. Thus, all of the elements of Rule 801(d)(1)(B), SCRE are satisfied and the trial court committed no error in allowing into evidence Jonathan's statement to Pitts.

## II. 911 Tape

Appellant argues the trial court erred in allowing the jury to view the transcript of the 911 tape while the jurors were listening to the tape during deliberations. We disagree.

"The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations." *State v. Plyler*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). "The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request." *Id.* The court is not required to submit evidence to the jury for review beyond that specifically requested but in its discretion may have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested. *Id.* In *Plyler*, the trial court allowed the jury to hear a tape of the testimony of the defendant's ex-wife in response to the jury's request to have her testimony read back to them. *Id.* In that case, this Court found there was no abuse of discretion where only the direct examination was played and the trial judge denied the defendant's motion that the jury be required to also hear the cross-examination to prevent overemphasis of the portion reheard. *Id.*

In this case, during jury deliberations, the jury sent the judge a question asking if they could read the 911 transcript. Appellant argued the transcript was not part of the trial record, was only offered as an aid to the tape recording, and was never put into evidence. The trial court replayed the 911 tape for the jury in the courtroom and the jury was allowed to review the transcript while the tape played, which mirrored the way in which the evidence was presented at trial.<sup>4</sup> This was done in Appellant's presence at the request of the jury. Thus, the judge exercised proper discretion and committed no error in allowing the jury to read the transcript while listening to the 911 tape.

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<sup>4</sup> Appellant offered no objection to the introduction of the 911 transcript at trial, nor did he object to the transcript being read while the 911 tape played.

### III. Self-representation

Appellant argues the trial court abused its discretion by refusing to allow Appellant to represent himself during the sentencing phase of the trial. We disagree.<sup>5</sup>

An accused may waive the right to counsel and proceed *pro se*. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). However, "[a] defendant's right to waive the assistance of counsel is not unlimited." *State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). "The request to proceed *pro se* must be clearly asserted by the defendant prior to trial." *Id.* (citation omitted). "If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge." *Id.* (citing *United States v. Singleton*, 107 F.3d 1091 (4th Cir.1997); *United States v. Lawrence*, 605 F.2d 1321 (4th Cir. 1979)). "Once trial commences, that right [to proceed *pro se*] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." *U.S. v. Wesley*, 798 F.2d 1155, 1155-56 (8th Cir. 1986) (citations omitted); *see also U.S. v. Stevens*, 83 F.3d 60, 66-67 (2d Cir. 1996) ("[O]nce a trial has begun, a defendant's right to represent himself 'is sharply curtailed,' and the judge considering the motion must weigh 'the prejudice to the legitimate interests of the defendant' against the 'potential disruption of proceedings already in progress.'"). The sentencing phase of a capital trial does not constitute a separate trial. *See* S.C. Code Ann. § 16-3-20(B) (2003); *see also State v. Stewart*, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

Appellant did not make his request to proceed *pro se* at the beginning of trial. Appellant made his request to proceed *pro se* at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

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<sup>5</sup> Issue three condenses Appellant's third and fourth issues on appeal into one issue.

The trial court did not abuse its discretion in denying Appellant's request to proceed *pro se* at the sentencing phase of the trial. First, the trial court noted it was concerned that Appellant's medication would affect his ability to properly and fully function as his own counsel. Second, the trial court was concerned that allowing Appellant to represent himself during the sentencing phase would require some delay for Appellant to fully prepare. Third, the trial court was concerned the jury may be confused to have the first half of the case tried by counsel and the second half tried without counsel, especially if the jury could see counsel at Appellant's counsel table. For these reasons, the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress. Hence, the trial court's decision to not allow Appellant to proceed *pro se* during the sentencing phase of trial was not an abuse of discretion and, therefore, nor error.

#### IV. *Faretta* Warnings

Appellant argues the trial court erred by failing to properly provide Appellant with *Faretta* warnings when Appellant sought to proceed *pro se* at the beginning of the sentencing phase. We disagree.

As noted above, Appellant did not timely waive his right to counsel and proceed *pro se*. Hence, Appellant's reliance on *Faretta* is misplaced. Had Appellant moved to proceed *pro se* before the trial began, then *Faretta* would apply. Moreover, Appellant contends that *Fuller* requires reversal. In *Fuller*, the defendant moved to proceed *pro se* before the trial began. 337 S.C. at 241, 523 S.E.2d at 170. However, in this case, Appellant did not seek to proceed *pro se* until the sentencing phase. Appellant's reliance on *Faretta* and *Fuller* is misplaced, and the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress.<sup>6</sup>

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<sup>6</sup> Even if *Faretta* were applicable, the record reflects the trial judge met the *Faretta* standard by adequately warning Appellant of the dangers of self-representation.

## V. Mitigating Social History

Appellant contends the trial court erred by allowing defense counsel to present mitigating social history evidence and call Appellant's family members as mitigation witnesses over Appellant's objection. We disagree.

"An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 560, 160 L. Ed. 2d 565, 578 (2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984)). "That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S. Ct. 646, 657, 98 L. Ed. 2d 798, 816 (1988)). The introduction of the mitigation evidence at issue was a tactical decision made by Appellant's trial counsel and is reviewed on a case by case basis. The mitigation evidence presented served the purpose of humanizing Appellant to the jury. We find the introduction of this mitigation evidence was a tactical decision made by trial counsel and the trial court committed no error in admitting mitigating evidence that Appellant did not want to be introduced.

## VI. S.C. Code Ann. § 16-3-20(C)(a)(11)

Appellant argues the trial court erred by refusing to direct a verdict on the statutory aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime. We disagree.

"In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned only with the existence of evidence, not its weight." *State v. Smith*, 298 S.C. 482, 485, 381 S.E.2d 724, 726 (1989). "The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it." *State v. Lindsey*, 372 S.C. 185, 194-95, 642 S.E.2d 557, 562 (2007).

The aggravating circumstance at issue is "[t]he murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime." S.C. Code Ann.

§ 16-3-20(C)(a)(11) (2003 & Supp. 2009). The State established there was an ongoing criminal process from 2005 against Appellant for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping at the time Victim was murdered. Victim, as the victim in the 2005 crimes, was clearly a potential witness in Appellant's trial on these three charges. There was circumstantial evidence to support a finding that Appellant murdered Victim to impede or deter prosecution of the charges listed above. Jonathan testified that Appellant stated, "you thought I was going to prison," when he broke into the condominium. Mary testified she heard a loud pop noise, and a voice that was not Jonathan's say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not—I'm back, I'm back. I'm never going back to jail." Shelley testified that Appellant warned Victim that she knew what would happen if someone called the police. Lastly, in the letter from Appellant to Shelley written while Appellant was incarcerated, Appellant asserted that Victim would still be alive had Shelley not gotten involved in Victim's life. This evidence is circumstantial evidence to support the statutory aggravating circumstance contained in section 16-3-20(C)(a)(11), and the trial court is affirmed in its denial of Appellant's motion for a directed verdict.

### **PROPORTIONALITY REVIEW**

Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. *See, e.g., State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

### **CONCLUSION**

For the aforementioned reasons, Appellant's conviction and sentence are affirmed.

**BEATTY, KITTREDGE, HEARN, JJ., concur. PLEICONES, J., concurring in result only.**



ORIGINAL

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
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Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender  
Joseph L. Savitz, III, Senior Appellate Defender

July 28, 2010

The Honorable Daniel E. Shearouse  
Clerk of Court  
The South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

RECEIVED  
JUL 28 2010  
S.C. SUPREME COURT

Re: The State v. Louis M. Winkler, Jr. (Capital Case)  
Oral Argument - June 24, 2010 at 9:30 a.m.

Dear Mr. Shearouse:

On June 24, 2010 at 9:30 a.m. an oral argument was held in the above-referenced case before this Court. I am respectfully requesting a copy of the tape of that argument. Please contact me if you have any questions or concerns and I thank you for your cooperation.

Sincerely,

Robert M. Dudek  
Chief Appellate Defender

RMD/mwl

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

---

## ORDER

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Pursuant to Rule 210(f) of the South Carolina Appellate Court Rules, it is ordered that the Clerk of Court for Horry County release:

### **Photos**

State's Exhibits 2-10, 12, 13, 15-16, 18-20, 22-24, 26-27, 29-33, 37-42, 52-68, 71-101, 103-137, 140-143, 145-46, 151-158, 160-61

Defense Exhibits 1-25

### **Other Paper Exhibits**

State's 11 (diagram)

State's 47 (aerial map)

State's 69 (Notice of Final Disposition)

State's 150 (diagram)

Defense 25 (excerpts from DSM-IV)

Defense 26 (records from Detention Center)



**Court Exhibits**

Court's Exhibit 22 (Notice of Evidence in Aggravation)

Court's Exhibit 23 (Miranda Warning)

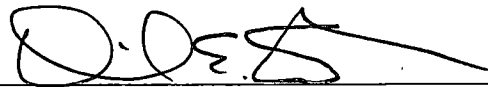
Court's Exhibit 25 (Jury Question)

to be transported to the South Carolina Supreme Court, by the South Carolina Office of Attorney General or his designee, for consideration in the above referenced appeal.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

A handwritten signature in black ink, appearing to be "D. O. S.", written over a horizontal line.

CLERK

Columbia, South Carolina

June 21, 2010

cc: Chief Appellate Defender Robert M. Dudek  
Appellate Defender Elizabeth A. Franklin-Best  
Assistant Attorney General Alphonso Simon, Jr.  
The Honorable Melanie Huggins

## Hopkins, Debbie

---

**From:** Alphonso Simon [ASimon@scag.gov]  
**Sent:** Friday, June 18, 2010 4:25 PM  
**To:** Hopkins, Debbie  
**Cc:** rdudek@sccid.sc.gov  
**Subject:** Exhibit numbers for State v. Louis Winkler

Good afternoon Ms. Hopkins.

As per your request, please find below a list of the exhibit numbers for all of photographs and paper exhibits from Mr. Winkler's trial. The only ones not listed are the court exhibits that are already part of the record on appeal. Please let me know if you have any questions or if I can be of any further assistance.

Al Simon

### **Photos**

State's Exhibits 2-10, 12, 13, 15-16, 18-20, 22-24, 26-27, 29-33, 37-42, 52-68, 71-101, 103-137, 140-143, 145-46, 151-158, 160-61

Defense Exhibits 1-25

### **Other Paper Exhibits**

State's 11 (diagram)  
State's 47 (aerial map)  
State's 50 (handwritten note)(might not want, physical evidence from scene)  
State's 69 (Notice of Final Disposition)  
State's 70 (Notice of Conviction) (this is in the ROA)  
State's 148 and 149 are in the ROA  
State's 150 (diagram)  
State's 159 (this is in the ROA)  
Defense 25 (excerpts from DSM-IV)  
Defense 26 (records from Detention Center)

### **Court Exhibits**

Court's Exhibit 22 (Notice of Evidence in Aggravation)  
Court's Exhibit 23 (Miranda Warning)  
Court's Exhibit 25 (Jury Question)

Alphonso Simon Jr.  
Assistant Attorney General  
South Carolina Attorney General's Office  
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# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

---

## ORDER

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Pursuant to Rule 210(f) of the South Carolina Appellate Court Rules, it is ordered that the Clerk of Court for Horry County release:

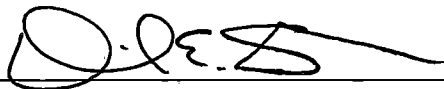
State's Exhibit 1 – Tape of 911 Call

to be transported to the South Carolina Supreme Court, by the South Carolina Office of Attorney General or his designee, for consideration in the above referenced appeal.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

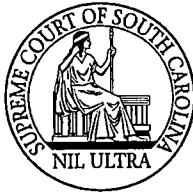


CLERK

Columbia, South Carolina

June 17, 2010

cc: Chief Appellate Defender Robert M. Dudek  
Appellate Defender Elizabeth A. Franklin-Best  
Assistant Attorney General Alphonso Simon, Jr.  
The Honorable Melanie Huggins



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 14, 2010

Chief Appellate Defender Robert M. Dudek  
Appellate Defender Elizabeth A. Franklin-Best  
South Carolina Commission on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Assistant Attorney General Alphonso Simon, Jr.  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

Re: The State v. Winkler, Louis Michael Jr.

Dear Counsel:

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows:

Appellant 15 minutes

Respondent 15 minutes

Appellant in Reply 5 minutes

This case is scheduled for hearing Thursday, June 24, 2010 at 9:30.

The State v. Louis Michael Winkler, Jr.

Page Two

June 14, 2010

Very truly yours,

Daniel E. Shearouse, Clerk

By Debbie M. Hopkins

Administrative Assistant

DES/dmh

cc: The Honorable J. Gregory Hembree



## The South Carolina Supreme Court

DANIEL E. SHEAROUSE  
CLERK OF COURT  
BRENDA F. SHEALY  
DEPUTY CLERK

P.O. BOX 11330  
COLUMBIA, S.C. 29211  
PHONE NO. 734-1080

To: Chief Appellate Defender Robert M. Dudek  
Appellate Defender Elizabeth A. Franklin-Best  
From: Daniel E. Shearouse  
Date: April 20, 2010  
RE: June Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the June 2010 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of June 8, 9, 23, 24 and 25. Please notify this office in writing prior to April 27, 2010 as to any scheduling conflicts for the June term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Winkler, Louis Michael Jr.



## The South Carolina Supreme Court

DANIEL E. SHEAROUSE  
CLERK OF COURT  
BRENDA F. SHEALY  
DEPUTY CLERK

P.O. BOX 11330  
COLUMBIA, S.C. 29211  
PHONE NO. 734-1080

To: Attorney General Henry D. McMaster  
Chief Deputy Attorney General John W. McIntosh  
Assistant Deputy Attorney General Donald J. Zelenka  
Assistant Attorney General Alphonso Simon, Jr.

From: Daniel E. Shearouse

Date: April 20, 2010

RE: June Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the June 2010 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of June 8, 9, 23, 24 and 25. Please notify this office in writing prior to April 27, 2010 as to any scheduling conflicts for the June term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Winkler, Louis Michael Jr.





## The South Carolina Supreme Court

DANIEL E. SHEAROUSE  
CLERK OF COURT  
BRENDA F. SHEALY  
DEPUTY CLERK

P.O. BOX 11330  
COLUMBIA, S.C. 29211  
PHONE NO. 734-1080

To: The Honorable J. Gregory Hembree  
From: Daniel E. Shearouse  
Date: April 20, 2010  
RE: June Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the June 2010 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of June 8, 9, 23, 24 and 25. Please notify this office in writing prior to April 27, 2010 as to any scheduling conflicts for the June term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Winkler, Louis Michael Jr.



HENRY McMASTER  
ATTORNEY GENERAL

RECEIVED

APR 14 2010

S.C. SUPREME COURT

April 14, 2010

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
P.O. Box 11330  
Columbia, South Carolina 29211

Re: *The State v. Louis Michael Winkler, Jr.*  
Appeal from Horry County

Dear Mr. Shearouse:

Enclosed for filing in your office is the original and fifteen (15) copies of the Final Brief of Respondent in the above-referenced case, together with a Certificate of Service and Certificate of Compliance.

Thank you for your assistance in this matter.

Sincerely,

Alphonso Simon, Jr.  
Assistant Attorney General

AS:dmd

Enclosures

cc: Robert M. Dudek, Esq. (w/three (3) copies of encls.)  
The Honorable J. Gregory Hembree, Solicitor, 15<sup>th</sup> Judicial Circuit (w/copy of encls.)  
Sandi Wofford, Victim Services (w/copy of encls.)

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

---

## ORDER

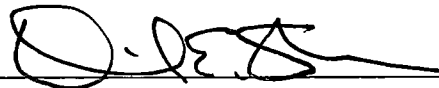
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For good cause having been shown, the time for serving and filing the final brief of respondent in the above entitled matter is hereby extended until April 14, 2010.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

April 8, 2010

cc: Chief Appellate Defender Robert M. Dudek  
Appellate Defender Elizabeth A. Franklin-Best  
Assistant Attorney General Alphonso Simon, Jr.

HENRY McMASTER  
ATTORNEY GENERAL



RECEIVED

APR 07 2010

S.C. SUPREME COURT

April 7, 2010

The Honorable Daniel E. Shearhouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: First Extension Request, Final Brief of Respondent  
*The State v. Louis Winkler*  
Appeal from Horry County

Dear Mr. Shearhouse:

I hereby request an extension of seven (7) days in which to file the Final Brief of Respondent in the above-referenced case. The Final Brief is currently due to be served and filed today, April 7, 2010. However, because of my involvement in other matters in state and federal court, I was unable to timely complete the Final Brief.

Therefore, I respectfully request this extension within which to serve and file the Final Brief of Respondent. I am informing opposing counsel of my request by copy of this letter.

Sincerely,

Alphonso Simon, Jr.  
Assistant Attorney General

AS/

cc: Robert M. Dudek, Esquire  
Elizabeth Franklin-Best, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

RECEIVED

MAR 18 2010

THE STATE,

S.C. SUPREME COURT  
RESPONDENT,

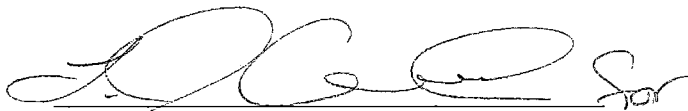
V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

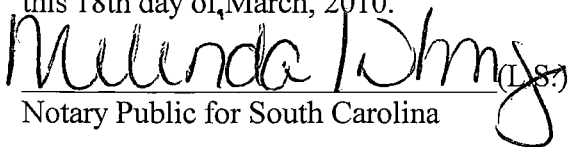
CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon Alphonso Simon, Jr., Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201 this 18th day of March, 2010.



Warren T. Ferguson  
Administrative Assistant

SUBSCRIBED AND SWORN TO before me  
this 18th day of March, 2010.

  
Notary Public for South Carolina

My Commission Expires: October 30, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

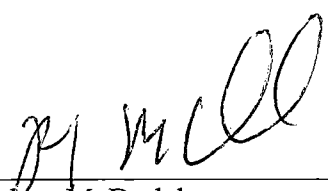
APPELLANT

---

CERTIFICATE OF SERVICE

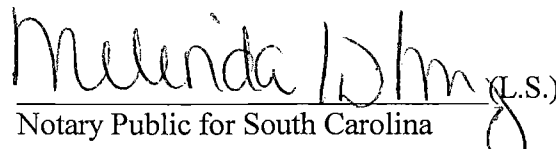
---

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Alphonso Simon, Jr., Esquire, this 16th day of February, 2010.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 16th day of February, 2010.

  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires: October 30, 2018 .

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

---

## ORDER

---

Appellant seeks a third extension of time to serve and file the Initial Reply Brief in the above entitled matter. The request for an extension is granted and extended until February 16, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

February 5, 2010

cc: Chief Appellate Defender Robert M. Dudek  
Appellate Defender Elizabeth A. Franklin-Best  
Assistant Attorney General Alphonso Simon, Jr.



STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Horry County  
James E. Lockemy, Circuit Court Judge

---

RECEIVED

FEB - 4 2010

THE STATE,

S.C. SUPREME COURT

RESPONDENT,

V.

LOUIS MICHAEL WINKLER,

APPELLANT

---

**PETITION FOR EXTENSION TO FILE  
INITIAL REPLY BRIEF OF APPELLANT**

---

The undersigned counsel would respectfully request a ten day extension in which to file the initial reply brief of appellant in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following circumstances:

1. The initial reply brief of appellant in this case is due to be served and filed today, having been extended by prior orders of this Court.
2. Counsel had an oral argument in this Court in the murder case of the State v. John Brayboy yesterday, February 2, 2010. Counsel had to be on standby to testify in the post-conviction murder case of The State v. Thaddeus Curry Friday, January 29, 2010. Counsel filed the petition for writ of certiorari in the Supreme Court from this Court in the kidnapping and criminal sexual conduct in the first degree case of The State v. Randy Thomas Thursday, January 28, 2010. Counsel conducted separate meetings for the attorneys and support staff Thursday, January 27, 2010. Counsel also had a Public Defender Association Board meeting that same day. Counsel also filed the brief in the murder case The State v. Terrance Johnson with this Court Tuesday, January 26, 2010. Counsel is also working on his presentation for the

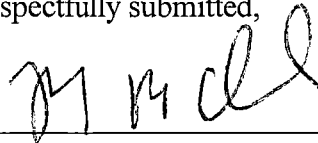
Best Practices CLE seminar in Charleston on February 19, 2010. Counsel filed a petition for writ of certiorari to the Court of Appeals in the case of The State v. Kevin Odem with the Supreme Court on Friday, January 22, 2010. Counsel had an oral argument in the murder case State v. Hercules Mitchell on January 20, 2010 in this Court. Counsel filed the brief in State v. Angela Baggott with this Court on Tuesday, January 19, 2010. In addition, counsel filed the brief of appellant in the case of State v. Ladrequez Polk on Friday, January 15, 2010 with this Court. Counsel filed the petition for rehearing in the case State v. Florence Evans on Thursday, January 14, 2010 with this Court. Counsel is also working on the death penalty competency to be executed remand case of State v. Jeffrey Motts. Counsel is also working on the reply brief in the death penalty case of State v. Louis Winkler. In addition, counsel filed a return to the petition for writ of certiorari in the murder case of State v. Charles Q. Jackson in the Supreme Court on Wednesday, January 13, 2010. Counsel also had a deposition in the death penalty case State v. James Nathaniel Bryant, III on Thursday, January 14, 2010. Counsel filed the brief of respondent in the murder case of State v. Marlon Rivera with the Supreme Court on Friday, January 8, 2010. Counsel filed the initial brief of appellant in the murder case of State v. Anthony Quinton Scott on Wednesday, January 6, 2010 with this Court, of Appeals as well as the brief of respondent in the case of State v. Ricky Brannon in this Court that same day. In addition, counsel has many administrative duties as Chief Appellate Defender, and he also has an extremely heavy caseload of mostly murder and death penalty cases in addition to his full time duties as Chief Appellate Defender.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become manageable in the near future, and less extensions need to be requested.

4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

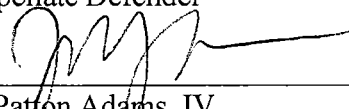
WHEREFORE, the undersigned counsel would respectfully request a ten day extension in which to file the initial reply brief of appellant in this case based upon the above circumstances. Counsel respectfully requests that the time limits for filing the initial reply brief of appellant be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Robert M. Dudek  
Chief Appellate Defender

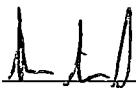
Elizabeth A. Franklin-Best  
Appellate Defender



T. Patton Adams, IV  
Executive Director or  
J. Hugh Ryan, III  
General Counsel

February 4, 2010

I DO NOT OPPOSE:



Alphonso Simon, Esquire

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy

Horry County

Trial Court Case No. 2006-GS-26-02101

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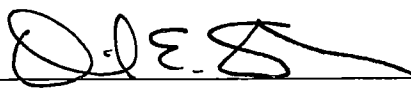
## ORDER

---

Appellant seeks a second extension of time to serve and file the Initial Reply Brief of Appellant in the above entitled matter. The request for an extension is granted and extended until February 4, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY  \_\_\_\_\_  
CLERK

Columbia, South Carolina

January 26, 2010

cc: Chief Appellate Defender Robert M. Dudek  
Appellate Defender Elizabeth A. Franklin-Best  
Assistant Attorney General Alphonso Simon, Jr.

RECEIVED

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

JAN 26 2010

S.C. SUPREME COURT

Appeal from Horry County  
James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

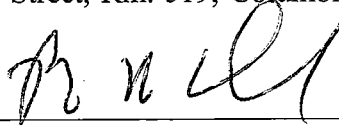
V.

LOUIS MICHAEL WINKLER,

APPELLANT

CERTIFICATE OF SERVICE

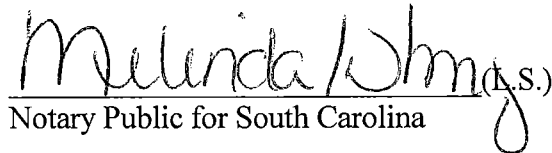
The undersigned attorney hereby certifies that a true copy of the Petition for an Extension in which to File the Initial Reply Brief of Appellant in the above referenced case has been served upon S. Creighton Waters, Esquire, Senior Assistant Attorney General and Alphonso Simons, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 25th day of January, 2010.



Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 25th day of January, 2010.

  
Notary Public for South Carolina

My Commission Expires: October 30, 2018.

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Horry County  
James E. Lockemy, Circuit Court Judge

**RECEIVED**

JAN 25 2010

**S.C. SUPREME COURT**

THE STATE,

RESPONDENT,

v.

LOUIS MICHAEL WINKLER,

APPELLANT

**PETITION FOR EXTENSION TO FILE  
INITIAL REPLY BRIEF OF APPELLANT**

The undersigned counsel would respectfully request a ten day extension in which to file the initial reply brief of appellant in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following circumstances:

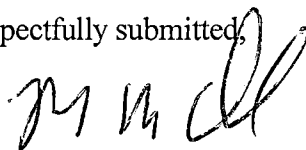
1. The initial reply brief of appellant in this case is due to be served and filed today, having been extended by one prior order of this Court.
2. Counsel filed a petition for writ of certiorari to the Court of Appeals in the case of The State v. Kevin Odem with this Court on Friday, January 22, 2010. Counsel had an oral argument in the murder case State v. Hercules Mitchell on January 20, 2010 in this Court. Counsel filed the brief in State v. Angela Baggott with the Court of Appeals on Tuesday, January 19, 2010. Counsel filed the brief of appellant in the case of State v. Ladrequez Polk on Friday, January 15, 2010 with the Court of Appeals. Counsel filed the petition for rehearing in the case State v. Florence Evans on Thursday, January 14, 2010 with the Court of Appeals. Counsel is also working on the death penalty competency to be executed remand case of State v. Jeffrey Motts. Counsel filed a return to the petition for writ of certiorari in the murder

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3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become manageable in the near future, and less extensions need to be requested.

WHEREFORE, the undersigned counsel would respectfully request a ten day extension in which to file the initial reply brief of appellant in this case based upon the above circumstances. Counsel respectfully requests that the time limits for filing the initial reply brief of appellant be held in abeyance pending a ruling on this motion.

Respectfully submitted,



---

Robert M. Dudek  
Chief Appellate Defender

Elizabeth A. Franklin-Best  
Appellate Defender

January 25, 2010



STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Horry County  
James E. Lockemy, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER,

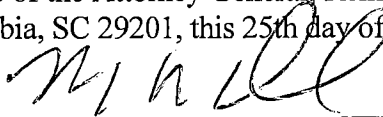
APPELLANT

---

CERTIFICATE OF SERVICE

---

The undersigned attorney hereby certifies that a true copy of the Petition in Which to File the Initial Reply Brief of Appellant in the above referenced case has been served upon S. Creight Waters, Esquire, Senior Assistant Attorney General and Alphonso Simons, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 25th day of January, 2009.

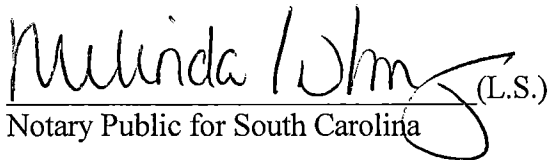


---

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 25th day of January, 2009.



(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2018.

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

---

## ORDER

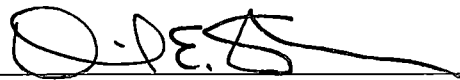
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For good cause having been shown, the time for serving and filing the Initial Reply Brief in the above entitled matter is hereby extended until January 25, 2010.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

January 15, 2010

cc: Acting Chief Appellate Defender Robert M. Dudek  
Appellate Defender Elizabeth A. Franklin-Best  
Assistant Attorney General Alphonso Simon, Jr.



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

January 14, 2010

Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

RECEIVED

JAN 14 2010

S.C. SUPREME COURT

Re: The State v. Louis Michael Winkler (capital case)

Dear Mr. Shearouse:

The initial reply brief of appellant in the above referenced case is due to be served and filed today. However, because of my current caseload, I have been unable to complete this brief for service. Therefore, I am requesting a ten day extension in which to file and serve the brief.

By copy of this letter, I am informing S. Creighton Waters, Esquire, and Alphonso Simons, Jr., Esquire, of the Attorney General's Office, of my request.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek  
Acting Chief Appellate Defender

RMD/mwl

cc: S. Creighton Waters Esquire  
Alphonso Simons, Jr., Esquire



HENRY McMASTER  
ATTORNEY GENERAL

RECEIVED

JAN - 6 2010

S.C. SUPREME COURT

January 4, 2010

The Honorable Daniel E. Shearhouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: *The State v. Louis Winkler*  
Appeal from Horry County

Dear Mr. Shearhouse:

Enclosed for filing please find the Initial Brief of Respondent, together with Proof of Service and Designation of Matter regarding the above-captioned matter.

Thank you for your assistance in this matter.

Sincerely,

Alphonso Simon, Jr.  
Assistant Attorney General

AS/dmd  
Enclosures

cc: Robert M. Dudek, Esquire (w/two (2) copies of encls.)  
Elizabeth Franklin-Best, Esquire (w/ two (2) copies of encls.)  
The Honorable J. Gregory Hembree, Solicitor, 15<sup>th</sup> Judicial Circuit (w/copy of encls.)

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

APPEAL FROM HORRY COUNTY

James E. Lockemy, Circuit Court Judge

---

THE STATE

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.

APPELLANT.

---

INITIAL BRIEF OF RESPONDENT

---

HENRY D. MCMASTER  
Attorney General

JOHN W. MCINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

ALPHONSO SIMON JR.  
Assistant Attorney General  
South Carolina Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549  
(803) 734-6305

J. GREGORY HEMBREE  
Solicitor, Fifteenth Circuit  
Post Office Drawer 1276  
Conway, South Carolina 29526  
ATTORNEYS FOR RESPONDENT

RECEIVED

JAN 06 2010

S.C. SUPREME COURT

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## APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the court erred by admitting a tape recording, as a prior consistent statement under Rule 801(b)(1)(B), SCRE, of an interview wherein the decedent's son, Jonathan G., told Detective Ann Pitts that his "stepfather," appellant, shot his mother since this statement was not admissible as a prior consistent statement because all of the elements of Rule 801(b)(1)(B), SCRE were not met, and the fact Officer Knoch testified that Jonathan told him immediately following the murders that his "Dad" shot his mother did not make this subsequent statement admissible since there was no accusation of a recent fabrication, improper influence or motive?
2. Whether the court erred by allowed the transcript of the 911 tape to be given to the jury when it asked to "read over the 911 transcript" during deliberations since the transcript was not in evidence, and it was not an accurate transcription of the interview?
3. Whether the court abused its discretion by refusing to allow appellant to represent himself during the penalty phase of his capital trial particularly where his attorneys agreed appellant was ready to represent himself and that no delay in the trial was necessary?
4. Whether the court erred, alternatively, by refusing to allow appellant to represent himself during the penalty stage of the trial since appellant had the right to represent himself during the penalty phase under the

reasoning of Faretta, and his case was not governed by the State v. Brewer abuse of discretion standard?

5. Whether the court erred by failing to properly provide appellant with Faretta warnings, during a focused waiver hearing, when appellant invoked his right to represent himself, and his attorneys told the court that appellant was ready and willing to represent himself and that no delay in the trial was necessary?
6. Whether the court erred alternatively by allowing defense counsel to present mitigating social history evidence and call appellant's family members as mitigation witnesses over his objection since appellant still had the right to control the case in mitigation and waive mitigation evidence he did not want the jury to consider even where the judge denied appellant the right to represent himself?
7. Whether the court erred by refusing to direct a verdict on the aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime aggravator since there was a lack of evidence to support it?

## RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court erred by admitting the audio tape recording as a prior consistent statement under Rule 801(b)(1)(B), SCRE, when defense counsel implicitly and explicitly asserted that Jonathan G. fabricated his testimony when he stated he told Officer Knoch that it was his stepfather who shot his mother?
2. Whether the trial court erred in allowing the jury to review the transcript of the 911 tape when the jury was only allowed to see the transcript in the courtroom with the defendant and counsel present and only when the audio tape was played as requested by the jury?
3. Whether the trial court correctly held that it was within the court's discretion to grant or deny Appellant's Motion to proceed pro se when the motion was not timely made?
4. Whether the trial court abused its discretion when it denied Appellant's Motion to proceed pro se when the court determined that granting the motion would cause undue delay, the court had concerns regarding Appellant's ability to represent himself as the result of his preparedness and his anxiety condition, and there was the potential of jury confusion caused by the change in Appellant's representation?
5. Whether the trial court erred in not conducting a full Faretta inquiry when Appellant's request to proceed pro se was not governed by Faretta?
6. Whether the trial court erred in allowing defense counsel to present mitigation evidence to which Appellant objected when no timely objection

to the testimony was made, and no argument regarding the allegation was presented on the record.

7. Whether the trial court erred in denying Appellant's motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11) when there was substantial circumstantial evidence supporting the charge?

## STATEMENT OF THE CASE

On January 28 – February 8, 2008, Appellant Louis Michael Winkler (“Winkler”) was tried by a jury for murder, first-degree burglary, and assault and battery of a high and aggravated nature. He was tried in the Horry County Court of General Sessions before the Honorable James E. Lockemy, Circuit Court Judge. Ralph J. Wilson, Esquire, and Assistant Public Defender Paul Elbert Rathbun, Esquire, represented Winkler. Solicitor J. Gregory Hembree, Esquire, Deputy Solicitor Francis A. Humphries, Jr., Esquire, and Assistant Solicitor Scott R. Hixson, Esquire, all of the Fifteenth Judicial Circuit, represented the State. On February 2, 2008, Winkler was convicted on all three charges.

The State had filed its Notice of Intent to Seek the Death Penalty on March 12, 2007. Tr. 1976. In the Notice, the statutory aggravating circumstances asserted were that the murder was committed during the commission of a burglary, S.C. Code Ann. Section 16-3-20(C)(a)(8); and that the murder was of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime under S.C. Code Ann. Section 16-3-20(C)(a)(11). Tr. 1977. On February 8, 2008, the jury found there was evidence of both asserted aggravating circumstances beyond a reasonable doubt. Tr. 2940. The jury recommended that Winkler be sentenced to death. Tr. 2940. Judge Lockemy sentenced Winkler to thirty years confinement on the burglary conviction, and ten years confinement on the ABHAN conviction, both to be served concurrently with a death sentence for the murder. Tr. 2949. This appeal follows.

### STATEMENT OF FACTS

On March 6, 2006, Appellant Louis Michael Winkler ("Winkler") broke into his estranged wife's condo in North Myrtle Beach, SC. Tr. 1430-31, State's Exhibit 1, State's Exhibit 51. He knocked her son, Jonathan G., out of a stool and onto the ground. Tr. 1431, 1433, State's Exhibit 1, 51. Winkler then shot the victim, Rebekah Grainger Winkler, once in the face at point blank range. Tr. 1436, State's Exhibit 1, 51. According to Dr. Edward Leroy Proctor, Jr., the forensic pathologist who conducted the victim's autopsy, the victim received a very close range gunshot wound that entered her left cheek, penetrated her brain stem, and exited through the rear right side of her brain. Tr. 1634. Dr. Proctor noted that the shot was probably fired within a distance of 12 to 18 inches, and no more than 24 inches of the victim. Tr. 1634. Dr. Proctor further testified there was stippling around the wound that caused by the burning gunpowder coming from the end of the gun. Tr. 1634. Dr. Proctor testified that death would have been instant. Tr. 1637.

Winkler then walked over and pointed the gun at Jonathan. Tr. 1437, State's Exhibits 1, 51. Shortly thereafter, Winkler left the condo. Tr. 1440, State's Exhibits 1, 51.

Mary Elizabeth C., Jonathan G.'s friend, testified that she was on the phone with him when she heard a loud pop noise, and a voice that was not Jonathan's say "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not -- I'm back, I'm back. I'm never going back to jail." Tr. 1511-1512. She

then heard a hit and the phone went to static. Tr. 1512. She also heard someone curse a few times, and then the phone went dead. Tr. 1512.

Andrew Cooper, a former crime scene technician for the Horry County Police Department, took a picture of the door jamb of the victim's condo door. Tr. 1546, 1554. He testified that it appeared there had been a forced entry because the door jamb, the door frame, the lock mechanism, and other parts of the door had been busted. Tr. 1554-55, See State's 8. He also testified that a reddish colored liquid was collected from the kitchen countertop. Tr. 1559, 1571.

Kimberly Hahn, a former SLED scientist, testified that she compared the blood swabs recovered from the counter of the victim's residence to Winkler's blood standard, and the blood from the counter matched Winkler's blood profile. Tr. 1744, 1747. Cooper also photographed and collected a broken cordless phone. Tr. 1562-63. Cooper also testified that a projectile was recovered from the baseboard of the wall behind the victim. Tr. 1566-68. They did not locate a shell casing on the scene. Tr. 1572.

Toby Boyd, a violent crime detective for the Horry County Police Department, testified that police were unable to find and arrest Winkler in the days after the homicide. Tr. 1646. On March 13, 2006, they formed a task force to apprehend Winkler. Tr. 1646. On March 20, 2006, two weeks after the homicide, Winkler was spotted in the wood line of a hole at the Eagle Nest Golf Course. Tr. 1647. The police set up a perimeter around the area where Winkler was last seen on the golf course. Tr. 1651. Boyd spotted Winkler moving inside the perimeter. Tr. 1652. He testified that Winkler was wearing a dark pullover.



Boyd requested that the helicopter assisting with the search scan the area. Tr. 1652. The helicopter had to refuel. As the helicopter returned to the scene of the search, Boyd saw Winkler in the wood line. Tr. 1653. Police were able to apprehend Winkler without any problems. Tr. 1653. Boyd noted that Winkler appearance was consistent with someone who had been outside for a period of time. Tr. 1657.

William Scott Rutherford, captain of the Horry County Police Department's Special Operations Division, testified that he and his team were called in to assist in the apprehension and arrest of Winkler. Tr. 1682-83. On March 20, 2006, two of the individuals in the bloodhound tracking team screamed contact in the search of the area. Tr. 1685. He testified that he went to the sound of where the other officers indicated they had made contact with Winkler. Tr. 1686. They were standing over Winkler with their guns drawn, and Winkler was laying face down with his hands behind his back. Tr. 1686. Rutherford handcuffed Winkler and searched Winkler. Tr. 1686. They recovered a Jennings .380 pistol from his right front pants pocket. Tr. 1686-87. Five live rounds were in the pistol, but there was not a live round in the port. Tr. 1687. During a full search of Winkler, they recovered eighteen rounds of .380 ammunition, a guard lock blade knife, and a brown bi-fold wallet. Tr. 1689-91. In the wallet, there was a newspaper clipping about the shooting and Winkler's license. Tr. 1691-92. Rutherford also testified that they recovered a green knit cap and a rolled up sweatshirt as part of search for Winkler. Tr. 1692-93.

Ann Pitts, the lead detective in Winkler's investigation, testified that she went to Winkler's residence three days after the homicide. Tr. 1710. Police found the victim's address on a piece of paper at the residence. Tr. 1709-10.

Vello Paavel, a firearms and toolmark examiner for SLED,<sup>1</sup> testified that he received a Walther PPK pistol<sup>2</sup> .380 pistol, a Jennings Bryco .380 pistol, 1 fired projectile, and 18 unfired cartridges with the Jennings Bryco pistol. Tr. 1757, 1760-61. He testified that there was dust, lint, and oil present in the bore of the Walther PPK, and that indicated it had not been fired since the last time it was cleaned. Tr. 1769. He also noted that the magazine of the Walther PPK was full when he received it. Tr. 1773. He also noted that the Bryco Jennings pistol's magazine held six cartridges, but only five were in the magazine when he received it. Tr. 1777. Paavel concluded that the Jennings Bryco pistol fired the fired bullet. Tr. 1787.

### ***Sentencing Phase***

Several witnesses testified on behalf of the State during the sentencing phase of Winkler's trial. The first witness to testify was Winkler's first ex-wife, Carla Kaiser. She testified that she first met Winkler when she was a freshman in high school and he was a senior. Tr. 1992. She noted that they never had problems while she was in high school, but when she went to college, things started changing. Tr. 1992. She testified that he was a jealous boyfriend, and at one point he called her five times in one night to ask her what she was doing. Tr. 1993-94. Kaiser and Winkler dated for three years, and were then in an on-

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<sup>1</sup> Paavel was qualified as an expert in firearms and toolmark examination. Tr. 1760.

<sup>2</sup> This pistol was recovered from underneath the bedroom pillow at the condo where the victim was shot.

again, off-again relationship for another two years. Tr. 1994. When they were broken up, Kaiser testified that if Winkler saw her talking with someone else, Winkler would harass that person. Tr. 1994-95. She noted that Winkler was not always like that, but it was his jealousy that pushed her away. Tr. 1995.

Kaiser related that on her 21<sup>st</sup> birthday, Winkler punched her square in the nose and knocked her out in front of a bar where her friends took her to celebrate her birthday. Tr. 1996. She did not have direct contact with him after that. However, she did attempt to recover some coats and other items she had left at his apartment. Tr. 1997. Kaiser testified that while she was there, Winkler forced himself on her sexually, and that was how she became pregnant with her daughter. Tr. 1998. The two then married. Tr. 1999. Kaiser testified that the marriage was good for the first few months. Tr. 2000. However, she noted things changed when Winkler lost his job with an auto parts store and he started working construction with one of his friend's father's construction company. Tr. 2000-01. She noted that he would then start going to a bar right after work, and she would not see him until 1 or 2 a.m. Tr. 2001. Winkler would come home drunk, and sometimes trouble would start. Tr. 2001. She noted that Winkler would accuse her of being with someone else or doing something whenever she went out. Tr. 2001. She testified that he would get very angry and would either kick her or throw her around. Tr. 2001. Physical violence was a part of their relationship. Tr. 2001. Sometimes Winkler would hit her; a lot of times he would throw her up against the wall or kick her while she was against the wall. Tr. 2002. She also testified that the longer the drinking went on, the worse it got. Tr.

2002. She testified that he kept a long gun next to the bed, and he would sometimes point it at her and ask her if she wanted to die that day. Tr. 2002. He did that on three different occasions. Tr. 2003. He would accuse her of being with someone else. Tr. 2002. Kaiser also testified that girls who were not her friends would come to their apartment and ask Winkler to go to the bar with them. Tr. 2003. Winkler would go with them. Tr. 2003.

Kaiser testified that on the day her daughter was born, Winkler came home early, yelling at her. Tr. 2004. She testified that he had her up against a wall, and he then kicked her in the stomach six times. Tr. 2004. He then called her mother, told her mother that Kaiser was about to have the baby, and then told Kaiser to go to the hospital because her mother would be looking for her there. Tr. 2004-05. Kaiser went to the hospital and went into labor while there. Tr. 2005.

When she returned to the family apartment, everything was okay for a couple of weeks. Tr. 2006. While Winkler did not want any of Kaiser's friends to see the baby or for Kaiser to have any visitors when he was not around, she did note that the violence did initially slow down. Tr. 2006. One day, he did come home and punched her in the face. Tr. 2006. Kaiser testified that she talked with Winkler's mother about the violence, and she left the apartment for a little over a week. Tr. 2007-08. When she did return, Winkler was nice and had stopped drinking. Tr. 2008. However, the final straw in Winkler's and Kaiser's relationship came during Christmas Eve after the baby was born. Tr. 2008. Kaiser testified that Winkler did not want to go to his mother's for Christmas.

Kaiser went to go pick up the baby, who was being kept by Kaiser's mother at the time. When she got back, Winkler stated he did not want to go. He left, but when he came back, he started throwing Kaiser up against the wall. Tr. 2010. Kaiser testified that Winkler threw framed pictures at her, and her arms were cut by the frames and broken glass. Tr. 2010. She testified that Winkler then took a gun out, cocked it, and said he would shoot her right then. Tr. 2010. She testified that he accused her of cheating, then started beating on her. Tr. 2010. After Winkler finished beating and kicking her, Kaiser wrapped her hands in towels because of the blood, grabbed her purse, and ran. Tr. 2010-11. She went to Winkler's mother and showed her what Winkler had done. Tr. 2011-12. Kaiser then went to the hospital. Tr. 2012. She later pressed charges against Winkler. Tr. 2013. She left with the baby and moved in with her parents in North Carolina. Tr. 2015. She went back to Ohio for the court hearing on the assault charges. Tr. 2017. She testified that he was found guilty. Tr. 2017. They later got divorced. Tr. 2019-2020. She testified that Winkler somehow got her parents' phone number and he started calling and harassing them. Tr. 2019.

Denise Ricketts, Winkler's second ex-wife, also testified at trial. Tr. 2043. She testified that there were no problems when they were initially dating. Tr. 2045. However, as time passed, the character of their relationship changed. Tr. 2045. She noted that Winkler started being controlling, verbally abusive, and physically abusive. Tr. 2045-46. Ricketts testified that the problems started about one year into the relationship. Tr. 2046. The couple was invited to a Super Bowl party, but Ricketts did not want to go. Tr. 2046. She testified that

Winkler grabbed her by the neck and threw her to the floor; they ended up going to the party as a result of the fight. Tr. 2046. She later forgave Winkler. She did note there were other instances of verbal abuse. Tr. 2046. She also testified that Winkler was controlling, and he tried to keep her away from family and friends. Tr. 2047. She testified that in April of 1997, before they were married, he came home one night and wanted to argue. She asserted that he kicked her in the legs and drug her around the house for a while, and then he threw her out the back door in her bedclothes and locked the door. Tr. 2047-8. She reported this incident to police, and Winkler was later found guilty of criminal domestic violence as a result. Tr. 2049-51.

Ricketts testified that she forgave Winkler after he later apologized. Tr. 2052. She noted that things between them were fine for a while, but eventually, the same problems arose again. Tr. 2052. Winkler started drinking a lot, and when he came home he would be mean to her. Tr. 2052. They married in September 2001. Tr. 2053. She testified that life was bad during the marriage. Tr. 2053. He drank a lot, did not come home from work, and he was verbally abusive. Tr. 2054. Ricketts also noted that Winkler was still controlling. Tr. 2054. She later left Winkler, in part because she was in fear he would become physically abusive. Tr. 2054-55. She indicated that Winkler began to follow her, and he would leave notes in her car and would call her cell phone. Tr. 2056. She later took out a restraining order on Winkler after he threatened to kill her when he saw a suitcase in the back of her truck. Tr. 2057.

Jeff Cauble, a Patrolman First Class with the Horry County Police Department, testified that he responded to a call to a residence where Winkler was present. Tr. 2067. He initially started to transport Winkler to the North Myrtle Beach Police Department, but he changed course after Winkler started gasping for air and complaining of chest pains. Tr. 2068. Instead, he took Winkler to the Seacoast Medical Center. Tr. 2068. At that time, Winkler was very angry with Patrolman Cauble, and it took a couple of people to get Winkler out of the vehicle. Tr. 2068. Winkler spat on Cauble. Tr. 2068. That led to a simple assault and battery conviction against Winkler. Tr. 2069, State's 70.

***Kidnapping and Criminal Sexual Conduct Against Victim Rebekah Winkler***

On October 10, 2005, Winkler kidnapped and sexually assaulted Rebekah Grainger Winkler, the murder victim. Allen Large, a detective with the Horry County Police Department, testified that on that evening, he received a page from dispatch regarding a missing person reference to a possible domestic incident. Tr. 2077. The missing person was Rebekah Winkler. Tr. 2077. Winkler's vehicle was first spotted behind the Seacoast Medical Center. Tr. 2078. Another officer had moved the vehicle out of the roadway. Tr. 2082. A floor mat, a shoe, and a cigarette butt were recovered from the vicinity of where the Winkler's vehicle was located. Tr. 2082. The car was towed. Tr. 2084. Large testified that while the scene where Winkler's car was being processed, dispatch reported that the victim's car was located. Large left the scene where Winkler's car was found and went to scene where the victim's car was found. Tr. 2086. Her vehicle was found off the road in some trees. Tr. 2086. The Horry

County Police Department activated its dog team to try to locate two missing persons at that point. Tr. 2091. The victim was later found next to Stephen's Crossroads, which was where the magistrate's complex and library was located. Tr. 2092.

Phyllis Richardson, who worked for the Horry County Probate Court on October 11, 2005, testified she was working at the satellite office located over by Stephen's Crossroads. Tr. 2097. She testified that when she arrived at the parking lot that morning around 7:30am, she saw a woman walking in the lot being followed by a man. Richardson noted that the woman had on a long shirt, but the woman was not wearing any shoes. Tr. 2099-2100. According to Richardson, the woman looked distraught and was acting confused. Tr. 2100. Richardson did not recognize the woman. She also noted that the man was about thirty feet behind the woman, and he was wearing a pair of shorts but not shirt. Tr. 2101. Richardson noted that his hands were in the air as if he was raging and irritated; however, she could not hear what he was saying. Tr. 2101-02. Richardson later entered the office where she worked. She testified that shortly thereafter, she saw the woman from the parking lot in the room where the probate court performed ceremonies. Tr. 2104. Richardson noted that the woman was on the phone, but she could not hear what she was saying on the phone. Tr. 2104. Richardson testified that she did not recognize the woman that was making the call, but described the woman's hair as being very matted, tangled looking, with some bald spots. Tr. 2109. Richardson also indicated that the building became very active with police and emergency medical personnel



later that morning. Tr. 2109. Richardson later learned it was the victim, Rebekah Winkler, who was making the call in the other room. Tr. 2110.

Curtis L. Thompson of the Horry County Police Department testified that he was the first officer to arrive at the building. Tr. 2117. He found a white female who was very afraid in the building. Tr. 2118. Thompson indicated that it appeared the victim had been in some sort of altercation, and she confirmed that she was Rebekah Winkler. Tr. 2118. Thompson further testified that the left side of her head looked like it had been ripped out, she had black eyes, abrasions, and other scratches. Tr. 2118-19. After EMS transported the victim to the Seacoast Medical Center, Thompson assisted in the search for Winkler. He and Officer Hemingway located Winkler at a third person's residence. Tr. 2124-25. They arrested Winkler and Hemingway transported him to the ML Brown Building. Tr. 2125-26, 2130.

Andrew Cooper testified that he processed both the Isuzu Rodeo and Land Rover that were connected to the kidnapping investigation. No evidence was collected from the Isuzu Rodeo. Tr. 2137. Cooper testified that the Land Rover, which was registered to Rebekah Winkler, appeared to have been wrecked. Tr. 2140. Cooper took pictures of the vehicle as he processed it. He testified there was blood on the driver side seat, and that the floor mat was missing from the driver's side of the car. Tr. 2141. He also noted there was some blood around both seats and around the center console. Tr. 2141. On the passenger's side, there were several blood smears and spots on the interior panel of the door. Tr. 2142. Cooper collected blood from the door handle of the

interior driver's side door; swabs on the outside edge of the driver's side front seat, swabs from the exterior of the steering wheel; blood spots in the dash; blood spots from the back support; spots in the area between the center console and the edge of the driver's front seat; and blood on the passenger side front seat. Tr. 2144-47. Cooper also took pictures of Winkler's face, arms, and legs. Tr. 2150. Cooper transported the blood swabs and the victim's rape kit to SLED.

Haley Grainger, the victim's younger daughter, testified that she first met Winkler at the house where the Rebekah, Haley's sister, and Haley's brother were staying. Tr. 2162. She testified that during the early stages of Winkler's and the victim's relationship, Winkler seemed to be fine. Tr. 2164. Haley testified that after Winkler and Rebekah had been married for a couple of years, Rebekah and Jonathan G. moved out of Winkler's home and moved into Haley's condo. Tr. 2165-66. The victim slept in the bedroom on the first floor, and Jonathan slept on the couch. Tr. 2166. When Haley was not there, Jonathan slept in the bedroom upstairs. Tr. 2166-67. On October 10, 2005, she and her sister became concerned about their mother's whereabouts. Tr. 2167. Haley's sister had called. Tr. 2167. That led Haley and her boyfriend to start looking for Rebekah. Tr. 2168. Initially, they went to Winkler's home. Tr. 2168. When they found his car was not there, they saw a Land Rover in the woods down the road. Tr. 2168. It was later identified as her mother's Land Rover. Tr. 2169.

Haley saw her mother the next morning at the Seacoast Medical Center. Tr. 2170. Haley testified that Rebekah was in pretty bad shape: her face was really messed up, her hair was all tangled and looked horrible, and she had

scratches all over. Tr. 2170. At first, Rebekah did not want her children to see her, but they talked her into it. Tr. 2170. Haley testified that after the incident, her mother was very depressed and could not sleep. Tr. 2172. She also observed that Rebekah was always scared, and she did not take any steps to change her outlook. Haley did note that Rebekah took steps to protect herself. Rebekah borrowed a gun from Haley's father (Rebekah's ex-husband Roger), and Rebekah received a can of mace from her mother (Haley's grandmother). Tr. 2172.

Haley also identified a toe ring, an earring, a hair clip, shorts, and a shirt with a wad of hair in it that all belonged to Rebekah. Tr. 2171. Jeff Gause, a police officer with the Horry County Police Department, testified that he recovered the shorts, a shirt with a wad of hair, a hair clip, and some underwear from a partly wooded area of the county that he had been informed was part of the area in which the assault took place. Tr. 2176-80. Neil Livingston, a detective with the Horry County Police Department, testified that he recovered an earring and another piece of jewelry from the inside of a commercial building that was under construction in the Little River section of Horry County. Tr. 2184-91.

Lisa Gore, a staff nurse at Seacoast Medical Center, treated the victim when she was brought in on October 11, 2005. Tr. 2195-96. Gore testified that the victim had injuries to the left eye, some swelling to the jaw area, bruising around the neck, dried blood about the face, a fractured nose, an upper lip injury, redness under her right eye, corneal abrasions, multiple bruises and contusions, and a bite mark to the face. Tr. 2205-06. Gore also testified that the victim had a

large amount of hair removed from her head, along with some matting and disarrangement of her hair with leaves and debris mixed in. Tr. 2206. Gore also indicated there were bruises to Rebekah's arms and wrists, the tops of her hands, her neck area, scrapes on her torso, belly, and back, and contusions and scrapes to her lower legs, thighs, and feet. Tr. 2207-10. A sexual assault evidence kit was collected from Rebekah. Tr. 2213-15.

Ann Pitts responded to the Stephen's Crossroads Complex. Tr. 2220. She later responded to the Seacoast Medical Center to interview the victim. Tr. 2221. Pitts testified that the victim seemed to be in shock, and was very afraid. Tr. 2222. Rebekah did tell Pitts what happened and where it happened. Tr. 2222. The victim also described the clothes she was wearing. See Tr. 2226. While those clothes were not recovered when Pitts, the victim, and Detective Livingston initially went to the area, they were later recovered when members from the crime scene unit and dog team searched the area. Tr. 2226. Pitts testified that Winkler was arrested for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping on October 11, 2005. Tr. 2227. He was found at a friend's house. Tr. 2227. When he was arrested, he was wearing blue jean shorts, a t-shirt with some type of printing on it, and some brown shoes. Tr. 2228. Pitts was also present at Winkler's first bond hearing. Tr. 2230. Bond was initially denied in his case. Tr. 2231. At a second bond hearing, Winkler's bond was set at \$150,000, and he was required to wear an electronic monitor while out on bond. Tr. 2231-33. Pitts also testified that at Winkler's third bond hearing, his bond was amended to allow him to remove his

electronic monitor for two hours so he could seek employment. Tr. 2233-34. According to the bond, the monitor was to be off from 4pm to 6pm.

John Ortuno, a DNA analyst for SLED, testified that the DNA from the semen found in the rectal and vaginal swabs from the sexual assault evidence collection kit matched Winkler's DNA. Tr. 2244-49. He also testified that the blood found in the Land Rover belonged to the victim, but there were mixtures with a secondary profile that could not be reliably interpreted. Tr. 2249-51.

Tammy Cox was one of Rebekah's friends. Tr. 2262-63. They first met when Rebekah trained Cox in medical transcription. Tr. 2263-64. Cox testified that Rebekah was shy until you got to know her. Tr. 2264. She also described Rebekah as a very sweet and caring person who worked all the time. Tr. 2265. Cox indicated that Rebekah did not like having her picture taken. Tr. 2266. Rebekah helped Cox with her work and with her illness during Cox's second pregnancy. Tr. 2266-67. Cox testified that Rebekah was married to Roger Grainger before she married Winkler. Tr. 2268-69. They split in 2001. Tr. 2269. When Cox learned of Rebekah's relationship with Winkler, she never saw them out much. Tr. 2269. After Rebekah married Winkler, Cox hardly ever saw her. Tr. 2270. Cox testified that they only talked on the phone during the day when Winkler was at work. Tr. 2269-70. Cox became aware that there were problems in Rebekah and Winkler's relationship in August or September. Tr. 2270. She learned of the assault in October 2005. Tr. 2271. Cox spent time with Rebekah between October 2005 and Rebekah's murder in March 2006. Cox noticed changes in Rebekah's personality. Tr. 2271. Rebekah could not work any more

and did not want to do anything any more. Tr. 2272. Further, Rebekah did not go out, she lived in fear every day, and she could not sleep at night. Tr. 2272. Cox stated that she was a totally different person, and that she was never the same person. Tr. 2272-73.

Jill Shelley, Rebekah's older daughter, was the last witness to testify for the State during the sentencing phase. Shelley testified that she did not like her mother's relationship with Winkler or Winkler when it started to get more serious. Tr. 2287. Shelley testified that it was just a few months after they started dating that Winkler was asking Rebekah to move in with him. Tr. 2288. Shelley indicated that Winkler was not very friendly, and when she visited his home, she felt unwelcome. Tr. 2288. After Shelley had her first child, Rebekah's first grandchild, Winkler did not really want them around his house. Tr. 2289. Winkler also would not let Rebekah leave her house to come see Shelley's family. Shelley testified that she did not know that they had trouble, but she knew something was not right because before Rebekah married Winkler, Rebekah would do things with the rest of the family that she no longer could after they were married. Tr. 2290.

Shelley relayed to the court an incident that occurred in September 2005 when Shelley went to take her mother shopping. She could not get Rebekah on the phone, so she drove over to Winkler's house. Tr. 2291. When she got there, she found Rebekah was beat up and her arms were covered in bruises. She also noted that the phone was continually ringing. Tr. 2291. It was Winkler calling the house because Rebekah had made him leave. Tr. 2291. Some time

thereafter, Winkler returned to the house and started kicking the side door. Tr. 2292. Winkler was yelling and screaming until Rebekah let him into the house. Tr. 2292. Shelley threatened to call the police. Winkler responded by warning Rebekah that she knew what would happen if they called the police. Tr. 2292. Shelley testified that Rebekah moved out of Winkler's home as a result of this confrontation. Tr. 2292.

Shelley also testified about the night of the kidnapping. Tr. 2293. Shelley indicated she first became concerned when she found out from her brother that he was not picked up from a football game on October 10, 2005. Tr. 2293-94. Shelley called the police when she first heard of the problem. Tr. 2294. She noted that her mother's Land Rover was found that night, but there was no sign of either Rebekah or Winkler. Tr. 2295. Shelley saw her mother the next morning at Seacoast hospital. Tr. 2295. Shelley testified that her mother was very beat up and dirty. Tr. 2295. Rebekah's eye was very swollen, and her hair was matted with sand spurs and twigs. Tr. 2296. Rebekah was also nervous, and she wanted them to do something with Winkler to get him away from her. Tr. 2296. Rebekah was very depressed. Tr. 2296. Shelley testified that Rebekah lived in fear all the time and was scared. Tr. 2296. Rebekah did not go anywhere or do anything. Tr. 2297. She could no longer work, and she was never the same. Tr. 2297-98. The final item of evidence presented by the State was a letter sent by Winkler to Jill Shelley while he was incarcerated. In the letter, Winkler asserted that had Shelley not gotten involved in he and Rebekah's business, Rebekah would still be alive. Tr. 2300. He complained about Shelley's

calling her mother to talk about Shelley's marriage, and he claimed that no one else in the family liked Shelley. Tr. 2300-01. Winkler claimed that the victim slept with everyone, and he alleged that he had pornographic movies of him and the victim having sex. Tr. 2301-02. He also threatened to post the video online. See Tr. 2303. Winkler claimed that the victim saw him during the separation after the initial arrest, stated that Rebekah lied to police about the first set of charges, and blamed Shelley for her mother's death. Tr. 2302-03.



## ARGUMENT

### I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TAPE OF JONATHAN G.'S INTERVIEW WITH POLICE ON THE EVENING OF THE MURDER; THE TAPE WAS ADMISSIBLE UNDER RULE 801(D)(1)(B) AND SOMETHING ELSE

#### Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). To constitute an abuse of discretion, the conclusions of the trial court must lack evidentiary support or be controlled by an error of law. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007).

#### Relevant Facts

Jonathan G. testified that he saw Appellant shoot and kill his mother on March 6, 2006. Jonathan testified that he was talking on the house phone with his friend Lizzie (Margaret Elizabeth C.). Tr. 1428-29. At the time, he was sitting in a bar stool at the bar near the kitchen in the apartment. Tr. 1428. His mother was sitting on the couch in the living area, and she was watching television. Tr. 1435. At around 5:30 pm, he heard a loud bam at the door. Tr. 1427-28. He

testified that it did not sound like it was on the door. It was just a loud boom. Tr. 1427-28. He heard a second bam five to ten seconds later. Tr. 1430. After the second bam, the door to the apartment flew open. Tr. 1430. At that point, he saw Appellant. Tr. 1431. Jonathan described Appellant as wearing a sweater, and noted that he was yelling. Tr. 1431. He testified that Appellant was stating, "I'm back and you thought I was going to prison, something like that." He was yelling very loud. Tr. 1431. Jonathan later testified that he did not initially see a gun on Appellant when he entered the apartment. Tr. 1437. He later saw Appellant pull the gun he used from his waistband after he walked into the apartment and knocked Jonathan onto the ground. Tr. 1437-38.

According to Jonathan, Appellant approached him first once he entered the apartment. Tr. 1432. When Appellant reached Jonathan, Appellant punched Jonathan.<sup>3</sup> Tr. 1432. Jonathan testified that he fell off the bar stool, and the telephone "smashed and broke." Tr. 1433-34. Jonathan testified that as he hit the ground, Appellant walked over towards Jonathan's mother. Tr. 1435. "He just walked up to her and shot her." Tr. 1436, l 17. Jonathan further testified that Appellant was "[n]ot very far away. Like point blank." Tr. 1436, l 18. Appellant fired just one shot. Tr. 1436. The victim, Rebekah Winkler, fell to the ground face down. Tr. 1436.

After shooting the victim, Appellant walked back over to Jonathan, who at the time was still lying on the floor. Tr. 1437. Jonathan testified that he told Appellant not to do anything stupid because Appellant was pointing the gun at

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<sup>3</sup> State's Exhibits 2 and 3, photographs of Jonathan from the night of the incident, were entered into evidence at trial. Tr. 1432-33. Jonathan testified it showed a red mark under his right eye that was the result of being punched by Appellant. See Tr. 1432-33.

him. Tr. 1437. Appellant stood over Jonathan for five to ten seconds, pointing the gun at his face. Tr. 1438. Jonathan testified that Appellant did not say anything at this point. Tr. 1438. After Appellant paced for five to ten seconds, he left. Tr. 1440.

Jonathan testified that after Appellant left, he went and got his cell phone, closed the door to the apartment, and made sure Appellant was not coming back. Tr. 1440. He then went to the balcony in the apartment and called 911. Tr. 1440. Jonathan was sitting on the balcony when the first police officer arrived on the scene. Tr. 1441. Jonathan went downstairs to let the officer into the apartment. Tr. 1441. According to Jonathan, the officer asked if there were any weapons in the house. Tr. 1442. Jonathan informed the officer that his mother kept a gun underneath the pillow in her room. Tr. 1442-3. Jonathan testified that the officer took him downstairs and put him in the back of his patrol car. Tr. 1443. He noted that he did call his sister Jill, his friend Lizzie, and he thought he called his other sister, Haley. Tr. 1443. Sometime later that evening, Jonathan was taken to the police station. Tr. 1443.

During cross-examination, Jonathan testified that his father was Roger Grainger. Tr. 1445. Roger was the victim's ex-husband, and the victim had been seeing him during her separation from Appellant. Tr. 1446-47. Jonathan testified that Grainger was supposed to come over on the night of the shooting. Tr. 1446. Jonathan admitted that he forgot he called Roger after the shooting. Tr. 1446. Defense counsel then asked Jonathan if he remembered telling the first officer who arrived on the scene that it was his dad who shot his mother. Tr. 1447.

Jonathan denied he told the first officer that, and stated he told the officer it was his stepdad. Tr. 1447. Jonathan also testified that Roger was supposed to arrive at the apartment at around 6pm. Tr. 1447. He noted that he told the officer it was his stepdad. Tr. 1447. He later again affirmed that he did not say his dad was the shooter. Tr. 1459.

Jonathan also testified that he only called Roger dad. Tr. 1462. He noted that Roger would have been off from work at the time of the shooting. Tr. 1462. Jonathan also testified that he did not believe that he spoke with Roger either the day before the shooting, or at any point before he called 911. Tr. 1462-63. He also did not call his dad before the police arrived. Tr. 1463. Jonathan did not recall whether he answered the 911 dispatcher's question about if he was alone or not. Tr. 1465-66. He did deny that Roger was at the apartment when the shooting occurred. Tr. 1466.

Officer Thomas Knoch of the Horry County Police Department also testified at trial. Officer Knoch was the first to arrive on the scene after Jonathan called 911. He noted that personal safety and the safety of anyone at the scene was a major concern. Tr. 1527. He also noted that he wanted to secure the scene for later investigation. When he opened the door to the apartment, he yelled up to the top of the steps where a young man, Jonathan, was sitting. Tr. 1527. He had the young man expose his hands around the corner. Tr. 1527. They had a brief conversation with the officer being at the bottom of the stairs, and the young man at the top of the stairs. Tr. 1527. Officer Knoch testified that the young man complied with every thing that Knoch asked him to do. Tr. 1529.

Officer Knoch testified that as he was heading up the steps to the apartment, the young man [Jonathan] stated, "[h]e said he's gone, and I asked him. I said who. . . He said my dad . . . " Tr. 1529.

Officer Knoch also testified that when he first entered the apartment, he observed wood splinters on the floor directly adjacent to the door and the jamb. Tr. 1530. He also observed a female victim laying face down with her head turned so that the left side of her face was exposed upwards. Tr. 1530. Officer Knoch noted that she had a wound of some sort to her face, and there was blood on the wound and on the floor. Tr. 1531. He also indicated that there was a chance that Jonathan said it was his stepdad, and not his dad, who shot the victim. Tr. 1531. "Yes, it very well could have been. There could have been several other things that may have been said that I just don't recall due to the situation being as tense as it was at the time, and I was the only officer of the scene." Tr. 1531, ll 11-14. Officer Knoch testified that he checked the victim for signs of life, but he did not detect either a pulse or breathing. Tr. 1531. During cross-examination, Knoch testified that in his report, he wrote "he said - - that I can recall - - he is gone. When I asked him who, he said my dad." Tr. 1542, ll 4-6. He further testified that he would not have written that if Jonathan had not told him that. Tr. 1542.

Detective Ann Pitts, who was with the Horry County Police Department in March 2006, was one of the primary investigators in the victim's murder. Tr. 1707. Pitts testified that she spoke with Jonathan on the evening of the shooting, March 6, 2006. Tr. 1711. The conversation was audio recorded. Tr. 1711. She

identified State's Exhibit 51 as the audiotape of her conversation with Jonathan. Tr. 1711-12. She also noted that it was authentic, and that it accurately reflected the statement obtained from Jonathan. Tr. 1712. Detective Pitts was also provided with a transcript of the audiotape. She indicated that the transcript was accurate. Tr. 1712.

The State submitted State's 51 to be entered into evidence. Tr. 1713. The defense objected. Tr. 1713. Initially, the court asked defense counsel how he addresses the 801(d)(1)(B) issue. Then the court overruled the objection under Rule 801(d)(1)(B), SCRE. Tr. 1713.

The trial court later allowed for more discussion on the admissibility of the statement in a bench conference.

The Court: Go ahead and say why you want me to state why I shouldn't let you put that in.

Mr. Humphries: Because there's two - - attacking the credibility, specifically the allegation of recent fabrication. These are prior consistent statements.

The Court: Is this about the dad did it? This about the dad, stepdad thing?

Mr. Humphries: Right. Exactly.

The Court: And what would you like to say, Mr. Wilson?

Mr. Wilson: Of course I said I object when he testified. He, he testified that - - he said his story was that - - what he said to me today was the first time that he said it. That's what he said. I didn't make it up. He said it.

The Court: Said what?

Mr. Wilson: That, that what he said on the witness stand was the first time he said that today. . . .

Mr. Humphries: I have no idea what he's talking about.

The Court: I don't either.

Mr. Wilson: When Jonathan testified on the witness stand, I asked him about what he, where he was and what he saw. And he testified to me that he told the solicitor he actually saw the shooting.

The Court: Oh, no, no, I'm not sure the statement's about that, but if it is --

Mr. Wilson: It is.

Mr. Humphries: It's particularly about his saying the stepdad, dad. This is a prior consistent statement which supports his testimony.

The Court: Anyway, I just want to get some stuff on the record. 801(d)(1)(B) is what you are seeking?

Mr. Humphries: Yes, Your Honor.

The Court: In evidence.

The Court: In making my ruling, by the way, of 801(d)(1)(B), I looked at the first sentence and thought that he was here. I assume you'd have him ready if anyone wishes to call him?

Mr. Humphries: Yes sir. No question. He's here.

T. Tr. 1715-16, 1717.

**A. This issue is not preserved for appellate review; counsel's objection under 801(d)(1)(B) was that the presentation of statement was not allowable under 801(d)(1)(B) because it discussed whether Jonathan actually saw Appellant pull the trigger, not whether he told the officer it was his dad who shot the victim.**

Appellant's claim in this argument is not preserved for appellate review.

Appellant argues that the prior statement was inadmissible because there was never any allegation that Jonathan recently fabricated testimony in regards to whether he told the first officer on the scene that it was his dad, not his stepdad, who shot and killed the victim. See Appellant's Brief, pg. 13-15. When asked why he objected, counsel stated that he was challenging the admission of the statement under 801(d)(1)(B) because Jonathan stated for the first time on the

stand that he actually saw the shooting. Tr. 1715-16. He never contested the statement was not admissible under 801(d)(1)(B) because of the issue of whether Jonathan told the officer it was his dad, and not his stepdad, who killed his mother. Since this argument was not raised to the trial court, it is not preserved for appellate review. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

***B. The statement was not hearsay under 801(d)(1)(B)***

The trial court did not abuse its discretion in admitting the statement into evidence because it was not hearsay under Rule 801(d)(1)(B).

Pursuant to Rule 801(d)(1)(B), SCRE, a statement is not hearsay if

[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose....

Thus, in order for a prior consistent statement to be admissible pursuant to this rule, the following elements must be present: (1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

State v. Saltz, 346 S.C. 114, 121-122, 551 S.E.2d 240, 244 (2001).



Jonathan's statement to Detective Pitts qualified as a prior consistent statement admissible under Rule 801(d)(1)(B). First, there is no dispute that Jonathan testified at trial, and was subject to cross-examination. Second, Winkler implicitly, if not explicitly, accused Jonathan of recently fabricating the statement. Clearly, Appellant was accusing Jonathan of lying when he testified that he told Officer Knoch it was his stepdad who shot his mother, not his dad. Appellant's questioning indicates that he was asserting that Jonathan was denying making the statement to the officer because he loved his father Roger. Through questioning, counsel also pointed out that Roger was expected at the victim's apartment that evening, Roger was not at work when the shooting occurred, and Jonathan did not answer the 911 dispatcher's question about whether he was alone. Tr. 1447, 1454, 1462, 1466. Further, the alleged fabrication was necessarily recent. There was no testimony or probative evidence introduced at trial that indicated that Jonathan was aware of what was in Officer Knoch's report before defense counsel asked him about it.

Third, Jonathan's statement to Detective Pitts was clearly consistent with his testimony at trial. In the statement to Detective Pitts, Jonathan identified Appellant as the one who broke into the apartment and shot his mother. See State's Exhibit 51, Court's Exhibit 20 at pg. 4. This was consistent with Jonathan's testimony at trial that Appellant broke into the apartment and shot Jonathan's mother. Tr. 1428-36. Fourth, the statement to Detective Pitts clearly occurred before the alleged recent fabrication. The statement to Detective Pitts

was given on the night of the shooting, March 6, 2006. The alleged fabrication occurred at trial on January 31, 2008.

The circumstances surrounding the admission of Jonathan's statement to police is clearly distinguishable from the improper admission of prior consistent statements in both State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003), and State v. Saltz, supra. In Foster, this Court found the admission of prior consistent statements was improper because the cross examination of the witness had not asserted she fabricated some portion of her testimony, and thus only amounted to simple impeachment. 354 S.C. at 622, 582 S.E.2d at 430. This Court noted that the cross-examination consisted primarily of questions regarding the witness's prior inconsistent statements. Id. at 619, 582 S.E.2d at 428. Similarly, in Saltz, this Court found that the admission of the prior consistent statement of Sydney Johnston was improper because the cross examination of Johnston only questioned the accuracy of the witness's memory, but did not charge her with recent fabrication. Saltz, 346 S.C. at 124, 551 S.E.2d at 245-46. Such a finding cannot be made in this case because Winkler was clearly asserting that Jonathan was lying when he stated he told Officer Knoch it was his stepdad who shot his mother. Winkler's counsel attempted to establish that Jonathan's father, Roger, was the one who actually shot Rebekah. Counsel asked Jonathan about whether his father was going to be at the condo that evening, whether his father was working at the time of the shooting, and confirmed that Jonathan loved his father. Counsel also pointed out that Jonathan did not respond to the 911 dispatcher's question regarding whether he was alone at the scene. Clearly,

counsel was asserting that Jonathan was lying when he stated he told Officer Knoch it was his stepfather who did the shooting. Since defense counsel was clearly intimating that Jonathan was fabricating his story that he told Officer Knoch that it was his stepdad who shot his mother, and that fabrication would have been recent, the trial court properly admitted Jonathan's interview with Detective Pitts. As a result, this claim for appellate relief should be dismissed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE JURY TO VIEW COPIES OF THE TRANSCRIPT OF THE 911 TAPE WHILE LISTENING TO THE TAPE.

Relevant facts

The first witness to testify in Appellant's trial was Sharon Renee Hardwick, of the deputy director of Horry County's 911 system. Tr. 1406-07. She maintained the 911 recordings for the county. Tr. 1407. She testified that she had the tape from Jonathan's 911 call from the night of the murder. Tr. 1407. A transcript of the 911 tape was prepared for trial. Hardwick testified that she reviewed the transcript, and it accurately reflected the conversation that was contained on the 911 tape between Jonathan and the 911 operator. Tr. 1408. The 911 tape was entered into evidence as State's Exhibit 1, and the transcript was tendered as State's Exhibit 35, but was entered as Court's Exhibit 18. Both were entered without objection. Tr. 1408-09.

During jury deliberations, the jury sent the judge a question asking if they could read the 911-call transcript. Tr. 1894. The court noted that it told the jurors the transcripts would not be going back into the jury room. Tr. 1894. Defense counsel then noted that he thought there might be some inaccuracies in the transcript, and that he would be concerned about sending the transcript back to the jury because of that concern. Tr. 1895. The court noted that the transcript and tape were introduced without objection during the trial. Tr. 1895. Defense counsel countered that he did not want the jury to have the transcript because of his concerns about the inaccuracies. Tr. 1895. The court stated that he would

not be sending the transcript back to the jury room, but asked counsel for both sides if they would have any issues with the court utilizing the same procedure that was used during trial for review of the audio tape of the 911 call. Tr. 1895. In that procedure, the court would allow the jury to review the transcript while listening to the 911 tape in the courtroom. Tr. 1895.

Appellant's counsel argued that procedure was not appropriate. "I know they did during the trial without objection, but this is - - the trial is over now. The document is not in evidence and the jury is already in the process of deliberating, and I don't understand - - they're not supposed to get the document again." Tr. 1895-96. Appellant went on to note that the document was not in evidence, and the trial was over. Tr. 1896. The trial court responded that it was concerned that the jury would think the parties were hiding something because it was not allowed to have the transcripts, and the court did not want it to seem as though it was adding too much emphasis on something. Tr. 1896. Winkler urged the court to inform the jury that the transcript was not in evidence, and allow the jury to play the audiotape until they could discern their concern.

The State noted it was concerned with not providing the jury with the transcript because the quality of the 911 audiotape was not great. Tr. 1897. The State noted that the reason they made a transcript was to make sure the words were accurate. Tr. 1897. The State also agreed with the court's assessment that the jury would be curious as to why they could not review the transcript, and it would probably lead to more confusion than help to present it to them in a way different than it was presented at trial. Tr. 1897. At that point, the Court noted it

was concerned the jury room was not wired like the courtroom, and he could not see how the jurors could all hear the tape because there were no big speakers in the jury room. Tr. 1898.

Defense counsel argued that the document was not in evidence, was not part of trial record, was only offered as an aid to the tape recording, and was never put into evidence. Tr. 1899. Defense counsel further stated that the jury was only entitled to review evidence. Tr. 1899. The trial court decided that allowing the jury to review the transcript while listening to the 911 tape in the courtroom in the presence of Winkler and counsel for both sides would be no different than having the court reporter transcribe what was played on the tape and having her read it aloud to the jury. Tr. 1900. "That tape and them reading it is as it was put in, them reading it, the words there that were put before them and you note your objection -- I'm going to permit them to do it that way." Tr. 1900. The 911 tape was replayed before the jury in the courtroom. Tr. 1901. The jury was allowed to review the transcript while the tape played. Tr. 1901. However, the jury was not allowed to take the transcripts back to the jury room. Tr. 1901.

***A. To the extent Appellant is challenging the accuracy of the transcript, that issue is not preserved for appellate review because Appellant failed to raise the issue in the first instance.***

As reflected in the record and noted by the trial court during the discussion on whether the jury could receive a copy of the transcript during deliberations, Appellant did not challenge the accuracy of the 911 transcript when it was used during trial. Since there was no objection made when the transcript was first used, Appellant was precluded from asserting the transcript was inaccurate later

in the proceeding. Appellant is further precluded from making the assertion in this appeal. State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991)(“A defendant must object at his first opportunity to preserve an issue for appellate review.”).

Furthermore, the record does not support Winkler’s assertion that the transcript was inaccurate. In his brief, Winkler asserts that the transcript is incorrect on page 5 in its recitation of a series of statements made by the operator. See State’s Exhibit 1, Court Exhibit 18. A review of the transcript while listening to the tape clearly shows that that the text in the transcript is accurate. Thus, to the extent Winkler asserts the trial court improperly allowed the jury to review the 911 tape’s transcript during jury deliberations because it was inaccurate, his claims should be dismissed because the record does not support it.

***B. The trial court did not abuse its discretion in allowing the jury to review the tape and transcript in the exact same fashion as they did during the testimony presented at trial.***

The trial court, in its discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations. State v. Plyler, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request. Id. The court is not required to submit evidence to the jury for review beyond that specifically requested but may, in its discretion, have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested. Id. In Plyler, this Court found there was

no abuse of discretion by the trial court when it allowed the jury to hear the tape of the testimony of the defendant's ex-wife in response to the jury's request to have her testimony read back to them. Id. Only the direct examination of the testimony was played for the jury in Plyler. Id.

The trial court did not abuse its discretion in its handling of the 911 tape transcript. The jury was not allowed to take the transcript back to the jury room for deliberations, and it was only allowed to view the transcript while listening to the 911 tape in the presence of the judge, defendant, and counsel for both sides. This case is clearly distinguishable from State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982). In Gulledge, the trial court allowed the jury to retain during deliberations the transcript of the tape-recorded communication between two highway patrolmen. Id. at 371, 287 S.E.2d at 490. Here, the jury was not allowed to take the transcript back to the jury room. They were only allowed to view the transcript in the judge's presence. The jury was not presented with any facts that were not already in evidence. The transcript was of the 911 tape that was played at trial and during the jury's deliberations. The underlying 911 tape was properly in evidence, unchallenged by Winkler. Clearly, the trial court exercised reasonable discretion in the handling of this issue at trial. Winkler has failed to establish that the trial court abused its discretion in handling the jury's request. As a result, this claim for relief should be dismissed, and Winkler's convictions should be affirmed.



III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING  
APPELLANT'S REQUEST TO GO PRO SE DURING THE SENTENCING  
PHASE OF HIS TRIAL.

**Relevant Facts**

***Pre-Trial Discussions Regarding Counsel***

At Appellant's first appearance, Ms. Orrie West, Esquire, a public defender for Horry County, was appointed to represent him. June 15, 2006 Tr. 2. One of Appellant's trial counsel, Mr. Thomas Rathbun, Esquire, also of the Horry County's Public Defender's Office, was assigned to help assist with the case. Tr. 3. Since at the time Appellant's case was [process on pg. 4]. At the appointment of counsel hearing on June 15, 2006, Ralph Wilson, Esquire, was appointed to serve as first chair in Appellant's defense. Tr. 11-12. At the hearing, Appellant indicated that he found the Public Defender's Office to be very inadequate. Tr. 9. He complained that Ms. West called him by the wrong first name. Tr. 9. Appellant also indicated that he had concerns about Mr. Rathbun because Rathbun told him he had not tried a murder case before. Tr. 10. When asked if he had any objections to Rathbun being appointed as second chair, Appellant indicated that he had an objection. Tr. 17. He indicated that he and Rathbun had argued more than anything. Tr. 17. He was later appointed (see file exhibit).

At the July 3, 2007 hearing, Appellant's trial counsel put on the record that Appellant was dissatisfied with Mr. Rathbun as counsel because of disagreements they had. July 3, 2007 hearing, Tr. 57. Wilson noted that a couple of weeks before the hearing, Rathbun went to see Appellant, and they

had a conversation. Tr. 57. Rathbun and Wilson had gone to see Appellant the Friday before, but they were not able to see Appellant because he had been taken to Charleston to meet with a psychiatrist. Tr. 57. Rathbun went to see Appellant the following Monday. Tr. 57. On Tuesday, Appellant was upset and irate. Tr. 57. Appellant told Wilson that Rathbun had said some things. Tr. 58. The Court indicated that Appellant needed to know that unless something regarding Rathbun reached the point of incompetence or something that would lead to a preliminary determination of ineffective assistance, it was improbable that the court would remove Rathbun unless it was something that would seriously prejudice Appellant's rights to receive a fair trial. Tr. 59. Wilson indicated that even when there have been disagreements between Rathbun and Appellant, Wilson has been able to sit down with Appellant and decide on the correct course of action with Appellant's consent. Tr. 59. Appellant was heard in this matter. Tr. 60-1. He informed the court that Rathbun was telling him to take a plea, plead guilty. Tr. 61. He told the court that when he sought counsel about the issue, Rathbun told him to plead guilty. Tr. 61. Appellant interpreted that to mean that Rathbun thought he was guilty. Tr. 61. Rathbun responded that he believed Appellant heard what he wanted to hear and didn't hear what counsel was saying. Tr. 62. Rathbun affirmed to the court that he would do his utmost to represent Appellant in a trial. Tr. 62.

During an ex parte hearing held before jury selection. Counsel indicated that during the telephonic conference on the Thursday before this hearing, Appellant started giving details about an incident that occurred between

Appellant and Wilson. The Court allowed Appellant the opportunity to get the information on the record. Appellant told the court that he wanted Wilson to go forward as counsel. Tr. 32. However, he no longer wanted Rathbun to continue as counsel. He noted that eight months prior, he had requested Rathbun be relieved, and he was turned down. Tr. 32. He informed the court that Rathbun got in his face, put his finger in Appellant's face, and touched his face. Tr. 33. He then told the court that he gave Wilson his sister's pictures, and told Wilson that Wilson was calling her a liar. Tr. 33. The court noted that it did not think that was enough to warrant counsel be relieved. Tr. 33. Appellant asked, "how can I get a fair trial with guys that are against me? I mean, they've' actually - -" Tr. 34. Appellant informed the court that he did not believe they would do their best to get him acquitted. Tr. 34.

In response, Wilson informed the court that he had done everything he knew to do to represent Appellant in the best fashion he knew. Tr. 34. He also indicated that Appellant is antagonistic, and has been so since the first day. Tr. 34. Wilson further noted that they had made every effort to protect every right, hired every expert they could think to hire, and have tried to talk with every witness they could possibly find. Tr. 34. He informed the court they were prepared for trial. Tr. 34. The fact that Appellant's personality got on Wilson's last nerve would not affect him and his ability to represent him in the fashion he was entitled to. Tr. 34-5. Rathbun also stated he was ready for trial. Tr. 35. Appellant complained that his attorneys did not find a witness. Tr. 35-6. Wilson told the court that they had made an exhaustive effort to find the witness

requested, and according to the witness' family, they did not know where he was. Appellant indicated he thought the witness was still in Horry County. Appellant indicated that his question regarding that witness was answered. He then noted that he was not sure if counsel had done their best efforts to find what he needed because he was in lockup. Tr. 37. He also complained that no one has gone out to the murder scene and measured couches and counters. Tr. 39. Wilson noted that they could not because the unit belonged to the daughter of the victim, not the defendant. Tr. 39.

Appellant continually complained that counsel was advising his family that Appellant was likely going to be convicted. Tr. 41-2. The Court responded that it could not chastise counsel for giving him an honest opinion. Tr. 42.

"Any event, we're going to proceed then. There's no request for you to represent yourself. You're requesting another attorney. Since that's the case, I will not grant your motion. Now, you always have that option to represent yourself, which would be very inadvisable at this stage, but we will continue on with the case." Tr. 42, ll 12-17.

Counsel later put on the record that it disagreed with Winkler's request to make a certain argument in the opening statement because counsel believed it would require Appellant testify in the guilt phase of trial. Tr. 1376-81. .

***Winkler Made the Request to Proceed Pro Se Before the Start of the Sentencing Phase***

Before the start of the sentencing phase of trial, defense counsel asked the court to explain to Appellant the pitfalls of him participating in the cross examination of witnesses. Tr. 1915. This led to court inquiry into whether

Appellant was asking to proceed pro se. Tr. 1916-1919. Counsel then indicated to the court that Appellant wanted to question each witness and advised the court that after some discussion with Appellant, he may want to go on his own. Tr. 1921. The court informed Appellant that it was highly inadvisable to go pro se at this point in the proceeding, and further warned Appellant that he would be restrained by the same rules as anyone else as far as questions, and that he could not make any statements at all. Tr. 1921.

The State's initial position on the matter at trial was that if Appellant wanted to represent himself, the only process was to let his lawyers go and allow him to do so. Tr. 1922. The State recognized a defendant's right to do so. Tr. 1922. It agreed with the court that it was a hazardous course, but there are Faretta warnings. Tr. 1922. The Court again advised Appellant that it was very dangerous and not advisable to represent himself, and it was always better to have a professional do that. Tr. 1922. He was also informed that he would not be allowed to question witnesses directly if he retained counsel. Tr. 1922. The State also pointed out that if Appellant decided to represent himself for one witness, he was responsible for questioning all witnesses and all other aspects of the case. Tr. 1923. The Court then allowed Appellant to think about the matter for a while. 1924-26.

After a recess, the trial court asked Winkler if he wanted to proceed pro se or if he wanted another lawyer. Tr. 1926. Winkler responded that he wished to proceed in the manner that he requested, i.e., that he be allowed to question the witnesses. Tr. 1926. He further indicated that he did not want his lawyers

dismissed, and he stated that he did not want to abandon them. Tr. 1926. After some further discussion, defense counsel articulated that Winkler's request was to represent himself, but he wanted counsel to stay in the courtroom and give him advice, information, and assist him in doing those things. Tr. 1928. The trial court then asked Winkler if he was requesting to represent himself, but wanted counsel around to consult. Tr. 1928. Winkler stated that was what he was requesting. Tr. 1928.

The trial court further inquired into Winkler's understanding of what he was doing. The court advised Winkler it was a very dangerous thing to do, and noted that he would be required to follow court procedure as lawyers would be required to do in the sense of following the rules of evidence. Tr. 1928. Winkler was also told that he would have to follow the restraints on how and what questions are permitted and how they are permitted to be asked. Tr. 1929. The court asked Winkler if he had any training in that regard, and Winkler said he had not. Tr. 1929. The trial court also asked Winkler if he was not concerned about that, noting Winkler might not be able to bring out points that could be brought out by a skilled attorney. Tr. 1929. Winkler was further asked if he had enough time to consider all of those concerns. Tr. 1929. The court further noted that Winkler did not even know the ground rules, and he wanted to ensure that Winkler understood the danger of going forward pro se. Tr. 1929-30. Winkler indicated that he understood. Tr. 1930.

The trial court then proceeded to ask Winkler if he understood that his guilt or innocence of the crimes had already been decided, and he could not go into

whether he committed the crime or not. Tr. 1930. Winkler stated that he understood, and that he understood he could not bring up those issues. Winkler then requested again the court dismiss his attorneys but allow them to stay and consult. Tr. 1930. The trial court noted that as it was reviewing Winkler's request, it was reviewing Faretta, State v. Brewer, and State v. Fuller. Tr. 1931. He also asked Winkler about the medication issue, and whether Winkler is confident that the lack of getting his medication yesterday as often as he felt he needed was in any way affecting his decision. Tr. 1931. Winkler stated that he was not concerned if they got the medication at the appropriate time. Tr. 1931. The court then asked defense counsel if he had a concern about that. Wilson responded that the medication issue was a concern throughout the trial because Winkler was a different person on his medication and it is in his system appropriately. Counsel further noted that when Winkler is not on his proper dosage of medication, he gets extremely anxious and combative, and he can be argumentative. Tr. 1931. Counsel could not say that missing one dose the day before the hearing was the difference. Tr. 1931-32.

The trial court asked Winkler if he had a chance to review all of the matters that counsel gathered for mitigation. Tr. 1932-33. Winkler stated that he had. Tr. 1933. Winkler also informed the court that he had reviewed all of the evidence that counsel was going to introduce in the sentencing phase of the trial. Tr. 1933. Winkler demonstrated that he understood what a leading question was, but he state that he had not reviewed the rules of evidence. Tr. 1933. Winkler indicated that he understood exceptions to hearsay, but when asked by

the court, he did not know what an excited utterance was. Tr. 1933-34. In response to the court's question about whether Winkler was concerned that the state might get things in that he would not know how to object to them, Winkler stated that he felt that his view of the guilt phase was that the State won that trial, and he did not have his day in court. Tr. 1934. Winkler further noted that most of the witnesses that were going to testify were people that he knew better than anyone else, including people who were supposedly friends who turned against him. Tr. 1934. Winkler stated that he knew them better than anyone in the room. Tr. 1934.

The trial court then noted that Brewer required Winkler to make his decision before trial, and Fuller indicated that it was within the discretion of the court. Tr. 1935. The court then asked Winkler if he understood the dangers and pitfalls of proceeding pro se, and reminded him that it was dangerous to do this. Tr. 1935. The court further asked if Winkler understood the danger, appreciated the danger of the decision he wished to make. Tr. 1936. The court insisted it wanted to be sure this was not something that Winkler's family or attorneys were telling him to do. Tr. 1936. Winkler stated that he had not talked to his family about his decision to represent himself. Tr. 1936. Defense counsel interjected that both Winkler's family and counsel had advised him against representing himself. Tr. 1936.

The State did request the court determine whether Winkler was capable of representing himself and that his request was a knowing and intelligent waiver of his right to counsel. Tr. 1937. The State further requested the court engage in a



discussion of all of the factors under Faretta on the record. Tr. 1937. The trial judge requested that both defense counsel and the solicitors put in writing specific requests for what they wish to be discussed with Winkler. Tr. 1938. The trial judge noted that he would consider Winkler's request and would ask additional questions. He asked Winkler to consider his request very seriously because it was a serious decision. Tr. 1938-39.

The State then argued that under Fuller, the court would have discretion to court says Fuller indicated that it was in the discretion of the judge, but noted that Fuller cited Lawrence, which points out the right to proceed pro se was done prior to the swearing of the jury. Tr. 1939. The State argued that they were well past that point, and further questioned whether discretion continued after the jury was sworn. Tr. 1939-40. The State did agree with the court's statement that if Winkler wanted to represent himself, the court had the discretion to decide, and that it would not be a violation of either Brewer or Faretta if in the court's discretion, Winkler's request was denied. Tr. 1940. "I believe that if the court in their discretion declines his assertion to proceed pro se, that the court can find that that's appropriate and that it meets the ends of justice to the administration of justice." Tr. 1940. Winkler's defense counsel disagreed with the court's assessment and argued that the sentencing proceeding was a separate and distinct proceeding from the guilt phase of the trial. Tr. 1941. Counsel argued that Winkler had the right to defend himself if that is what he wants to do, provided the court believes and understands that Winkler is voluntarily making that decision. Tr. 1942. In response, the solicitor pointed to State v. Reed, in

which the defendant was qualified and represented himself in guilt phase, convicted, and during the penalty phase moved to have counsel reappointed. Tr. 1942. The trial court found that since he represented himself in guilt phase, he was no longer entitled to bring his lawyers back. Tr. 1942. The solicitor argued that Reed was the inverse of what happened here, and asked court to consider Reed. Defense counsel argued there was a distinct difference between Winkler's request and the request in Reed because in Reed, counsel was not prepared to step in. Tr. 1943. The Court acknowledged that before he can even get to the point of deciding whether Winkler has made a knowing and voluntary decision, until it resolved its concern about Winkler's medication and whether he fully understands what he's doing. Tr. 1944-45. The Court asked the attorneys to review Fuller and asked if they knew of any other capital case where the request to dismiss counsel came at the conclusion of the guilt phase. Tr. 1945, see Tr. 1947.

After a short recess, the trial court noted on the record that

[t]he research that I've done convinces me that this is the continuation of a trial, and it is not a separate trial. It is a separate proceeding in a bifurcated trial. And pursuant my reviewing Fuller as well as State vs. Reed, by the way, where they make a point of saying that the defendant does not -- that the judge is not required to permit hybrid representation so that part is with counsel and part is without counsel.

Tr. 1948. The court then noted that it was concerned that Winkler may not have had the opportunity to review the volumes of material collected during the mitigation investigation done by counsel. Tr. 1948-49. Further, the trial court was concerned that it would cause a delay of a few days to allow Winkler to review everything, and the court indicated it did not believe that would be

appropriate or fair to delay the proceedings to allow such review. Tr. 1949. The trial court was also concerned about Winkler's mental health because of the concerns regarding Winkler's medication made by defense counsel. Tr. 1949-50. The court was concerned that if there was a problem with Winkler's medication, and the state was objecting to improper questions, it would cause more anxiety because Winkler would have to go to counsel to ask how to respond. Tr. 1950. The trial court was concerned about Winkler's senses being dulled by the medication, and was afraid he would miss points that he would really need to make to help himself. Tr. 1951.

Deborah Hipp, the nurse practitioner who administered drugs at the detention center, testified that she was currently prescribing drugs to keep Winkler calm. Tr. 1951-52. The current dosage was based upon Winkler not being as actively involved as a lawyer would be. Tr. 1952. She further indicated that an increase in anxiety would require more medication, and more medication may make Winkler less alert. Tr. 1952. That caused the trial court great concern. Tr. 1953.

Defense counsel noted that he did not think that Winkler was making this request to delay the trial or in any way impede justice. Tr. 1953. Counsel asserted Winkler was ready and willing to go forward. Tr. 1953. Winkler had indicated that he is familiar with the materials, and Winkler had met with every expert on multiple occasions. Tr. 1953. Counsel concluded by saying he did not agree with Winkler's decision, but he wanted it on the record that there was no

indication that he was mentally incapable of not proceeding on his own if that's what he elects to do. Tr. 1953.

The trial court then asked Winkler if he was familiar with S.C. Code Ann. § 16-3-20. Tr. 1954. Winkler indicated that he was not. Tr. 1954. The trial court then asked if Winkler was familiar with the listed mitigating factors in the statute. Tr. 1954. Winkler again indicated that he was not. Tr. 1955. The trial court then asked defense counsel if he believed Winkler would need time to review all those things so he would understand. In response, defense counsel read part of State v. Brewer:

The determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed pro se does not justify a denial of the right to self-representation. The only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right . . .

Tr. 1955-56.

The trial court responded that if this was the beginning of trial, Brewer would be right on point. Tr. 1956. The court then indicated it was concerned that dismissing counsel would require a long delay so Winkler could review the statutes so he would know what mitigating evidence he could produce and what aggravating evidence the state could not produce, and the court was concerned about Winkler's anxiety situation with his medication. Tr. 1956-57. The trial court did not see how he can be fair to Winkler to permit him to represent himself without giving him an adequate opportunity to review all the law. Tr. 1957. The trial court was also concerned that Winkler did not fully understand what he was requesting. Tr. 1958. The trial court further expressed its concern that the delay

would work to Winkler's detriment because the jury was already sequestered, and it would have to remain sequestered while Winkler prepared. Tr. 1958.

During a recess, the court conducted a telephone conference with Dr. Halanovich, one of Winkler's treating psychiatrists. Tr. 1959. During the conference, Halanovich expressed the same concern the court had with keeping Winkler calm during the proceedings if he represented himself. Halanovich was concerned regardless of whether they increased the medication because it was his personality to get worked up. Tr. 1960. While Winkler's personality had been better since Dr. Smith increased his medication, Klonopin could make Winkler think less clearly and impact his ability to make good, clear decisions. Tr. 1960-61. Halanovich indicated that increasing the dosage would have the same effect as drinking too much alcohol; however, a possible solution might be to give Winkler a smaller dosage if he got worked upon in the courtroom. Tr. 1962. However, a low dose still could dull Winkler. Tr. 1963.

In issuing its decision, the trial court noted that it considered Faretta, State v. Lawrence in the Fourth Circuit, State v. Fuller, State v. McLauren, State v. Reed, State v. Brewer, State v. Walters from North Carolina, Grandson v. Maryland, U.S. v. Dunlap, another Fourth Circuit decision, Kubsch v. Indiana, and State v. Bateman. Tr. 1965-66. The trial court found this was a bifurcated trial. Tr. 1967. Under Fuller, it was clear that it was not an absolute right to waive counsel in the middle of trial. Tr. 1968. Such requests are within the discretion of the trial court. Tr. 1968. The trial court noted that both Walters and Lawrence support that position. Tr. 1968. Furthermore, the court indicated it

was persuaded by Dunlap in the sense that the court had the obligation to minimize disruptions, avoid inconvenience and delay, maintain continuity, and avoid confusing the jury. Tr. 1968. The judge further noted that in Lawrence, only the jury had been selected; trial had not even proceeded other than the jury being sworn. Thus, in exercising discretion in deciding whether to permit the defendant to proceed pro se, the court must make sure its decision is not an abuse of discretion. Tr. 1968-69. The decision must really consider the rights of the defendant, fairness of trial, rights of state, rights of jury to make sure they are presented matters that will let them make a decision after being presented evidence on both sides and with an opportunity to decide those issues. Tr. 1969. The trial court was concerned with Winkler's ability to proceed without the anxiety situation. Tr. 1969. Since there was a jury waiting, and it had already been selected and heard the first part of trial, the court found it would be undue delay to wait, and that would be improper in the administration of justice. Tr. 1970. Further, the court was concerned the jury may be confused to have one half of the case tried by counsel and the second half of the case tried without counsel, especially if the jury could see counsel at the defendant's counsel table. Tr. 1970. In all, the court determined it would not be in the proper administration of justice to allow Winkler to proceed pro se, so the court decided it would not be proper to grant his motion. Tr. 1971.

III. THE TRIAL COURT CORRECTLY FOUND THAT THE DECISION REGARDING WHETHER WINKLER WAS ENTITLED TO REPRESENT HIMSELF DURING THE SENTENCING PHASE OF TRIAL WAS WITHIN THE TRIAL COURT'S DISCRETION.

The trial court was correct when it found that it was within the court's discretion whether Winkler should be allowed to represent himself during the sentencing phase of the trial. Winkler's request to proceed pro se during the sentencing phase was made well after the trial began.

It is well-established that an accused may waive the right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975). Although a defendant's decision to proceed pro se may be to the defendant's own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. at 834, 95 S.Ct. at 2541 (internal quotation omitted). A defendant's right to waive the assistance of counsel is not unlimited. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). The request to proceed pro se must be clearly asserted by the defendant prior to trial. Fuller, 337 S.C. at 241, 523 S.E.2d at 170 (citing State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998)); State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991), cert. denied, 502 U.S. 1103, 112 S.Ct. 1193, 117 L.Ed.2d 434 (1992). "If the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge." State v. Fuller, 337 S.C. at 241, 523 S.E.2d at 170 (citing U.S. v. Singleton, 107 F.3d 1091 (4<sup>th</sup> Cir. 1997); U.S. v. Lawrence, 605 F.2d 1321 (4th Cir.1979)).

Winkler's request to proceed pro se in this case was clearly not timely. Winkler did not make the request until the day the sentencing phase of his trial was to commence. Tr. 1926. The sentencing phase of a capital trial does not constitute a separate trial. See S.C. Code Ann. § 16-3-20(B); See generally, State v. Stewart, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986). Thus, Winkler's request to proceed pro se could not be considered timely. As a result, it was clearly within the trial court's discretion to decide whether Winkler would be allowed to proceed pro se in this case. This argument for relief should therefore be dismissed.

The cases cited by Winkler to support his argument that it was not within the court's discretion to decide whether he could proceed pro se when the request was made during just before the sentencing phase either support the proposition the decision on whether a defendant is allowed to proceed pro se when the request is made after the trial has begun or are clearly distinguishable from Appellant's case. In Commonwealth v. Davido, 582 Pa. 52, 65, 868 A.2d 431, 438 (2005), the Supreme Court of Pennsylvania noted that in its previous decision in Commonwealth v. Owens, 496 Pa. 16, 436 A.2d 129 (1981), it had

noted that "[w]here the accused does not request to represent himself before trial, the constitutional right to self-representation recognized in Faretta is not implicated. When, during the course of trial, an accused wishes to dismiss counsel and either represent himself or obtain new counsel, his request is addressed to the sound discretion of the trial court." Owens, 436 A.2d at 133 n. 6 (citations omitted); see also United States v. McKenna, 327 F.3d 830, 844 (9th Cir.2003); Commonwealth v. Jermyn, 551 Pa. 96, 709 A.2d 849, 863 (1998).

Davido, 582 Pa. at 65, 868 A.3d at 438.



Winkler's reliance upon United States v. Davis, 285 F.3d 378 (2002), is also misplaced. The defendant in Davis had been granted a new sentencing trial due to an error in his original trial. Id. at 380. The defendant had requested to proceed pro se in his new sentencing trial. Id. After a Faretta hearing, the trial court found that the defendant's decision to represent himself was knowingly and intelligently made. Id. However, the district court concluded that the right to self representation did not extend to sentencing, and that even if it did, Davis's interest were outweighed by the Eighth Amendment requirement that the death penalty not be applied arbitrarily or capriciously. Id. The Fifth Circuit Court of Appeals overturned the trial court's decision when the defendant filed for a writ of mandamus to require the district court to allow him to proceed pro se. Id. at 380. The Fifth Circuit did allow the district court to appoint standby counsel. Id. At issue in the Davis opinion was whether the district court failed to comply with the Fifth Circuit's writ of mandamus when it appointed independent counsel to represent the defendant. Id. The district court had appointed counsel to present a mitigation case that the defendant had indicated that he did not want to present. Id. at 381. The appointed counsel's presentation would have been independent of the defendant's defense case. Id.

The Fifth Circuit's opinion in Davis is not applicable to Winkler's case for several reasons. First, unlike Winkler's case, there was no question that the defendant in Davis timely requested to represent himself in his new sentencing hearing. The timeliness of the defendant's request in Davis was never an issue before either the district court or the Fifth Circuit. Since the defendant in Davis

had timely moved to represent himself in his new sentencing trial, it was not within the trial court's discretion whether the defendant could proceed pro se. This is clearly distinguishable from Winkler, whose request to represent himself was not timely because it was not made before the beginning of trial.

Second, the Fifth Circuit has recognized that a trial court has the discretion to decide whether to grant a defendant permission to proceed pro se when the request to do so is untimely. Wood v. Quarterman, 491 F.3d 196, 201-02 (5<sup>th</sup> Cir. 2007)(citing Martinez v. Court of Appeal, 528 U.S. 152, 162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000); United States v. Davis, 269 F.3d 514, 520 (5<sup>th</sup> Cir.2001) ("The district court was not obliged to honor Davis's mid-trial request to represent himself.") (citing Moreno v. Estelle, 717 F.2d 171, 176 (5<sup>th</sup> Cir.1983)); see also Haynes v. Cain, 298 F.3d 375, 384 (5<sup>th</sup> Cir.2002) (en banc) (Dennis, J., concurring)). In Wood, the Fifth Circuit found that the state court did not unreasonably apply federal law when it found the trial court had the discretion to deny a motion to proceed pro se when the defendant made the motion after the guilt phase and immediately before the sentencing phase in his capital trial. 491 F.3d at 202. The state habeas court in Wood held the trial court had the discretion because the motion was not timely. Id. at 201-02.

People v. Miller, 153 Cal.App.4<sup>th</sup> 1015, 62 Cal.Rptr.3d 900 (2007) is also not applicable. In Miller, a non-capital case, the defendant requested to represent himself at his sentencing hearing. The California Court of Appeals held that the defendant's request to proceed pro se was timely because sentencing in non-capital cases in California are post-trial matters. 153

Cal.App.4<sup>th</sup> 1023-24; 62 Cal.Rptr.3d at 905-06. Thus, the defendant's request was not untimely when it was made after the trial was completed and after his motion for a new trial was dismissed. In its reasoning, the California Court of Appeals, Fifth District, noted that in People v. Windham, 19 Cal.3d 121, 124, 137 Cal.Rptr. 8, 560 P.2d 1187 (1977), the California Supreme Court concluded "that 'when a defendant has elected to proceed to trial represented by counsel and the trial has commenced, it is thereafter within the sound discretion of the trial court to determine whether such a defendant may dismiss counsel and proceed pro se.'" Miller, 153 Cal.App.4<sup>th</sup> 1021; 62 Cal.Rptr.3d at 903. Further, the California Court of Appeals acknowledged that the California Supreme Court

has held that, for purposes of assessing the timeliness of a motion for self-representation, a motion made between the guilt and penalty phases in a capital prosecution is untimely, and therefore subject to the trial court's discretion, because the guilt and penalty phases are not separate trials, but parts of a single trial.

Id. at 1023, 62 Cal.Rptr.3d at 905.

Hojan v. Florida, 3 So.3d 1204 (2009), is not applicable to this case. The issue in Hojan was whether a defendant could waive the presentation of mitigation evidence. Id. at 1211. There was no issue of whether the defendant could proceed pro se in that case. Similarly, Cowans v. Bagley, 624 F.Supp.2d 709 (S.D.Ohio 2008), is not applicable because the defendant never requested to proceed pro se in his case. Also, Lamarca v. Florida, 931 So. 2d 838 (2006), is not applicable because there is no discussion regarding the decision by the trial court to allow the defendant to proceed pro se for the sentencing phase of his trial. This issue was not an appellate issue at any point in time during the

proceedings, either in Lamarca's direct appeal or in his post-conviction relief action appeal. Finally, Chapman v. Commonwealth, 265 S.W.3d 156 (Ky 2007), is not applicable to this issue. In Chapman, the defendant moved to fire his attorneys and proceed pro se well before his trial. Id. at 161. Thus, there was no issue of whether the trial court had the discretion to either grant or deny the request before either the trial or appellate court.

In all, Winkler has failed to establish that the trial court incorrectly determined that it was within the court's discretion to either grant or deny his request to represent himself during the sentencing phase of his trial. Faretta did not apply to this determination because the motion to proceed pro se was not timely made. As a result, it was well within the sound discretion of the trial court to decide to deny the motion. Winkler's argument in the alternative, that his case was not governed by the abuse of discretion standard lacks merit. As a result, this claim for relief should be dismissed, and Winkler's convictions and death sentence should be affirmed.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WINKLER'S REQUEST TO PROCEED PRO SE; THE COURT'S FINDING THAT GRANTING THE MOTION WOULD CAUSE UNDUE DELAY BECAUSE OF WINKLER'S NEED FOR TIME TO PREPARE, CONCERNS ABOUT WINKLER'S ANXIETY, AND CONCERNS REGARDING POTENTIAL JURY CONFUSION SUPPORTED THE COURT'S FINDING THAT IT WOULD IMPEDE IN THE ADMINISTRATION OF JUSTICE IF THE MOTION WAS GRANTED.

As already noted, “[I]f the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge.” State v. Fuller, 337 S.C. at 241, 523 S.E.2d at 170 (citing U.S. v. Singleton, 107 F.3d 1091 (4<sup>th</sup> Cir. 1997); U.S. v. Lawrence, 605 F.2d 1321 (4<sup>th</sup> Cir.1979)). “In justifying the need to timely raise the right of self-representation, the courts recognized, among other things, the need to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury. In light of this limitation on the right of self-representation existing before Faretta, the courts held that whether the defendant could dismiss counsel and proceed pro se was within the sound discretion of the trial court.” United States v. Dunlap, 577 F.2d 867, 868 (4<sup>th</sup> Cir. 1978). “Once trial commences, that right [to proceed pro se] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress.” United States v. Wesley, 798 F.2d 1155,

1155-56 (8<sup>th</sup> Cir. 1986). “[O]nce a trial has begun, a defendant’s right to represent himself ‘is sharply curtailed,’ and the judge considering the motion must weigh ‘the prejudice to the legitimate interests of the defendant’ against the ‘potential disruption of proceedings already in progress.’” United States v. Stevens, 83 F.3d 60, 66-7 (2d Cir. 1996).

The trial judge clearly exercised due discretion in denying Winkler’s request to proceed pro se for the sentencing phase of his trial. The trial court indicated that it had three major concerns regarding Winkler’s request. First, the trial court noted that it was concerned that Winkler’s medication would affect his ability to properly and fully function as his own counsel. Tr. This concern was well founded in the record. During the guilt phase of Winkler’s trial, the closing arguments were delayed because Winkler needed to take his medication, and it was not immediately available in the courtroom. Tr. 1833-35. Winkler’s medication issues were also raised as a concern before he moved to proceed pro se on the morning the sentencing phase was set to begin. Tr. 1915. The trial court heard from the nurse practitioner who administered Winkler’s medication at the detention center. The current dosage was based upon Winkler not being as actively involved as a lawyer would be. Tr. 1952. She further indicated that an increase in anxiety could require more medication, and more medication may make Winkler less alert. Tr. 1952. That caused the trial court great concern. Tr. 1953. Dr. Halanovich also expressed concern about Winkler’s anxiety because she felt that he could get more frustrated in handling the case on his own. Tr. 1960. She indicated that the medication might not

prevent that from happening because of his personality. Tr. 1960. She also noted that the medication, which had been increased during the course of the trial, could dull Winkler if increased even more. Tr. 1961.

Second, the trial court was concerned that allowing Winkler to represent himself at this juncture of the trial would require some delay in order for Winkler to fully prepare for trial. Specifically, the court noted that Winkler did not appear to understand some of the basics of courtroom procedure, including the rules of evidence, and Winkler was not aware of the law regarding mitigation. This was supported by Winkler's responses to the trial court's inquiries on those subjects. Winkler asserts that the trial court applied the wrong standard in assessing whether Winkler should have been allowed to proceed pro se. He asserts that the only relevant inquiry in deciding whether Winkler should have been allowed to proceed pro se was whether the accused made a knowing and intelligent waiver of the right to counsel, as outlined in State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997). See Brief of Appellant at p. 40. As noted by the trial court, however, Brewer did not apply to Winkler's request to proceed pro se. In Brewer, the defendant appears to have timely filed his motion to proceed pro se. Thus, as noted in the discussion in Section III, the defendant would have an absolute right to proceed pro se as long as his request to do so was voluntarily and intelligently made. See Faretta, supra; Fuller, supra. Unlike Brewer, however, Winkler's request was not timely. As a result, the standard for assessing whether a defendant should be allowed to proceed pro se outlined in Brewer did not apply to Winkler's case. Thus, the trial court could properly consider Winkler's

knowledge of the processes of the court, and the time it would take for Winkler to prepare his case.

Third, the trial court was concerned that allowing Winkler to proceed pro se would confuse the jury, especially in light of the fact that his attorneys for the guilt phase would be sitting at Winkler's counsel table as standby counsel. In all, the trial court found that when considering those three concerns together, those concerns weighed against granting Winkler's motion because they would lead to undue delay and would be improper in the administration of justice. The trial court also indicated that if for no other reason, there would likely need to be a delay if Winkler was allowed to proceed pro se just to determine if Winkler would need additional medication to continue as a result of his anxiety situation. See Tr. 1973. In light of the reasoned decision by the trial court, Winkler cannot establish that the court's denial of his motion to proceed pro se was an abuse of discretion. As a result, this claim for appellate relief should be dismissed.



V. THE TRIAL COURT DID NOT ERR WHEN IT GAVE ITS WARNINGS TO WINKLER REGARDING SELF-REPRESENTATION: A FULL FARETTA INQUIRY WAS NOT REQUIRED BECAUSE FARETTA DID NOT APPLY; WINKLER'S MOTION TO PROCEED PRO SE WAS NOT TIMELY.

Faretta did not apply to Winkler's request to proceed pro se because Winkler's request was untimely. As noted in Argument Section III, did not request to represent himself until after the guilt phase was completed, and the sentencing phase was about to begin. The right to self-representation in Faretta is not absolute, and it is within the sound discretion of the trial court whether Since Faretta did not apply to Winkler's request to proceed pro se, the trial court did not err in not providing Winkler with a full, focused waiver hearing.

Contrary to Appellant's assertion in his brief, Fuller does not require reversal. Fuller is clearly distinguishable from Winkler's case. In Fuller, the defendant moved to waive counsel and proceed pro se on the morning of trial before the charges were read and before the jury was selected and sworn. 337 S.C. at 240, 523 S.E.2d at 170. The Supreme Court declined to hold that a motion to proceed pro se is either timely or untimely when the motion is made on the morning of trial prior to the beginning of trial proceedings as a matter of law. Id. at 241, 523 S.E.2d at 171 (citing People v. Mogul, 812 P.2d 705 (Colo.Ct.App.1991)). The Supreme Court further noted that the trial court failed to conduct an adequate hearing to fully assess the purpose behind the defendant's request or to determine what effect the granting of the request would have had on the proceedings. Fuller, 337 S.C. at 242, 523 S.E.2d at 171.

Fuller does not reach the issue of whether a full Faretta hearing is required in every case where a defendant moves to proceed pro se. The Supreme Court only found that when the timeliness or untimeliness of a motion to proceed pro se is in question, a trial court should conduct a hearing to assess the purpose behind the request and to determine the effect granting the request would have on the proceedings. Furthermore, unlike Fuller, it is clear that Winkler's request to proceed pro se was untimely. The jury was selected, and a verdict upon Winkler's guilt was in place when Winkler made his request to proceed pro se. Thus, the concerns raised by the Supreme Court in Fuller were not present. Finally, the trial court did engage in an adequate hearing to determine the motives behind Winkler's request to proceed pro se and the effect granting the request would have on the proceedings as required by Fuller. The request initially arose from Winkler's insistence that he be allowed to question witnesses that would be presented by the state during the sentencing phase of his trial. Winkler was allowed to explain why he wished to proceed pro se. In his analysis, the trial judge noted that he had some concerns about the effect of allowing Winkler to represent himself at that time would lead to undue delay and would have impede the administration of justice. The trial judge pointed out that he had concerns about Winkler's anxiety issues and his preparedness to continue with the trial immediately if the request was granted. The court also indicated it was concerned that allowing Winkler to represent himself would also confuse the jury. Thus, the trial court clearly engaged in the analysis required by Fuller when it denied Winkler's motion to proceed pro se.

Overall, Winkler has failed to establish that he was entitled to a full Faretta hearing because his request to proceed pro se was untimely. As a result, the trial court did not err by not providing Winkler with a full, focused waiver hearing as outlined by Faretta. The trial court also complied with the requirements outlined in Fuller. Since Winkler has failed to establish that he was entitled to a full Faretta hearing in his case, this claim for appellate relief should be dismissed.

VI. THE TRIAL COURT DID NOT ERR BY ALLOWING DEFENSE COUNSEL TO PRESENT MITIGATING SOCIAL HISTORY EVIDENCE: THIS ARGUMENT FOR RELIEF IS NOT PRESERVED FOR APPELLATE REVIEW BECAUSE IT WAS NOT TIMELY MADE; IT WAS NOT FULLY DEVELOPED BEFORE THE TRIAL COURT, AND IT WAS NOT RULED UPON BY THE TRIAL COURT.

**Relevant Facts**

During Winkler's mitigation case, the defense presented the testimony of several witnesses. First, Dr. Richard Frierson, a forensic psychiatrist, testified that he diagnosed Winkler with having depressive disorder not otherwise specified, anxiety, alcohol abuse, and having some paranoid personality traits. Tr. 2338-39, 2343-46. During cross-examination, Frierson noted that Winkler did not have a history of childhood physical abuse, childhood sexual assault or child neglect. Tr. 2347. Dr. Rikki Halanovich, another forensic psychiatrist, testified that she diagnosed Winkler with borderline personality disorder, major depressive disorder, alcohol dependence and cocaine abuse. Tr. 2655-57, 2658-60. Dr. William Morton, Jr., who was qualified as an expert in psychopharmacology, also testified. Tr. 2695-2743.

Te Anne Oehler, a social worker, testified that Winkler's father was very controlling of his mother. Tr. 2752. When Winkler's parents were first married, they moved in with his father's parents. Tr. 2752. Winkler's father made his mother quit her job, even before they had children. Tr. 2752. Further, Oehler testified that Winkler's father worked at the family owned bar. Winkler's father would come home late at night, was very controlling of Winkler's mother, and he

would not let her have any money of her won. Tr. 2752. By the time the second Winkler child was born, Winkler's mother was emphatic that the new family move out into their own home. Tr. 2752.

Oehler further testified that Winkler's mother was the primary caregiver because she was the person home during the day. Tr. 2753. His mother was the person involved with Winkler's schoolwork. Tr. 2753. Winkler's father did coach all of the boys on their sports teams. Tr. 2753. However, Winkler's father would leave and go out after dinner, and he would not come back until 1 or 2 am. Tr. 2753. Oehler noted that Winkler's father had frequently been drinking a lot, and he was not always present at home. Tr. 2753-54. She stated that Winkler's father was very controlling towards family members, and he had very poor parenting skills. Tr. 2754. While Winkler denied his father ever beat him, both of the oldest Winkler children informed Oehler that their father had beaten them. Tr. 2754. The only exception was when Winkler was a junior in high school, and his mother found marijuana in the bathroom. Tr. 2754. Oehler testified that when she told Winkler's father that evening after work, Winkler's father grabbed Winkler by the throat and started choking him. Tr. 2754. According to Oehler, Winkler's mother informed Oehler that she did not tell his father of any other transgressions out of fear that he might hurt Winkler worse. Tr. 2754-55.

Oehler also testified that Winkler got his first drink from his father on a camping trip when Winkler was 13. Tr. 2755. By the time Winkler graduated from high school, he was using alcohol and marijuana frequently. Tr. 2755. At that point, if there was any problem with one of the Winkler children, Winkler's

mother addressed it. Tr. 2755. Winkler's father was out of the home working more with his insurance business. Tr. 2755.

Oehler also testified about Winkler's personal history with women. She noted that Winkler tended to seek out women who had children. Tr. 2758. She also noted that Winkler was a chronic drinker throughout the years, starting when he was a teenager. Tr. 2760. She testified that the drinking affected his ability to hold down a job, and she noted that the longest tenure for Winkler at a job was his last one with the property management company. Tr. 2760. Oehler asserted that Winkler did not immediately trust others, and he would remain suspicious of others until they proved otherwise. Tr. 2761. Winkler grew up in a strict Catholic home where his father was very rigid. Tr. 2761-62. There was no physical abuse later in Winkler's upbringing. Tr. 2762. Also, Winkler's father controlled his wife and children through finances. Tr. 2762. This was a source of conflict in the family among the older children because Winkler's father helped Winkler out financially every time. Tr. 2762-63. Oehler indicated that Winkler lived a happy-go-lucky life growing up that he tried to replicate by seeking women with children. Tr. 2763. She testified that Winkler had difficulty in relationships with peers because he sought to be the center of attention, and he wanted affirmation from others. Tr. 2766. Some of his family relationships focused around holiday times, and he always seemed to be surrounded by children. Tr. 2766-67.

After further testimony from Oehler, Rosemary Wolfe, a tenant in the Tillman property where Winkler worked testified on his behalf. Tr. 2782-87.

During the break after Wolfe's testimony, defense counsel stated the following on the record:

As you know, the record will reflect that I put up a social, social history through a sociologist, Ms. Oehler, in -- regarding the defendant and his history and his family. And the defendant wants me to let the court know that he had asked me not to put up any social history and that I put that up in spite of his objections. And for the record, I'm noting that he did ask me not to put any social history in because he didn't want anything derogatory said about his family. But in my judgment as a lawyer, I felt it was the appropriate thing to do and I did it.

Tr. 2788. The trial court noted the statement on the record. Winkler then stated

Sir, I'd like to also again put for the record that, that again disobeying what I, I asked him, what I -- you know, I told him specifically that I did not want my family dragged through the mud, and he did it anyway.

I'm asking again for a new lawyer. This is the third time that he's done that. He did it on the witness stand earlier today, and it's everything I'm asking him to do, he's going against me. I asked him for a recess, he ignored me while that was going on, while his, while his -- Ms. Te Anne was doing that, and he ignored me.

Tr. 2789.

### **Argument**

First, Winkler failed to preserve this issue for review on direct appeal. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court." State v. Goodwin, 384 S.C. 588, 603, 683 S.E.2d 500, 508 (Ct.App.2009)(citing State v. Turner, 373 S.C. 121, 126 n. 1, 644 S.E.2d 693, 696 n. 1 (2007)). Respondent submits that no proper objection was ever made to any of the testimony of the social worker Te Anne Oehler before or during her testimony. Counsel only had the court note for the record that Winkler did not want Te Anne Oehler to testify about his family history. This was not sufficient to preserve this issue for appellate review. The trial court was

not asked to rule upon any objection. Further, the trial court did not rule upon the notation made in the record. Thus, there is no alleged preserved error to review on appeal. As a result, this claim for relief should be dismissed. Note that this case is not similar to the circumstances in Hojan, supra, in which the defendant waived the presentation of certain mitigating evidence on the record. In Winkler's case, no such motions were ever presented to the trial court. Thus, there was no issue upon which the trial court could rule regarding the presentation of evidence during the sentencing phase.

Second, the issue raised in Winkler's sixth appellate argument is not an appropriate claim for direct appeal. This Court has held that ineffectiveness assistance of counsel claims are "not appropriate for review on direct appeal, and may be asserted only in proceedings under the Post-Conviction Procedure Act." State v. Kornahrens, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986). Winkler's claim in this argument is the equivalent of an ineffective assistance of counsel claim. In Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551 (2004), the United States Supreme Court stated

An attorney undoubtedly has a duty to consult with the client regarding "important decisions," including questions of overarching defense strategy. Strickland, 466 U.S., at 688, 104 S.Ct. 2052. That obligation, however, does not require counsel to obtain the defendant's consent to "every tactical decision." Taylor v. Illinois, 484 U.S. 400, 417-418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval).

Nixon, 543 U.S. at 187, 125 S.Ct. at 560.<sup>4</sup> Resolution of this claim for relief on direct appeal would necessarily require examination into whether the decision

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<sup>4</sup> Florida v. Nixon reversed Nixon v. Singletary, which was cited by the Florida Supreme Court in Hojan.



regarding what questions to ask Te Anne Oehler constituted tactical decisions within the control of counsel or were instead important decisions within the control of the defendant. In all, the record is clearly insufficient to support a finding on this issue in this case. As a result, this claim for appellate relief should be dismissed.

VII. THE TRIAL COURT CORRECTLY DENIED WINKLER'S MOTION FOR A  
DIRECTED VERDICT ON THE STATUTORY AGGRAVATING  
CIRCUMSTANCE OF THE MURDER OF A WITNESS TO IMPEDE OR DETER  
PROSECUTION OF A CRIME; THERE WAS SUBSTANTIAL  
CIRCUMSTANTIAL EVIDENCE SUPPORTING THE CHARGE.

**Relevant Facts:**

At the close of the State's case during the sentencing phase of Winkler's trial, counsel moved for a directed verdict on the second aggravating factor asserted by the State, which was the murder was of a witness or potential witness committed at any time during a criminal process for the purpose of impeding or deterring the prosecution of any kind. Tr. 2307.

I would submit to the court that while there has certainly been evidence produced of a crime, there has been no evidence produced that it was for the purpose of deterring or impeding the criminal procedure which would have followed. And, and, and because of that, I would think that they failed, then, to have proven this particular statutory aggravating circumstance as a matter of law. And I would ask the court to rule as a matter of law that the state has failed to prove that as an aggravating circumstance.

Tr. 2307. The trial court noted that the state had had introduced evidence that there was an allegation, and Winker was arrested for several charges: criminal sexual conduct in the first degree, kidnapping, and assault and battery with intent to kill. Tr. 2307. Further, there was evidence introduced that the victim was a witness to that crime, so based on the circumstances the death of the victim would have been the death of a witness of the prosecution. Tr. 2307-08. The State asserted that was exactly what it was going to argue, and further contended that if you take the defense's argument to its logical conclusion, the

state would never be able to prove that a killing was for the purpose of impeding or deterring a prosecution unless the defendant stated that he killed her so she could not testify. Tr. 2308. The trial court found there was sufficient evidence for the jury to find the aggravating circumstance beyond a reasonable doubt based on circumstantial information. Tr. 2308-09.

At the close of the defense's case, defense counsel renewed its motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11). Tr. 2817. The trial court again denied the motion because of the existence of circumstantial evidence. Tr. 2817.

### **Argument**

"In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned with the existence of the evidence, not its weight." State v. Smith, 298 S.C. 482, 485, 381 S.E.2d 724, 726 (1989). "The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it." State v. Lindsey, 372 S.C. 185, 194-195, 642 S.E.2d 557, 562 (2007)(citing State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000)).

There was substantial circumstantial evidence to support the aggravating circumstance enumerated in S.C. Code Ann. § 16-3-20(C)(a)(11): "[t]he murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime." First, the State clearly established there was an ongoing criminal process against Winkler when he murdered his estranged wife. During the sentencing phase, the

State presented evidence establishing that there was an open case against Winkler for kidnapping, criminal sexual conduct in the first degree, and assault and battery with intent to kill. On October 10, 2005, Haley Grainger and her sister became concerned about their mother's whereabouts. Tr. 2167. Haley's sister had called. Tr. 2167. That led Haley and her boyfriend to start looking for Rebekah. Tr. 2168. Jill Shelley, Rebekah's other daughter, also testified about the night of the kidnapping. Tr. 2293. Shelley indicated she first became concerned when she found out from her brother that he was not picked up from a football game on October 10, 2005. Tr. 2293-94. Shelley called the police when she first heard of the problem. Tr. 2294. She noted that her mother's Land Rover was found that night, but there was no sign of either Rebekah or Winkler. Tr. 2295. Shelley saw her mother the next morning at Seacoast hospital. Tr. 2295. Shelley testified that her mother was very beat up and dirty. Tr. 2295. Rebekah's eye was very swollen, and her hair was matted with sand spurs and twigs. Tr. 2296. Rebekah was also nervous, and she wanted them to do something with Winkler to get him away from her. Tr. 2296.

Lisa Gore, a staff nurse at Seacoast Medical Center, treated the victim when she was brought in on October 11, 2005. Tr. 2195-96. Gore testified that the victim had injuries to the left eye, some swelling to the jaw area, bruising around the neck, dried blood about the face, a fractured nose, an upper lip injury, redness under her right eye, corneal abrasions, multiple bruises and contusions, and a bite mark to the face. Tr. 2205-06. Gore also testified that the victim had a large amount of hair removed from her head, along with some matting and

disarrangement of her hair with leaves and debris mixed in. Tr. 2206. Gore also indicated there were bruises to Rebekah's arms and wrists, the tops of her hands, her neck area, scrapes on her torso, belly, and back, and contusions and scrapes to her lower legs, thighs, and feet. Tr. 2207-10. A sexual assault evidence kit was collected from Rebekah. Tr. 2213-15.

Ann Pitts responded to the Stephen's Crossroads Complex. Tr. 2220. She later responded to the Seacoast Medical Center to interview the victim. Tr. 2221. Pitts testified that the victim seemed to be in shock, and was very afraid. Tr. 2222. Rebekah did tell Pitts what happened and where it happened. Tr. 2222. The victim also described the clothes she was wearing. See Tr. 2226. While those clothes were not recovered when Pitts, the victim, and Detective Livingston initially went to the area, they were later recovered when members from the crime scene unit and dog team searched the area. Tr. 2226. Haley also identified a toe ring, an earring, a hair clip, shorts, and a shirt with a wad of hair in it that all belonged to Rebekah. Tr. 2171. Jeff Gause, a police officer with the Horry County Police Department, testified that he recovered the shorts, a shirt with a wad of hair, a hair clip, and some underwear from a partly wooded area of the county that he had been informed was part of the area in which the assault took place. Tr. 2176-80. Neil Livingston, a detective with the Horry County Police Department, testified that he recovered an earring and another piece of jewelry from the inside of a commercial building that was under construction in the Little River section of Horry County. Tr. 2184-91. John Ortuno, a DNA analyst for SLED, testified that the DNA from the semen found in

the rectal and vaginal swabs from the sexual assault evidence collection kit matched Winkler's DNA. Tr. 2244-49.

Pitts testified that Winkler was arrested for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping on October 11, 2005. Tr. 2227. He was found at a friend's house. Tr. 2227. When he was arrested, he was wearing blue jean shorts, a t-shirt with some type of printing on it, and some brown shoes. Tr. 2228. Pitts was also present at Winkler's first bond hearing. Tr. 2230. Bond was initially denied in his case. Tr. 2231. At a second bond hearing, Winkler's bond was set at \$150,000, and he was required to wear an electronic monitor while out on bond. Tr. 2231-33. Pitts also testified that at Winkler's third bond hearing, his bond was amended to allow him to remove his electronic monitor for two hours so he could seek employment. Tr. 2233-34. According to the bond, the monitor was to be off from 4pm to 6pm.

Second, Rebekah, the victim, was clearly a witness or potential witness in Winkler's trial on these three charges. Third, there was clear circumstantial evidence to support a finding that he killed his estranged wife to impede or deter the kidnapping and criminal sexual conduct prosecution. First, during the guilt phase of the trial, Jonathan testified that He testified that Winker was stating, "I'm back and you thought I was going to prison, something like that," when he broke into the condo. Tr. 1431. He was yelling very loud. Tr. 1431. Mary Elizabeth C., Jonathan's friend, testified that she was on the phone with Jonathan when she heard a loud pop noise, and a voice that was not Jonathan's say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not -- I'm back, I'm back.

I'm never going back to jail." Tr. 1511-1512. Jill Shelley testified that during the incident on September 2005, Winkler warned Rebekah that she knew what would happen if someone called the police on him. Tr. 2292. Further, the last item of evidence introduced during the sentencing phase of Winkler's trial was a letter that Winkler asserted that Rebekah had lied to the police about the first set of charges against him (i.e. the kidnapping, criminal sexual conduct, and ABWIK). Tr. 2302. He claimed that the evidence clearly showed that Rebekah was driving the Land Rover when it crashed, and she lied to establish the charges against him (i.e. the kidnapping, criminal sexual conduct, and ABWIK). Tr. 2302. He claimed that the evidence clearly showed that Rebekah was driving the Land Rover when it crashed, and he alleged that Rebekah lied because she was afraid to tell Shelley. Tr. 2302. Winkler also asserted that Rebekah would not be dead had Shelley not initially called the police. Tr. 2302.

In all, there was clearly sufficient circumstantial evidence to support the statutory aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11). As a result, Winkler's claim for appellate relief in his seventh argument should be dismissed.

Even if the trial court erred in not granting Winkler's motion for a directed verdict, the error was harmless. "[A] death sentence supported by at least one valid aggravating circumstance need not be set aside ... simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty." Zant v. Stephens, 462 U.S. 862, 884, 103 S.Ct. 2733, 2746 (1983). Since the jury also found there was evidence beyond a

reasonable doubt to support the aggravating factor enunciated in S.C. Code Ann. § 16-3-20 (C)(a)(x), and the burglary aggravating circumstance was supported by sufficient evidence, any error in charging the jury with the second aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11) was harmless. State v. Elkins, 312 S.C. 541, 545, 436 S.E.2d 178, 180 (1993) (“[T] the failure of one aggravating circumstance does not so taint the proceedings as to require reversal where there remains a valid aggravating circumstance upon which the sentence of death is based.”); see United States v. Higgs, 353 F.3d 281 (4<sup>th</sup> Cir. 2003);



CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to deny Winkler's appeal and affirm his convictions for murder, burglary in the first degree, assault and battery of a high and aggravated nature, and his death sentence.

Respectfully submitted,

HENRY DARGAN McMASTER  
Attorney General

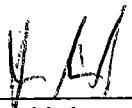
JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

ALPHONSO SIMON JR.  
Assistant Attorney General  
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J. GREGORY HEMBREE  
Solicitor, Fifteenth Circuit  
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Conway, South Carolina 29526

**ATTORNEYS FOR RESPONDENT**

By:  \_\_\_\_\_  
Alphonso Simon Jr.

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

January 4, 2010.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Horry County  
The Honorable James E. Lockemy, Circuit Court Judge

---

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT.

---

**DESIGNATION OF MATTER  
TO BE INCLUDED IN THE RECORD ON APPEAL**

---

Respondent also requests all of the items requested by Appellant in his designation of matter be included in the Record on Appeal. In addition to the matter designated by the Appellant, Respondent proposes the following to be included in the Record on Appeal:

1. State's Exhibit 8;
2. State's Exhibit 70;
3. State's Exhibit 148
4. State's Exhibit 149
5. State's Exhibit 159
6. Court's Exhibit 18.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

HENRY D. McMASTER  
Attorney General

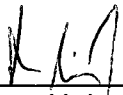
JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
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Conway, SC 29528-1276

**ATTORNEYS FOR RESPONDENT**

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\_\_\_\_\_  
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Columbia, South Carolina 29211  
(803) 734-6305

January 4, 2010.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

---

INITIAL REPLY BRIEF OF APPELLANT

---

ROBERT M. DUDEK  
Chief Appellate Defender

ELIZABETH A. FRANKLIN-BEST  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

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## ARGUMENTS IN REPLY

3.

Defense counsel was clear that appellant was ready to proceed and that he wanted to represent himself during the penalty phase. No delay was necessary, defense counsel supported appellant's decision to represent himself, and the judge abused his discretion by refusing to allow appellant to represent himself under the unusual facts of this case.

Appellant did not want to go quietly to his death represented by an attorney who only a few days earlier had assaulted him. Appellant was willing and ready to represent himself and the trial would not have been delayed. Defense counsel repeatedly and correctly stated appellant had the right to represent himself and the trial would not have been disrupted. The state's ascertain to the contrary find no support in the record, and this case simply is not State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998).

In State v. Reed the defendant asked to have his standby counsel take over and cross-examine witnesses during the penalty phase. This court noted "standby counsel stated that while he would do his best to prepare to cross-examine witnesses, he was *not prepared* to represent appellant during the penalty phase. Standby counsel stated he had not investigated the case in reference to victim impact evidence or mitigation." 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998) This Court concluded that it would be a hybrid form of representation placing standby counsel in the position of not being fully prepared to cross-examine witnesses without delaying the trial.

Here, conversely, preparation was not an issue and appellant was not attempting to put his attorney in an unfair position of later being held ineffective because he was not prepared. Appellant simply wanted control over the penalty phase of his trial, and in this

highly unusual case where his attorney had assaulted him and appellant had good reason not to have confidence in the defense team, it was an abuse of discretion for the judge to refuse to allow appellant to defend himself.

Faretta v. California 422 U.S. 806 (1975) is anchored in affirming the dignity of a defendant who wishes to represent himself where his life or liberty is at stake rather than having the government impose counsel that the defendant does not trust to represent him. If ever there was a case in which this fundamental Constitutional right to be free of government imposed counsel was meaningful it was this case. Counsel had assaulted appellant and appellant wanted to know how to have counsel arrested for assault and battery. Counsel stated, and the judge should have accepted counsel's assertion, that appellant should be allowed to represent himself.



The state's claim that allowing defense counsel to present mitigating social history evidence over appellant's objection is an ineffective assistance of counsel claim is misplaced. Appellant was not allowed to defend himself and he placed on the record that his attorneys were disregarding his specific instructions that his family members not be called as witnesses.

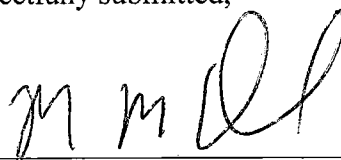
As seen, the court refused to allow appellant to represent himself during the penalty phase. Appellant had the right to prevent his attorneys from calling social worker Oehler and his family members as witnesses. See Hojan v. State, 3 So.3d 1204 (2009); Commonwealth v. Davido, 582 Pa.52, 868 A.2d 431 (2005); United States v. Davis, 285 F.3d 378 (5<sup>th</sup> Cir. 2002); Chapman v. Commonwealth of Kentucky, 265 S.W. 3d 156 (2007). Even though appellant was not representing himself, he objected to his attorneys disregarding his wishes and, and in appellant's words, dragging his family "through the mud." Tr. 2788, l. 5 – 2789, l. 19.

Appellant's family was brought down to South Carolina from Ohio because appellant's attorneys sought to have them beg for appellant's life. Appellant clearly did not want his family members to be witnesses during the penalty stage. This is not an ineffective assistant of counsel claim ripe only in post-conviction relief -- it is a right to control evidence in mitigation case -- and the state's argument to the contrary has no support in this record or the law.

CONCLUSION

By reason of the forgoing arguments, and the arguments in appellant's brief, appellant's convictions and death sentence should be reversed, and this case remanded to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

Elizabeth A. Franklin-Best  
Appellate Defender

ATTORNEYS FOR APPELLANT.

This 16th day of February, 2010.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Horry County  
The Honorable James E. Lockemy, Circuit Court Judge

---

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT.

---

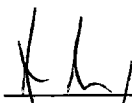
**CERTIFICATE OF SERVICE**

---

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorneys of record, Robert M. Dudek, Esq., SCCID, Division of Appellate Defense, 1330 Lady St., Ste #401, Columbia, SC 29201-3332; and to Elizabeth Franklin-Best, Esq., Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 4<sup>th</sup> day of January, 2010.



---

ALPHONSO SIMON, JR.

Office of Attorney General  
P. O. Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

ATTORNEY FOR RESPONDENT

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

---

## ORDER

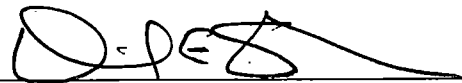
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Respondent seeks a third extension of time to serve and file the Initial Brief of Respondent and Designation of Matter in the above entitled matter. The request for an extension is granted and extended until January 4, 2010. Any further extension request must show the existence of extraordinary circumstances and state what actions are being taken to insure that no further extension will be required.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

December 8, 2009

cc: Acting Chief Appellate Defender Robert M. Dudek  
Assistant Appellate Defender Elizabeth Franklin-Best  
Assistant Attorney General Alphonso Simon, Jr.

HENRY McMASTER  
ATTORNEY GENERAL



December 4, 2009

RECEIVED  
DEC 04 2009  
S.C. SUPREME COURT

The Honorable Daniel E. Shearhouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: The State v. Louis Michael Winkler, Jr.

Dear Mr. Shearhouse:

Enclosed please find the original and six (6) copies of a Motion for Extension to File Initial Brief of Respondent and Designation of Matter, together with Proof of Service which I would appreciate your filing in the above-referenced appeal.

As always, thank you for your kind attention in this matter.

Sincerely,

Alphonso Simon, Jr.  
Assistant Attorney General

AS:dmd  
Enclosures

cc: Robert M. Dudek, Esq. (w/2 copies of encls.)  
Elizabeth A. Franklin-Best, Esq. (w/ 2 copies of encls.)

RECEIVED

DEC - 4 2009

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

S.C. SUPREME COURT

---

Appeal from Horry County  
The Honorable James E. Lockemy, Circuit Court Judge

---

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT.

---

MOTION FOR EXTENSION TO FILE  
INITIAL BRIEF OF RESPONDENT  
AND DESIGNATION OF MATTER

---

The undersigned counsel would respectfully request a thirty (30) day extension in which to file the Initial Brief of Respondent in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following:

Respondent's Initial Brief is due today, December 4, 2009, upon this Court's grant of Respondent's second request for an extension filed on November 5, 2009.

The undersigned attorneys for the Respondent has had a number of state and federal matters to attend to since November 5, 2009. Specifically, co-counsel Alphonso Simon, Jr. has prepared and filed Returns and Memoranda in Support of Motions for Summary Judgment in Dale S. Epps, #227893 vs. Leroy Cartledge, C/A No.: 6:09-2007-PMD-WMC; and T. Terrell Bryan, #254638 vs.

Warden, Michael McCall, and/or responsible officials, C/A No. 4:09-02117-TLW-TER, both of which are federal habeas matters pending in the United States District Court for the District of South Carolina. Counsel also prepared a Response in Opposition to Petitioner's Motion for Summary Judgment in the matter of Bruce M. Richardson, #291292 vs. State of South Carolina and Warden of Turbeville Correctional Institution, C/A No. 3:09-1107-MBS-JRM; and a Response in Opposition to Petitioner's Motion to Dismiss Without Prejudice in the matter of Robert Dale Smart, #272017, a/k/a Robert Smart, Robert D. Smart vs. Cecilia Reynolds, Warden Kershaw Correctional Institution, C/A No.: 8:08-3918-GRA-BHH, both pending in the United States District Court for the District of South Carolina. Counsel prepared an Initial Brief of Respondent in the matter State vs. Samuel Harmon, a direct appeal in a Lexington County murder case, and on the date of this filing, counsel is also filing the Initial Brief of Respondent in State vs. Leroy McKenzie, an appeal in a Sumter County murder case. Counsel also prepared for and assisted in representing the State in the evidentiary hearing in Jeffrey Haselden v. State, 2005-CP-32-0267, a Lexington County capital post-conviction relief action on November 23<sup>rd</sup> and November 24<sup>th</sup>, 2009.

Co-counsel for the Respondent, S. Creighton Waters has had a number of state and federal matters to attend to since November 5, 2009. Specifically, counsel has prepared and filed Returns and Memoranda in Support of Motions for Summary Judgment in Julius D. Weathers, #294420 vs. Robert M. Stevenson, III, C/A No. 2:09-1999-TLW-RSC; and David M. Edmonds, #152624



vs. Warden BRCI, C/A No. 0:09-1910-PMD-PJG, both of which are federal habeas matters pending in the United States District Court for the District of South Carolina. Counsel also prepared a Response in Opposition to Petitioner's Motion for Summary Judgment in the matter of Jerome James, #288382 vs. South Carolina Department of Corrections; Warden, Lee Correctional Institution, C/A No. 0:08-4079-DCN-PJG, also pending in the United States District Court for the District of South Carolina. Counsel prepared Initial Briefs of Respondent in the matters of State vs. Norman Starnes, a direct appeal in a Lexington County capital case; and State vs. Gregory Kirk Duncan, a direct appeal in a Greenville County murder case. Counsel also attended the Appointment of Counsel Hearing on November 24, 2009 before the Honorable James R. Barber, III in the matter of Kevin J. Mercer vs. State, a Lexington County capital post-conviction relief matter. Counsel also prepared for and represented the State in the evidentiary hearing in Jeffrey Haselden v. State, 2005-CP-32-0267, a Lexington County capital post-conviction relief action on November 23<sup>rd</sup> and November 24<sup>th</sup>, 2009.

In this period, counsel reviewed all of the over 3,400 pages of transcript of the trial court proceedings, and counsel has done some of the research on the issues raised on appeal. However, due to these and counsel's involvement in other matters pending in state and federal court, counsel was unable to timely and properly complete the Initial Brief of Respondent and Designation of Matter in this case. This request is made in good faith, and not for the purposes of delay.

WHEREFORE, premises considered, counsel hereby respectfully requests a thirty (30) day extension of time to serve and file the Initial Brief of Respondent and Designation of Matter.

Respectfully submitted,

HENRY D. MCMASTER  
Attorney General

JOHN W. MCINTOSH  
Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

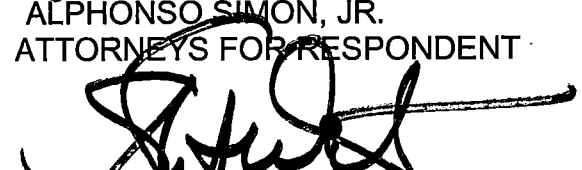
S. CREIGHTON WATERS  
Senior Assistant Attorney General

ALPHONSO SIMON, JR.  
Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

BY:



ALPHONSO SIMON, JR.  
ATTORNEYS FOR RESPONDENT

  
S. CREIGHTON WATERS  
ATTORNEYS FOR RESPONDENT  
DONALD J. ZELENKA  
ATTORNEYS FOR RESPONDENT

December 4, 2009.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Horry County  
The Honorable James E. Lockemy, Circuit Court Judge

---

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT.

---

PROOF OF SERVICE

---

I, Alphonso Simon, Jr., of Counsel for the Respondent, certify that I have served the within Motion for Extension to File Initial Brief of Respondent and Designation of Matter via hand delivery to his attorneys of record, Robert M. Dudek, Esq. and Elizabeth A. Franklin-Best, Esq., SCCID, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 4<sup>th</sup> day of December, 2009.



---

ALPHONSO SIMON, JR.  
Office of Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

---

## ORDER

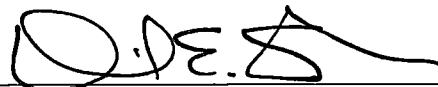
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Respondent seeks a second extension of time to serve and file the Initial Brief of Respondent and Designation of Matter in the above entitled matter. The request for an extension is granted until December 4, 2009. No further extensions of time will be granted absent the showing of extraordinary circumstances.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

November 5, 2009

cc: Acting Chief Appellate Defender for Capital Appeals Robert M. Dudek  
Assistant Appellate Defender Elizabeth Franklin-Best  
Assistant Attorney General Alphonso Simon, Jr.



HENRY McMASTER  
ATTORNEY GENERAL

November 4, 2009

**RECEIVED**

NOV - 4 2009

**S.C. SUPREME COURT**

The Honorable Daniel E. Shearhouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: The State v. Louis Michael Winkler, Jr.

Dear Mr. Shearhouse:

Enclosed please find the original and six (6) copies of a Motion for Extension to File Initial Brief of Respondent and Designation of Matter, together with Proof of Service which I would appreciate your filing in the above-referenced appeal.

As always, thank you for your kind attention in this matter.

Sincerely,

Alphonso Simon, Jr.  
Assistant Attorney General

AS/  
Enclosures

cc: Robert M. Dudek, Esq. (w/2 copies of encls.)  
Elizabeth A. Franklin-Best, Esq. (w/ 2 copies of encls.)

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Horry County  
The Honorable James E. Lockemy, Circuit Court Judge

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THE STATE OF SOUTH CAROLINA,

RESPONDENT

**RECEIVED**

NOV - 4 2009

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT. **S.C. SUPREME COURT**

---

MOTION FOR EXTENSION TO FILE  
INITIAL BRIEF OF RESPONDENT  
AND DESIGNATION OF MATTER

---

The undersigned counsel would respectfully request a thirty (30) day extension in which to file the Initial Brief of Respondent in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following:

Respondent's Initial Brief is due today, November 4, 2009, upon this Court's grant of Respondent's first request for an extension filed on October 5, 2009.

The undersigned attorney for the Respondent has had a number of state and federal matters to attend to since October 5, 2009. Specifically, counsel has prepared and filed Returns and Memoranda in Support of Motions for Summary Judgment in Cornelius Keith, #115876 v. Robert Stevenson, Warden, Broad River, C/A No. 4:09-1865-MBS-TER; Melvin Bivings Williams, #319002 v. Leory

Cartlidge, Warden-McCormick Inst., C/A No. 4:09-1683-JFA-TER; Eugene Gary, III, #231045 a/k/a Eugene Gee Gary v. McKither Bodison, Warden, C/A No. 2:09-1445-MBS-RSC; Jerome McDaniel, #166436, aka Jerome McDaniels v. Warden, Michael McCall, C/A No. 4:09-1348-MBS-TER; Jimmy Dean Jones, #240330, a/k/a Jimmy D. Jones v. Michael McCall, Warden, Perry Correctional Institution, C/A No. 9:09-951-TLW-BM; and Scott L. Ellison, #287202 v. Anthony Padula, Warden, Lee Correctional Institution, C/A No. 4:09-2261-CMC-TER; all of which are federal habeas matters pending in the United States District Court for the District of South Carolina. Counsel also prepared for and assisted in representing the State in the hearing on a Motion for a New Trial filed in State v. Marion Bowman, 2001-GS-18-0348 and 2001-GS-18-0349, a Dorchester County capital case. The hearing on the Motion was held on October 13, 2009.

Due to these and counsel's involvement in other matters pending in state and federal court, counsel was unable to timely properly prepare the Initial Brief of Respondent and Designation of Matter in this case. This request is made in good faith, and not for the purposes of delay.

WHEREFORE, premises considered, counsel hereby respectfully requests a thirty (30) day extension of time to serve and file the Initial Brief of Respondent and Designation of Matter.

Respectfully submitted,

HENRY D. MCMASTER  
Attorney General

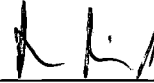
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BY:



---

ALPHONSO SIMON, JR.  
ATTORNEYS FOR RESPONDENT

November 4, 2009.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Horry County  
The Honorable James E. Lockemy, Circuit Court Judge

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THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT.

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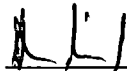
PROOF OF SERVICE

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I, Alphonso Simon, Jr., of Counsel for the Respondent, certify that I have served the within Motion for Extension to File Initial Brief of Respondent and Designation of Matter via hand delivery to his attorneys of record, Robert M. Dudek, Esq. and Elizabeth A. Franklin-Best, Esq., SCCID, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 4<sup>th</sup> day of November, 2009.



---

ALPHONSO SIMON, JR.  
Office of Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

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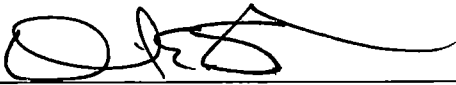
## ORDER

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For good cause having been shown, the time for serving and filing the Initial Brief of Respondent and Designation of Matter in the above entitled matter is hereby extended until November 4, 2009.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY   
CLERK

Columbia, South Carolina

October 6, 2009

cc: Deputy Chief Appellate Defender for Capital Appeals  
Robert M. Dudek  
Assistant Appellate Defender Elizabeth Franklin-Best  
Assistant Attorney General Alphonso Simon, Jr.  
Senior Assistant Attorney General S. Creighton Waters

HENRY McMASTER  
ATTORNEY GENERAL



RECEIVED

OCT \_ 5 2009

S.C. SUPREME COURT

October 5, 2009

The Honorable Daniel E. Shearhouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: First Extension Request  
*The State v. Louis Winkler*  
Appeal from Horry County

Dear Mr. Shearhouse:

We hereby request an extension of thirty (30) days in which to file the Initial Brief of Respondent and Designation of Matter in the above-referenced case. The Initial Brief is currently due to be served and filed today, October 5, 2009. However, because of our involvement in other matters in state and federal court, we have been unable to timely complete the Initial Brief.

Therefore, we are requesting this extension within which to serve and file the Initial Brief of Respondent and Designation of Matter. We are informing opposing counsel of our request by copy of this letter.

Sincerely,

Alphonso Simon, Jr.  
Assistant Attorney General

S. Creighton Waters  
Senior Assistant Attorney General

AS/

cc: Robert M. Dudek, Esquire  
Elizabeth Franklin-Best, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Appeal from Horry County

James E. Lockemy, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

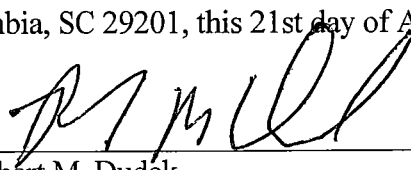
V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

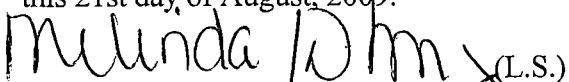
\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, Assistant Deputy Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 21st day of August, 2009.

  
\_\_\_\_\_  
Robert M. Dudek  
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 21st day of August, 2009.

  
(L.S.)

Notary Public for South Carolina  
My Commission Expires: October 30, 2018.

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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AUG 21 2009

Appeal from Horry County

S.C. SUPREME COURT

James E. Lockemy, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

---

INITIAL BRIEF OF APPELLANT

---

ROBERT M. DUDEK  
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ATTORNEYS FOR APPELLANT.

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## STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by admitting a tape recording, as a prior consistent statement under Rule 801(b)(1)(B), SCRE, of an interview wherein the decedent's son, Jonathan Grainger, told Detective Ann Pitts that his "stepfather," appellant, shot his mother since this statement was not admissible as a prior consistent statement because all of the elements of Rule 801(b)(1)(B), SCRE were not met, and the fact Officer Knoch testified that Jonathan told him immediately following the murders that his "Dad" shot his mother did not make this subsequent statement admissible since there was no accusation of a recent fabrication, improper influence or motive?

2.

Whether the court erred by allowed the transcript of the 911 tape to be given to the jury when it asked to "read over the 911 transcript" during deliberations since the transcript was not in evidence, and it was not an accurate transcription of the interview?

3.

Whether the court abused its discretion by refusing to allow appellant to represent himself during the penalty phase of his capital trial particularly where his attorneys agreed appellant was ready to represent himself and that no delay in the trial was necessary?

4.

Whether the court erred, alternatively, by refusing to allow appellant to represent himself during the penalty stage of the trial since appellant had the right to represent

himself during the penalty phase under the reasoning of Faretta, and his case was not governed by the State v. Brewer abuse of discretion standard?

5.

Whether the court erred by failing to properly provide appellant with Faretta warnings, during a focused waiver hearing, when appellant invoked his right to represent himself, and his attorneys told the court that appellant was ready and willing to represent himself and that no delay in the trial was necessary?

6.

Whether the court erred alternatively by allowing defense counsel to present mitigating social history evidence and call appellant's family members as mitigation witnesses over his objection since appellant still had the right to control the case in mitigation and waive mitigation evidence he did not want the jury to consider even where the judge denied appellant the right to represent himself?

7.

Whether the court erred by refusing to direct a verdict on the aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime aggravator since there was a lack of evidence to support it?

### STATEMENT OF THE CASE

Appellant was indicted by the Horry County grand jury for the offenses of murder, burglary in the first degree and assault and battery of a high and aggravated nature. The state alleged appellant entered his estranged wife's condominium without consent, punched his stepson, and shot his estranged wife. R. \*.

His case came on for trial on January 28, 2008 before the Honorable James E. Lockemy, and a jury. J. Gregory Hembree, Francis A. Humphries, Jr., and Scott R. Hixson were the solicitors. Ralph J. Wilson and Paul Elbert Rathbun represented appellant. Tr. 1.

The state sought the death penalty. At the conclusion of the guilt phase on Saturday, February 2, 2008, the jury found appellant guilty on all three counts. Tr. 1903, ll. 10 – 15.

The penalty phase commenced on February 4, 2008. Tr. 1913, ll. 1 – 2. On February 8, 2008 the jury sentenced appellant to death, and the trial judge imposed that sentence. Tr. 2940, ll. 10- 20.

This appeal follows.

## ARGUMENT

1.

The court erred by admitting a tape recording, as a prior consistent statement under Rule 801(b)(1)(B), SCRE, of an interview wherein the decedent's son, Jonathan Grainger, told Detective Ann Pitts that his "stepfather," appellant, shot his mother. This statement was not admissible as a prior consistent statement because all of the elements of Rule 801(b)(1)(B), SCRE were not met, and the fact Officer Knochs testified that Jonathan told him immediately following the murders that his "Dad" shot his mother did not make this subsequent statement admissible since there was no accusation of a recent fabrication, improper influence or motive.

### **Relevant Facts**

Sixteen-year-old Jonathan Grainger was the son of the decedent, Rebekah Winkler. Appellant was his stepfather. Roger Grainger was his father. Jonathan testified that his mother married appellant in 2003. As will be seen infra, appellant and the decedent were separated, and the decedent was seeing Roger Grainger again. Tr. 1418, l. 6 – 1420, l. 24.

Jonathan knew appellant as "Mick." They had lived in the Stones Edge neighborhood in North Myrtle Beach at 2409 Bitter Spar Road. This was appellant's house. Tr. 1422, l. 1 – 1423, l. 9.

Jonathan recalled that after about a year he moved out of appellant's house with his mother because "my mom wanted to get a divorce, and she moved out and moved in with my sister [ Haley] . . . sometime in 2005." Tr. 1422, l. 15 – 1423, l. 22. Jonathan lived with his mother and Haley in her Town House Condominium at Golf Colony Bar Tree. Tr. 1423, l. 15 – 1425, l. 16. Jonathan recalled that appellant had visited with them one time at the



Golf Colony Condominium after the separation and prior to the incident on June 6, 2006. Tr. 1425, ll. 17 -24.

Jonathan testified that on March 6, 2006 he walked home from North Myrtle Beach High School as usual. He said it was a normal day. Once Jonathan got home, he logged onto the computer. Around 5:30 that afternoon, he heard “like a loud bam on the door or somewhere.” Tr. 1426, l. 10 – p.1429, l. 22. Jonathan said he was talking on his cell phone with his friend Lizzie Craft who was in the eighth grade at the time. Tr. 1429, l. 7 – 1430, l. 7.

Jonathan stated that the next thing he heard was “another bam,” and that “the door flew open.” Tr. 1430, ll. 6 – 15. Jonathan testified that appellant entered the condominium, and that “he was yelling and he came in and he hit me and knocked me over.” Tr. 1431, ll. 7 – 21. Jonathan said that appellant punched him in the eye and that he fell off the bar stool where he had been eating his dinner. Tr. 1432, l. 6 – 1433, l. 22. Jonathan’s claim was that appellant walked over to his mother who was “sitting on the couch watching TV” . . . [and] he just walked up to her and shot her. Tr. 1434, l. 11 – 1436, l. 25.

Jonathan said he was still on the floor when appellant walked towards him after he shot the decedent. “I told him not to do anything stupid.” Tr. 1437, l. 3 – 1438, l. 14. Jonathan maintained appellant “paced back and forth” for “five to ten seconds,” and then he left. Jonathan testified:

Q. He, after he paced back and forth five or ten seconds, tell us, tell this jury what Louis Winkler did.

A. He walked back out the door.

Q. And?

A. That was it.

Q. What did you do?

A. I went and got my cell phone and closed the door and made sure he wasn't coming back in, and looked out the window and got my shoes, and then went and sat on the balcony and called the police.

Tr. 1439, l. 25 – p. 1440, l. 9.

Jonathan said when the police officer arrived: "I think he asked if we had any weapons in the house." Jonathan recalled that he told the officer his mother kept a gun "under the pillow in her room." Tr. 1442, ll. 3 – 16. Jonathan testified the officer "took me downstairs and put me in the back of the car." Jonathan said while he was in the backseat of the patrol car: "I called my sister Jill, and I think I called Haley." Tr. 1443, ll. 19 -23.

On cross-examination, Jonathan acknowledged his father was Roger Grainger. Tr. 1445, ll. 21 – 22. Jonathan admitted his mother had been seeing Roger after she separated from appellant. Jonathan also stated that Roger was supposed to come over that very evening, but Jonathan claimed they did not expect Roger until about 6 p.m. Jonathan called 911 at 5:37 p.m. Tr. 1414, ll. 12-13. Tr. 1446, ll. 1 – 9. The following occurred on cross-examination of Jonathan:

Q. And do you recall telling the officer, the first officer who arrived on the scene who asked you about it that *it was your dad who had done the shooting?* Do you recall telling the officer that?

A. *No. I said stepdad.*

Q. You said stepdad? All right, so you didn't tell them it was your dad?

A. No.

Tr. p. 1447, ll. 2 – 9. (emphasis added).

Jonathan admitted that he actually did not see the shooting because he had been knocked to the floor at the time his mother was shot. Tr. 1468, ll. 3- 19.

The first police officer to arrive on the scene was Horry County Police Officer Thomas Knoch. Tr. 1522, l. 25 – 1523, l. 19. Officer Knoch's remembered on March 6, 2006, at about 5:45 p.m. he was dispatched to the Bay Tree Complex. Tr. 1523, l. 12 – 1525, l. 6. When he got to the apartment 20-J, Haley's apartment, he had his weapon drawn. He saw Jonathan on the landing and they had "a brief conversation." Knoch said it was an "extremely tense situation." Tr. 1525, l. 14 – 1527, l. 20. The following occurred on cross-examination of Officer Knoch:

Q. Well, tell about that conversation.

A. After he, he complied with everything that I asked him to do, which was showing me his hands, once I understand that he was not a threat to me, he made a statement to me. He said he's gone, and I asked him. I said who.

One minute, please.

*He said my dad*, and then I, and I asked him where the person was who was shot, and he said it's my mom, and he pointed towards, like, his condominium or the, the open door of unit 20-J. And he also made kind of a, another statement to me. He said that she's dead. (Emphasis added).

Tr. p. 1592, ll. 12 – 22. (emphasis added).

The solicitor asked Officer Knoch "is there any chance he said my step-dad? Officer Knoch responded: "Yes, it very could have been. There could have been several other things that may have been said that I just don't recall due to the situation being as tense as it

was at the time, and I was the only officer of the scene.” Tr. 1531, ll. 11 – 14. Officer Knoch also said that Jonathan was calm after the shooting and that he was not crying, yelling or screaming. Officer Knoch confirmed this was Jonathan’s demeanor at the time “his mom was laying on the floor dead.” The 911 tape on file with this Court also reveals this eerie calm. As will be seen infra, although Jonathan maintained to the 911 operator that appellant was the shooter, in fact the 911 tape reveals a pause and no answer after the 911 operator asked Jonathan if he was alone. Tr. 1541, l. 4 – 1542, l. 2.

Officer Knoch confirmed on cross-examination that he wrote in his report that Jonathan told him the shooter was “My Dad.” Officer Knoch said he did not know Jonathan’s “Dad from his uncle from his cousin” and that he wrote in his report that Jonathan told him “my Dad” . . . “*just left* or my Dad’s gone.” Tr. 1541, l. 21 – 1542, l. 12. (emphasis added).

The state called Horry County Police Detective Ann Pitts as a witness. Tr. 1707, ll. 6 – 21. Pitts knew the decedent. Tr. 1707, ll. 22 – 24.

Pitts said she went to the decedent’s condominium following the shooting on March 6, 2006. Tr. 1708, l. 17 – 1709, l. 1.<sup>1</sup> Pitts said that she interviewed Jonathan Grainger that evening. Tr. 1711, ll. 16 – 18. Pitts and Jonathan were alone at the time of the interview and it was recorded. Tr. 1712, l. 5 – 1713, l. 2. When Deputy Solicitor Humphries went to move the tape into evidence defense counsel objected. Tr. 1713, ll. 5 – 6. The following then occurred:

---

<sup>1</sup> Pitts said she also went to the decedent’s house on January 11, 2006 and the decedent showed her the firearm she kept under her pillow. Tr. 1709, ll. 2 – 7.

The Court: How do you address 801(d)(1)? You still object?

Mr. Wilson: Yes, sir.

The Court: (d)(1)(b).

Mr. Humphries: That's the ground under which I - - -

The Court: I'm asking Mr. Wilson this.

Mr. Wilson: Yes.

The Court: Overruled under 801(d)(1)(b).

Tr. p. 1713, ll. 9 – 17.

At a subsequent bench conference the solicitor's argued that because the defense was "attacking the credibility, specifically the allegation of recent fabrication, these are prior consistent statements." Tr. 1715, ll. 4 – 6. The solicitor confirmed the issue was whether Jonathan said his Dad did it or his Stepfather did it. The judge then repeated that the taped interview constituted a prior consistent statement under Rule 801(d)(1)(b), SCRE, and he assumed that Jonathan would be available if anyone wished to call him. The solicitor said that Jonathan was still in court. Tr. 1715, l. 2 – 1717, l. 2.

In his statement during the interview with Pitts, Jonathan named appellant as the shooter. He said appellant hit him and he fell to the floor. "I was sitting on the floor and he was leaning over me. He's, like, you're gonna - - you told people you were gonna kick my butt or whatever. And I'm, like, no, I never said that. And then he just walked over to mom, and she stood up off the couch and he shot her and she fell down. He walked back over to me and he just kept looking at me and acting like he was going to shoot me. And I just said don't shoot me, don't shoot me." Tr. 1731, l. 20 – 1732, l. 3; Statement at R. p. \*.

Pitts testified that the interview with Jonathan ended at 7:28 p.m., approximately two hours after the shooting. Tr. 1732, ll. 7 – 14.

### **Appellant's testimony**

Appellant testified during the penalty phase of the trial. Appellant said even though there was a restraining order providing that he and the decedent were not supposed to have contact with each other, the decedent would drive her car “ in front of my house and park . . . She pulled in my driveway once and parked, yes.” Tr. 2497, ll. 12 – 24.

Appellant remembered that “March 6th - - started out a normal day.” Tr. 2499, ll. 3 – 6. Appellant was out of jail on bond on a prior charge that he kidnapped and sexually assaulted the decedent. Appellant said he went next door to play basketball “and the (GPS) monitor wouldn't go off.” Tr. 2499, ll. 7 – 13. Appellant recalled playing basketball that day and he asked his friend, Jeff Joslin, if he could give him a ride to the decedent's house so that he could return “two DVD's” because “she harped on getting those DVD's - - the DVD copies. She said I want those copies.” Tr. 2499, l. 6 – 2503, l. 8. These were DVD's of appellant and the decedent having sex. Tr. 2429, l. 18 – 2430, l. 15.

Appellant remembered that Joslin told him he could not give him a ride at that time so appellant ate lunch and played some more basketball. Tr. 2501, l. 11 – 2504, l. 2. Appellant testified that about five o'clock Joslin arrived at his house again, and asked him if he still wanted a ride. Appellant accepted and he said it took about ten minutes to reach the decedent's condominium at Bay Tree. Tr. 2504, l. 4 – 2505, l. 2.

Appellant testified that Joslin dropped him off at the decedent's home, and “I opened the door the outside entrance that is the entrance to three condos. Now that condo, it had been brought up before, but I did a lot of work there in that condo for Haley [the decedent's

sister who owned the unit] a lot of work. Everything I - - I installed the new door locks for them did all this and that. I had been there a lot of times.” Tr. 2505, ll. 11 – 16.

Appellant explained that when he first knocked on the door “no one came to the door. I knocked on the door again. Jonathan came and opened the door. . . Jon opened the door and he’s, like, just glaring at me, so I pushed my way into the door . . . and Jon just kind of let it go, and I walked in and he just walked over back over to the counter.” Tr. 2506, ll. 2 – 22.

Appellant remembered seeing his estranged wife inside. Appellant recalled: “Jon said what’s going on. I said, Jon, why would you send the neighborhood boys over to your Tiki bar to destroy it because when I got home from bond, there were some destruction done to our Tiki bar. And I learned [from] one of the neighborhood kids that Jon instructed them . . . they could do whatever they wanted over there because I wasn’t allowed to go no further.” Tr. 2507, ll. 9 – 15.

Appellant testified: “I turned toward Becky I said - - well, actually I turned away, came to the end of the couch and took that left and started toward Becky. When she went like this, just she went - - like that and to this day [if] she wouldn’t have warned me, I’d be the one dead today instead of her. It was Roger Grainger behind me with his hand straight out like that with a pistol in his hand . . . he was standing right behind me. That bullet was intended to go directly into my head, and when I had seen him, I went like that. And I gave him a jab and knocked his butt right on the floor. He fell on the floor and rolled over, and the gun was laying right beside me. Those are the facts. . . I seen him. I said what in the hell are you doing. And I reached over and I picked the gun up and looked to the left, and it was one of the things that’s been haunting me ever since then. I’m the one that couldn’t go

to the funeral. I'm the one that was sitting somewhere where I couldn't be anywhere near it. I looked up and Becky's face was facing me flat down. There was blood oozing from her ear, her nose, and it appeared to be right from her face. Her eyes were closed, but it was like she was looking straight at me, and I see that almost every night. I seen her take her last breath. It was my wife and despite we were broke up, I cared very much for her." Tr. 2508, ll. 7 – 18; Tr. 2508, l. 24 – 2509, l. 4; Tr. 2509, l. 6 – l. 18.

Appellant continued: "I did not know what to do. I had just been shot at and I just seen my wife get killed. That bullet was intended for me; there's no doubt about that. Roger had a great motive for it." Tr. 2510, ll. 3 – 15.

Appellant testified: "I went straight to my house to the golf course." Tr. 2511, ll. 2 - 5. Appellant said he got some clothes because "it started getting cold." Appellant recalled: "I have never been shot at before, so I don't know actually what was going through my mind." Tr. 2512, l. 1 – 2513, l. 10.

Appellant testified he walked the golf course all night long and then he spent time in a house under construction and in an abandoned warehouse over the next two weeks. Tr. 2515, l. 3 – 2520, l. 1. Appellant told the jury: "Now, the reason I was on the run for that long is I know through - - I had heard that Roger Grainger is in a hunt club. He has many guns. I was in fear for my life and I knew they were looking for me. He knew I could pinpoint him, and that's what I was going to do is pinpoint him. That's why I stayed away. The paper said they were looking for a suspect. One night I got the paper; it said they were looking for a suspect. They did not say Roger Grainger." Tr. 2520, ll. 5 – 13.

Appellant testified when he was on the golf course on the day of his arrest, the "cart girl" asked "[A]re you Winkler? And I said yes. Shook, shook my head yes. Said well, I'm



going to have to call the police. I said - - I shook my head yes.” Tr. 2522, ll. 3 – 22. Appellant remembered seeing the police helicopters and police “carrying what looked to me was an M-16 . . . they are acting like I’m some type of mass murderer, and I, I didn’t, in fact, didn’t kill anyone.” Tr. 2522, l. 3 – 2523, l. 13. Appellant explained that he told the police: “I didn’t shoot Becky.” Tr. 2527, ll. 5 – 8; Tr. 2536, ll. 13 – 26.

Appellant testified the first person he trusted after his arrest was his family court lawyer, Scott Bellamy. Appellant said he eventually told the police he did not shoot the decedent. Tr. 2603, l. 1 – 2604, l. 24. Appellant acknowledged he told the police that he took his gun over to the decedent’s house but he also told them that he blacked out and he did not remember what happened. Tr. 2609, l. 12 – 2613, l. 4. Appellant said he hid after the shooting because he was afraid Roger Grainger, who “had a lot of weapons,” and he was afraid Grainger would kill him Tr. 2617, l. 14 – 2618, l. 18.

### **Discussion**

The trial court erred by admitting Jonathan’s statement to Detective Pitts as prior consistent statement. As seen above, defense counsel did not charge Jonathan with recently fabricating his version of events or having an improper influence or motive as mandated for a prior consistent statement being admitted under Rule 801(d)(1)(B), SCRE. See State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003).

In this case, Jonathan claimed to the 911 operator that appellant shot his mother. However, the tape does reveal, as appellant noted, that Jonathan did not answer the 911 operator’s question about whether he was alone at the time. As seen, appellant testified Jonathan’s father, Roger Grainger, was inside the condominium with Jonathan and the decedent when he arrived there. The 911 tape is on file with this Court.

As seen, Officer Knoch testified Jonathan told him “my Dad” had shot his mother, and that he was “gone” or “just left.” Officer Knoch admitted when asked by the solicitor that he could have been mistaken. Tr. 1529 – 1531. Jonathan earlier testified that he told the police that his step-dad shot his mother. Tr. 1447, ll. 2 – 9. Defense counsel’s cross-examination of Jonathan, as seen above, was very mild. He simply asked Jonathan whether he remembered telling the officer who arrived on the scene that he said his Dad had shot his mother. Jonathan denied that and he said he told the officer it was his step-dad. Tr. 1447, ll. 2 – 9.

Defense counsel never accused Jonathan with recently fabricating or having an improper motive to implicate appellant. The cross-examination in this case was very standard. Defense counsel asked Jonathan if he loved his father and Jonathan responded that he did love his father, but he denied he was closer to his father than to his deceased mother. Tr. 1454, ll. 6 – 12.

The prior consistent statements of a witness is only admissible if: (1) the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statements; (2) the statement is consistent with the declarant’s testimony; (3) the statement is offered to *rebut an express or implied charge against the defendant of recent fabrication or improper influence or motive*; and (4) the statement was made before the alleged fabrication, or before the alleged improper influence or motive arose. Rule 801(d)(1)(B), SCORE; State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); State v. Fulton, 333 S.C. 59, 509 S.E.2d 819 (Ct. App. 1998).

Here, the judge erred by admitting Jonathan’s statement to the Detective Pitts because it failed under the third and fourth prongs of Rule 801(d)(1)(B), SCORE.

As this Court stated in State v. Foster, merely questioning the accuracy of a witnesses' memory or attempting to call his credibility into question is simple impeachment. It does not rise to the level of charging fabrication. State v. Foster, 354 S.C. 614, 622, 582 S.E.2d 426, 430 (2003).

Since no charge of recent fabrication or improper influence or improper motive had been made, Jonathan's statement to the Detective Pitts was not admissible. See Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994); Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960). Following the adoption of the Rules of Evidence, all of the elements of Rule 801(d)(1)(B), SCRE must be met for the statement to be admissible.

The statement in this case also was not made before any alleged fabrication, or before the alleged improper influence or motive arose. Officer Knoch simply testified that Jonathan told me "my Dad" had shot the decedent. Jonathan *subsequent* statement to Detective Pitts wherein he said appellant was the shooter simply not admissible as a prior consistent statement under the fourth prong of admissibility.

Because the statement failed to qualify as a prior consistent statement, the judge erred by admitting it.

As in State v. Foster, Jonathan was the only eyewitness to the shooting. It was a factual determination for the jury to decide whether appellant or Roger Grainger was the shooter. This error cannot be harmless where Jonathan was the only eyewitness to the shooting, and his testimony was obviously critical to the state's case. The prejudice of erroneously introducing a prior statement of the only eyewitness to the crime was that it improperly bolstered his testimony. State v. Foster, *supra*. Appellant should be granted a new trial.

The court erred when it allowed the transcript of the 911 tape to be given to the jury when it asked to “read over the 911 transcript” during deliberations since the transcript was not in evidence, and it was not an accurate transcription of the interview. The transcript was highly prejudicial to appellant’s defense since it erroneously expressed that the 911 operator immediately interrupted Jonathan after she asked him if he was alone following the shooting, where the tape shows a long pause and Jonathan never answering that question.

During deliberations, the jury asked to re-hear the 911 tape that was earlier introduced during the state’s case-in-chief. It sent the judge a note: “Could we please read over the 911 transcripts?” Court’s exhibit 21. R. p. \*. Tr. 1894, ll.20-21; Tr. 1409, ll. 17-20; Tr. 1410, l. 23. Someone associated with the state apparently created the transcript. Tr. 1897, ll. 12-16. Defense counsel objected to the court’s giving the jury a copy of a transcript that purported to accurately depict the content of the tape. Defense counsel objected that the transcript contained inaccuracies and that, since the trial had concluded, it was not appropriate for the jury to review matters that were not in evidence. Tr. 1895, ll. 5-7; Tr. 1896, ll. 8-11; Tr. 1899, ll. 12-23.

The 911 tape is inaccurate because it asserts the operator said: “And you’re there by yourself. Okay. I have them in route. Okay. Stay with me. All right?” Transcript of tape at 5. R. p.\*. The presence or absence of any other individual – here Roger Grainger -- at the apartment at the time the call was made was critical to appellant’s defense. This is why allowing the jury to review the transcript overwhelmingly prejudiced appellant.

As seen, appellant's defense was that Jonathan's father—Roger Grainger—was, in fact, the murderer and that he was present at the apartment when Jonathan called 911. Tr. 1865, ll.7-9; Tr. 1866, ll.6-15; Tr. 1870, ll.12-19. The failure of Jonathan to answer that question was critical because it lay at the heart of appellant's defense. The tape was materially misleading.

Solicitor Hembree acknowledged that the tape was difficult to hear:

My concern, Your Honor, with that idea is that the tape is still not the greatest quality. It's difficult to hear. That's the entire—that's the reason why we do a transcript at all is so we can take the time to make sure that the words are accurate and get that—so we can clearly present the truth to this jury, not have them subject to misunderstanding and a lot of confusion. And that's the worst of the worst.

Tr. 1897, ll. 10-17.

The court ruled that the jury would be allowed to review the transcript while they listened to the 911 tape:

If they wished, I could have the court reporter, if I wanted to go to the trouble to do it, read to them everything that was on that tape because she's got it and she could read what was on the tape. There's no difference in her reading it, what's on that tape, and them having something and reading along as they listen to it. She could, if she wished, she could go ahead and it would take a while to do it. She could type up what was on that tape and then they could read that. We could read it out loud to them if we wanted to. But that would take too long and it would take—be too much trouble to do it.

That tape and them reading it is as it was put in, them reading it, the words there that were put before them—and you note your objection—I'm going to permit them to do it that way.

Tr. 1900, ll. 1-15.

The jury should not have been allowed to review the transcript because it was not admitted into evidence. The jury should simply have been informed that all of the evidence was in at that point, the transcript was not in evidence, but that they could listen to the 911 tape again because it was in evidence.

Allowing the jury to review the erroneous transcript, which was not in evidence, while listening to the 911 tape, and where they were deliberating, and focused critical attention on the contents of the 911 tape heightened its prejudicial impact. See State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978)(critical attention focused on the subject in question). Doing so, the judge unduly emphasized the tape's inaccuracies before the jury. See State v. Gullledge, 277 S.C. 368, 287 S.E.2d 488 (1982); State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980).

In this case, the identity of the decedent's slayer was the issue. The admission of this transcript was not harmless, inter alia, because jury exposure to facts not in evidence deprives a defendant of the rights of confrontation, cross-examination and assistance of counsel embodied in the Sixth Amendment. Anderson v. Terhune, 2009 WL2462398 (E.D.Cal.); Dickson v. Sullivan, 849 F.2d 403, 406 (9<sup>th</sup> Cir. 1988). And see U.S. v. Ofray-Campos, 534 F.3d 1 (C.A.1, 2008) (quoting United States v. Rivera-Santiago, 107 F.3d 960, 965 (1<sup>st</sup> Cir.1997):

A district court must use extreme caution in answering questions from juries so as not to usurp the jury's fact finding role. As we have noted on many occasions "undeniably inherent in the constitutional guarantee of trial by jury is the principle that a court may not step in and direct a finding of contested fact in favor of the prosecution

regardless of how overwhelmingly the evidence may point in that direction.

Id. At 18. See also, United States v. Sabetta, 373 F.3d 75, 80 (1<sup>st</sup> Cir.2004). Allowing the jury to review the transcript, which was not in evidence, during their deliberations, where it was denied appellant of his right to due process. Respectfully, Appellant asks this Court to reverse his convictions and remand his case for trial.

The court abused its discretion by refusing to allow appellant to represent himself during the penalty phase of his capital trial particularly where his attorneys agreed appellant was ready to represent himself and that no delay in the trial was necessary.

### **Introduction**

Assaulted by his lead counsel only a few days earlier, and fundamentally opposed to his attorneys' mitigation strategy on his behalf, appellant unequivocally asked to represent himself during the penalty phase of his capital trial. Appellant had reason to be concerned with his attorneys' performance. After all, one business day before the original start date of his trial, his attorneys informed the judge that they were not prepared to go forward. They asked for, and received, a continuance. The state reluctantly agreed to join in that motion, since it was clear they had no choice—no work had been done by the mitigation specialist the defense attorneys hired, Paige Tarr. It was against this backdrop of hostility and complete dissatisfaction -- appellant's even asked the judge how he could take out an arrest warrant for his lead counsel's arrest for assaulting him -- that appellant asked to represent himself, but the judge, focused on appellant's *ability* to defend himself, and not his right to do so, denied his request.

### **Relevant Facts**

Appellant requested to represent himself before the start of the penalty phase of his capital trial. He had long been dissatisfied with his attorneys, and requested, prior to the start of the *guilt* phase, that he be appointed new attorneys. Denying that request, the judge said:



Any event, we're going to proceed then. There's been no request for you to represent yourself. You're requesting another attorney. Since that's the case, I do not grant your motion. Now, **you always have that option to represent yourself**, which would be very inadvisable **for this stage**, but we will continue on with the case."

Tr. 42, ll. 12-18 (emphasis added).

Appellant was convicted of all charges at the close of the guilt phase. After recessing for the mandatory 24 waiting period, the parties returned to court on February 4, 2008. Defense counsel informed the court that appellant wanted to participate in the cross-examination of witnesses. Tr. 1915, ll. 16-23. Denying that, the trial court reiterated to appellant that he would be allowed to represent himself:

"Well, Mr. Winkler, **you always have the opportunity, sir, if you wish to represent yourself**, sir. And if you want to represent yourself, **we'll go through another dialogue here** to make sure that's what you're doing."

Tr. 1917, ll. 14-18. (emphasis added).

Appellant then asked the court to allow him to proceed pro se and to allow his attorneys to remain as a resource for him. Tr.1925, l.14 - 1928, l. 7. Winkler's request was unequivocal:

Court: If you're saying that you want to represent yourself with Mr. Wilson and Mr. Rathbun to stay there as consultants for you to consult with during the course of this phase of the trial, but not to be your attorneys who ask questions or make closing arguments to the jury, is that what you're requesting?

A: Yes, sir.

Tr. 1928, ll. 11-17; Tr. p. 1930, ll. 19-24.

Trial counsel informed the judge that appellant had indicated to him “on more than one occasion” that this is what he wanted to do. Tr. 1932, ll. 7-9. Appellant made it clear that he was no longer asking for new attorneys, but to represent himself: “I already asked that eight months ago.” Tr. 1932, ll. 15-20.

The judge then asked if appellant had reviewed the materials gathered in preparation for the trial. Appellant responded that he had, otherwise, “[w]e wouldn’t be ready for trial.” Tr. 1932, l. 25 - 1933, l.6. The judge also asked if appellant had reviewed the evidence that Wilson and Rathbun were prepared to introduce during that part of the trial. Again, appellant said he had. Tr. 1933, ll. 7-10.

#### **Appellant’s History of Dissatisfaction with his Attorneys**

Appellant was unhappy with his attorneys from a very early point in their representation. During the July 3, 2007 hearing, Wilson informed the trial court that appellant had indicated “on several occasions” that he was dissatisfied with Rathbun. (July 3, 2007 hearing, Tr. 57, ll. 8-15). The judge informed appellant that:

“[U]nless anything regarding Rathbun reaches the point of incompetence or something that I would make a preliminary determination of ineffective assistance, it’s improbable that I would remove Mr. Rathbun unless it’s something that would really seriously prejudice Mr. Winkler’s rights to receive a fair trial.”

Tr. 59, ll. 1-7.

Appellant informed the court that he was concerned because his attorney was telling him to plead guilty. Tr. 60, l. 25 - 62, l. 2.

The Court: That hasn’t changed your mind, has it?

Mr. Winkler: Well, no, sir.

The Court: Okay, let's continue on.

Tr. 61, ll. 17-19.

At that same hearing, Rathbun informed the court that his wife was a Horry County deputy sheriff. Tr. 50, ll. 2-4. The judge denied the motion to relieve Rathbun. Tr. 62, ll. 10-21.

Appellant had earlier noted his concern about Rathbun's participation in the trial at a hearing held, nearly a year earlier, on June 15, 2006. There, he expressed his concern with Rathbun's lack of experience, especially in matters relating to the death penalty. June 15, 2006 hearing, Tr. 10, ll. 1-20. At the time of his appointment, Rathbun was primarily doing family court work, and he had never tried a murder case. June 15, 2006 hearing, Tr. 3, ll. 3-10; Tr. 4, ll. 5-6.

At the June 15, 2006, Rathbun explained that he asked Orrie West, the Chief Public Defender for Horry County, to allow him to "help and assist" with appellant's capital trial. West had actually been served with appellant's notice of intention to seek the death penalty. Tr. 5, ll.1-3. Rathbun said he had some spare time that he could use to "research, that kind of thing." Tr. 3, ll. 10-16. He had never defended a burglary case, but he had tried an armed robbery case. Tr. 4, ll. 4-11. West informed the court that she and appellant were "not as compatible as we could be." Tr. 5, ll.15-17. That was one of the reasons West decided that she would not handle the case herself for the Public Defender's Office. Tr. 5, ll.18-22.

The judge asked:

And you feel he is competent to handle this matter, as long as he's not first chair?

Ms. West: Yes, Your Honor, he is. Yes, he is.

Tr. 6, ll.7-9.

Appellant's case was initially scheduled to be tried on July 16, 2007. On July 12, 2007 the court was notified by conference call that the defense was having difficulty communicating with their mitigation investigator. On that late date—one business day before the scheduled start of their client's capital trial-- they were concerned that "little or no work in preparation for mitigation" had been completed. Defense was asking for a continuance at the 11<sup>th</sup> hour. Yet, according to the Order, dated August 20, 2007 and memorializing the events of the hearing,<sup>2</sup> counsel knew of these problems since late-May. Order of Judge Lockemy. R. P. \*. On Friday, July 13, 2007, *the state* requested a hearing on the matter. The Court sent a Horry County Sheriff's deputy to serve the mitigation investigator, Paige Tarr, with a subpoena in Columbia, South Carolina. July 13th, 2007 Order, ¶ 4. R. p. \*. Among the other findings, the Court noted:

"[N]umerous hearings and conferences had been held in this matter since late May and never had the Court been advised for the defense that any problem existed in reference to the mitigation investigator or counsels' readiness to adequately represent the defendant in either the "trial phase" or the "sentencing phase" of the case until July 12, 2007, one business day from the start of the trial in this matter."

A new trial date was ultimately set for January 28, 2008. July 13<sup>th</sup>, 2007 Order, at page one. R. p. \*. Counsel for appellant was also ordered to have contact with the Court "at a minimum every two weeks until trial to insure appropriate progress is being made in

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<sup>2</sup> There is no transcript of this hearing.

the preparation of the defendant's defense and mitigation of sentence." Order, dated July 13, 2007, p. 3. R. p. \*.

Clearly, appellant had reason to be concerned about the representation he was receiving at this point, since there had been no meaningful preparation of his mitigation case prior to the start of his death penalty trial, nor had his attorneys attempted to protect his interests by bringing it to the court's attention at an earlier date. Counsels' actions, surely, did not inspire confidence. And the Court, too, must have been concerned about the representation that appellant was receiving since it required bi-monthly updates, with respect to the mitigation case they were preparing, up until the start of the trial. Additionally, there had been even earlier problems with defense counsel securing a mitigation investigator, a "Ms. Davis", as early as February 16, 2007. They had simply waited too long to try and hire someone. February 16, 2007 hearing, Tr. 38, l. 3 - 41, l. 19:

The Court: This person says they could not begin until June, Ms. Davis.

Mr. Wilson: Well, she's actually begun. She came down and—and actually spent some time with Mr. Winkler. She came down and spent a whole day with me, going over his file.

And I know she's had some other things going on. I do understand that. She made that—

The Court: Her affidavit says: "It will take six to eight months, and I can't start till June." Mr. Wilson, that's determinative.

Tr. 39, l. 18 – 40, l. 3.

As early as January 3, 2006, the parties had been meeting for purposes of scheduling all matters related to this case, yet as late as mid-February, 2007, defense counsel still did not have a mitigation specialist on the case. R. p. \*. Appellant was justified in his lack of confidence in his attorneys' ability to mount a mitigation case on his behalf.

At the start of his trial, on January 28, 2008, defense counsel informed the court that appellant wanted to have *both* Wilson and Rathbun them relieved. Tr. 30, ll. 13-24. appellant reiterated that he had attempted to have Rathbun relieved eight months earlier, but the request had been denied. Tr.32, l. 24 - 33, l. 6.

Appellant also informed the court that a physical altercation occurred between himself and Wilson a couple of days earlier. Tr.33, ll. 2 -19. During a hearing on January 24, 2008, appellant informed the trial court of the nature of this altercation, and also complained that he had not seen his attorneys for the week prior to the start of his death penalty trial. Tr. 25, ll.11-24. Appellant said:

“[Wilson] turned towards me, put his finger in my face, touched my face, and said she [appellant's sister] is a f'ing liar. At that time I swatted his hand away from my face, officers came in, and they acted like it was my fault. But it was Mr. Wilson's. And there's no way I can see where I'm gonna get a fair trial with this man, my attorney, when he has called me and my family liars over the past month.”

January 24, 2008 hearing, Tr. 25, ll. 4-10.

Appellant also informed the judge that he wanted to press criminal charges against Wilson. He was thwarted in his efforts to secure a warrant for lead counsel's arrest:

“I contacted Corporal Neal, who was in my pod last night, directed me to Major Johnson. Relayed my, my message that I’d like to press charges on Mr. Wilson, and he said back to her—I did not speak to Major Johnson. I spoke to, I spoke to Craig that, that, at the jailhouse, did not permit me to do that. I needed a written statement from you in order to do an in-house assault charge.”

Tr. 25, l. 23 - 26, l. 4.

The judge informed appellant that these were matters that could be addressed at a later date. January 24 hearing, Tr. 26, ll. 16-17. “There’s no urgency about that.” Tr. 26, l. 17. Wilson was quick to point out that there were witnesses to these events and that he hoped there was a video of the incident. Tr. 27, ll. 5-10. Wilson statements clearly show that he was contemplating his defense to appellant’s criminal allegations:

The other thing is, is that I was not in the room with him alone when this occurred. Captain Rathbun and my co-counsel with me was (sic) there. And so was the paralegal, Mrs. DePursio. So—and the officers came in and I don’t know whether there was a video or not of it. I hope there was.

Tr. 27, ll. 5-10.

Appellant continued to express his extreme dissatisfaction with Wilson:

“I don’t, I don’t see how we can get along. We have to—*we have to go through a mock trial and that this man is just now called me a liar, and there is no way we can get along.* I’ve asked him to be, to be removed. I can’t get along with the man. He obviously is just called me a liar again, and, and there’s no way that I can get along with him in order to, to get a fair trial out of it, out of this as to what he did tell me.

He did tell me that I was gonna be convicted. He called me a liar again. I’m not—*I can’t work with the man*, and, and go about how I’m gonna be approached to be on the stand. So, I don’t see it. I don’t see how it’s gonna, how, how

that, in any way, is gonna give me a fair trial with a man that's already come to a conclusion."

Tr. 29, ll. 5-18. (emphasis added).

The trial court told Winkler --3 times-- that he could "address this further" on Monday, the start date of his death penalty trial. Tr. 29, ll. 23-25; Tr. 30, l. 5, Tr. 30, ll. 12-13. On Monday, the judge stated these events were not "significant enough" to remove Wilson, and the trial began. Tr. 33, ll. 22-25.

### **The Trial Court Decides Not to Allow Appellant to Represent Himself**

After the trial court informed appellant again that he "always [has] the opportunity . . . to represent himself," he noted it would be dangerous it would be for him to do so. Tr. 1917, ll. 14-23. *Appellant's attorneys asked the judge to allow appellant to represent himself.* Tr. 1920, l. 21 – Tr. 1921, l. 20. The judge again told appellant that the decision was highly inadvisable, and that he would be bound by court rules. Tr. 1921, ll. 21-25. The state conceded that appellant had the right to represent himself. Tr. 1922, ll. 2-8. The judge informed appellant for the third time that he had the right to represent himself but that it was dangerous to do so. Tr. 1922, ll. 14-19. Appellant was insistent that he wished to represent himself. Tr. 1926, l. 6 - 1927, l. 25; Tr. 1930, l. 19 - 1931, l. 3.

The judge began to seriously engage appellant regarding his decision to represent himself. Tr. 1929, l.14. Wilson clarified appellant's position:

Mr. Wilson: Yes, sir, but what he, what he what he wants to do, and he'll tell you if I'm correct. What he wants to do is to represent himself, but he wants to make sure, and you say dismiss your attorneys, and that's the other word that's confusing him.



Tr. 1927, ll. 21-25.

Appellant unequivocally invoked his right to represent himself. Tr. 1928, ll. 11-17.

The judge wanted to know if appellant was concerned about undertaking self-representation because he was not a skilled lawyer. Tr. 1929, ll. 6-13. The court wondered if appellant had enough time to consider the decision, and whether he would know how to make proper objections. Tr. 1929, ll.14-21. He told appellant he would be treated like “anyone else in a court of law.” Tr. 1929, ll. 22-23. He informed him this was the mitigation phase, and not the penalty phase. Tr. 1930, ll. 6-18. The judge noted that he was reviewing Faretta, *supra*, Brewer<sup>3</sup>, and Fuller<sup>4</sup> while asking these questions. Tr. 1931, ll.1-3.

The judge then discussed appellant’s medications. Tr. 1931, ll. 4-25. Wilson again informed the judge that appellant was adamant about representing himself, even though Wilson -- as would any attorney -- did not believe it was a good idea. Tr. 1932, ll. 4-9. The judge asked appellant if he reviewed the mitigation materials collected by his defense team. Tr. 1932, l. 25 - 1933, l. 10. He asked him if he understood “the nature of the term leading question.” Tr. 1933, ll.1-20. Appellant answered that “it’s trying to get someone to say something that you want them to say, putting words in their mouth.” Tr. 1933, ll. 11-17.

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<sup>3</sup> 328 S.C. 117, 492 S.E.2d 97 (1997).

<sup>4</sup> 337 S.C. 236, 523 S.E.2d 168 (1999).

The judge asked if appellant had reviewed the rules of evidence for South Carolina; did he understand the various exceptions to hearsay? Tr. 1933, ll.18-25. Did he know what an excited utterance is? Tr. 1934, ll.1-5.

Appellant then addressed the court:

Your Honor, my view of it is yesterday we won that trial. We got the bad verdict. I did not have my day in court. I did not take the stand, which we were trying to fit in. . . . Most of these witnesses that they're going to call today, what I understand, there's nobody that knows them better than myself. They were supposedly my friends who turned against me to keep me with my wife, who they only met several times. I know them better than anybody in this room, your Honor, and-- . . . Your Honor, I'm confident in taking, taking care of this, this business.

Tr. 1934, l.8 - 1935, l. 4.

The judge then asked counsel to look at Fuller, supra, and Brewer, supra to see when the decision to proceed pro se had to be made. And he asked appellant:

And let me just review these one more time. Let me—but you understand the dangers, the pitfalls? You understand it's not that, that – it's very dangerous to do this, and you understand at this phase of the trial, sir, this jury is going to decide whether or not you would receive life imprisonment or the death penalty? You understand that, sir?

Defendant: Yes, Your Honor.

Tr. 1925, ll.16-23.

The judge then asked appellant if he understood the danger of going forward representing himself--if it was a decision he wished to make. Appellant said he did. Tr. 1936, ll. 2-9.

After this, Solicitor Hembree asked the judge to “engage in a discussion of all the factors under Faretta just for the record.” Tr. 1937, ll. 18-23. The judge replied that he

thought he had. Tr. 1937, l. 24 - p. 1938, l. 2. The judge said that he would entertain specific requests from counsel if they wished to put them in writing. Tr. 1938, ll.19-24.

The parties then engaged in a discussion regarding the timing of appellant's request. The judge said to appellant:

Mr. Winkler, I do want you to consider this very seriously because this is a serious decision. If ultimately, though, I determine that you've make (sic) that decision and it is a knowing, intelligent and voluntary decision and you made it pursuant to Faretta vs. California standards and reviewing Fuller and Brewer, then it's probable I'll permit you to do. Let me think further with it.

Tr. 1938, l. 25 - 1939, l.7.

Defense counsel continued to insist on their client's right to represent himself. Tr. 1944, ll.8-20. The judge stated that he had "not yet made a finding that he's—knowing and voluntary decision knowing his rights (sic)." Tr. 1944, ll.21-24. "I haven't made that finding yet." Tr. 1945, ll.1-2.

Defense counsel again enthusiastically argued appellant's right to represent himself, while maintaining that they did not personally agree with his decision. Tr. 1953, ll.9 - 1954, l. 18. The judge then asked if appellant was familiar with South Carolina Code Ann. §16-3-20. Tr. 1954, ll.19-22. Appellant said he was not. Defense counsel then argued that Brewer allows appellant to represent himself:

"The open (sic) test is whether defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice but the defendant's understanding . . . The determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed pro se does not justify a denial of the right of self-representation. The only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to —".

Tr. 1955, l. 9 - 1956, l. 1.

The judge again stated that he was concerned about a long delay, appellant's "anxiety situation" and "whether he really understands the nature of representing himself." Tr. 1956, l. 1 - 1957, l. 19. Appellant had been found competent to stand trial and assist in his defense during two prior Blair hearings, conducted on February 16, 2007 and December 13, 2007. R. p. \*.

Defense counsel Wilson told the judge at one point, that "he [Appellant] wanted to be heard." The judge responded: "No. I think I have heard enough in that regard." Tr. 1958, ll. 20-22. The judge, of course, ultimately did not allow appellant to represent himself.

The judge asked both counsel to review State v. Fuller<sup>5</sup> and State v. Brewer<sup>6</sup> to determine when the decision to allow a defendant to represent himself must be made. As the judge noted, Brewer states that the decision must be made before trial. The judge noted, however that "one could assert this is a trial." Tr. 1935, ll. 10-15. The judge also gave counsel for both sides the opportunity to make "specific requests of conversation with the defendant if you want to put that in writing." Tr. 1938, ll. 19-24. The judge told appellant:

"If ultimately, though, I determine that you've made that decision and it is knowing, intelligent and voluntary decision and you made it pursuant to Faretta v. California standards and reviewing Fuller and Brewer, then it's probable I'll permit you to do. Let me think further with it."

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<sup>5</sup> 337 S.C. 236, 523 S.E.2d 168 (1999).

<sup>6</sup> 328 S.C. 117, 492 S.E.2d 97 (1997).

Tr.1939, ll. 2-7.

The judge asked whether the parties agreed, pursuant to Fuller, that the decision was now within the discretion of the judge. Tr.1940, ll. 5-11. The state did agree. Tr.1940, ll.12-15. However, defense counsel did not agree—their position was that appellant had the right to represent himself during the penalty phase of his own capital trial. Tr. 1940, l. 23 -- Tr. 1942, l. 5. Defense counsel distinguished State v. Reed<sup>7</sup> from the instant case. Essentially, counsel argued that, unlike Reed, this was not a case where a defendant was asking to have counsel “reinstated” after having represented himself during the guilt phase of a capital trial. Tr. 1943, l. 15 - 1945, l. 2. The judge then suggested that he had concerns that appellant was even capable of making a knowing and voluntary waiver of his rights. Tr.1944, ll. 21-24. The court took a recess.

When court convened again, the judge informed the parties that he was concerned that appellant had not had the opportunity to review the volumes of material that had been amassed in preparation for the penalty phase of the trial. He noted that there was an expert witness scheduled to testify for the defense and that “Mr. Wilson and Mr. Rathbun obviously know better how to examine them (sic).” Tr. 1948, l. 1 - 1949, l. 11. The judge stated that he did not think it was appropriate or fair to delay the trial to give appellant the opportunity to review the materials. Tr. 1949, ll. 12-19.

The judge was also concerned about appellant’s mental health and the fact that he would need additional medications to control his anxiety if he were allowed to represent himself. Tr. 1949, l. 20 – 1951, l. 6.

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<sup>7</sup> 332 S.C. 35, 503 S.E.2d 747 (1998).

“Then if we had that, would that affect the situation of maybe his senses being dulled since that would make him miss points that he would really need to make to help himself. And that does concern me.”

Tr. 1951, ll. 3-6.

The judge spoke with, and took testimony from, Deborah Hipp, a nurse practitioner. She testified that an “increase in anxiety may require more medication.” Tr.

1951, l. 13. The judge then asked her:

“And more medication, although it might keep someone calm, it may go at some point in time over the line, keep him calm to the extent that they maybe are not quite as alert as they would be without it?”

A. That’s true.”

Tr. 1952, ll. 14-18.

Again, the judge stated that his medicines cause him concern “about whether or not he can adequately represent himself.” Tr. 1953, ll. 1-3.

Wilson informed the court that appellant was not attempting to delay the trial with his request, and that he was ready to go forward. Counsel said that appellant was familiar with the materials, and that he had met with every expert on multiple occasions. He said that the experts had given appellant the materials that they intended to present, and that he knew what those materials were. Tr.1953, ll. 9-19. Counsel also informed the court that there was no indication he was mentally incapable of proceeding. Tr. 1953, ll. 22-25.

The judge reiterated that he was concerned that he would have to delay the case, and that he might need more medication, and that he was concerned that appellant did not “really understand[] the nature of representing himself.” Tr. 1956, l. 9 - 1957, l. 19.

This was when defense counsel told the judge that appellant wished to be heard, but the judge stated he had “heard enough in that regard.” Tr. 1958, ll. 20-22.

The trial judge then conducted an *in camera* telephone conference with counsel and Dr. Rikki Halavonich, a forensic psychiatrist who testified later in the trial as a defense witness. The judge asked her about appellant’s ability to represent himself in light of his medical condition. The doctor stated:

“Well, I, you know, am concerned frankly, regardless of whether they increased his medication or not, of his ability to actively cross-examine witnesses and that type of thing without getting frustrated and, you know, worked up. **It’s his personality.**”

Tr. 1960, ll. 2-23 (emphasis added).

The doctor continued to explain that the Klonopin-- the prescribed medication for Appellant’s anxiety-- “kicks in pretty quickly.” Tr.1962, ll. 12-13. She stated that they could titrate the medications to accommodate any increase in his anxiety. She stated it would be “kind of a clinical call.” Tr. 1963, l. 8. As an expert witness, she did not believe she could oversee his medications, but she suggested that Dr. Smith could come and be available as needed during the trial to oversee his medications. She also stated that Klonopin works on the same receptors as alcohol does, and that if you start getting *too much* it could impair judgment. Tr. 1962, l. 2 – Tr. 1963, l. 17.

The judge then put his ruling on the record, and denied appellant’s request. Tr. 1964, l. 8 – Tr. 1972, l. 7.

Defense counsel reiterated that appellant never asked for a delay, and that he has not asked the court for any additional time to do anything. Tr. 1973, ll. 7-12. Defense

counsel continued to object that appellant should be allowed to represent himself. Tr. 1973, l. 13 - 1975, l. 24.

### **Legal Analysis**

The Sixth Amendment provides that an accused may waive the right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806 (1975); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). That right must be preserved even if the court believes that the defendant will benefit from the advice of counsel. State v. Fuller, 337, S.C. 236, 241, 523 S.E.2d 168, 170 (1999). See also United States v. Singleton, 107 F.3d 1091 (4<sup>th</sup> Cir. 1997). If the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge. Fuller at 241. See also Singleton, supra; United States v. Lawrence, 605 F.2d 1321 (4<sup>th</sup> Cir. 1979). [I]t is incumbent upon the trial court to determine whether the request is made for purposes of delay or to gain a tactical advantage, and whether the lateness of the request may hinder the administration of justice.” Fuller at 241 (quoting People v. Mogul, 812 P.2d 705, 709 (Colo.Ct.App.1991)).

The judge abused his discretion in this case for two reasons. First, the judge found that he would have to delay the case to give appellant an opportunity to review and study the law, and to otherwise review the materials that had been collected on his behalf. Tr. 1956, ll. 9-20. Appellant, however, never requested a continuance, as his attorneys informed the court there was no need for any delay. Also, appellant had already thoroughly reviewed all of the materials in their possession. As counsel informed the court:



“One, I don’t think that there is—that this defendant is making this motion in order to delay this trial or in any way impede justice in any way whatsoever. And every indication is that he said to this court that he is ready to go forward. He is willing to go forward. He’s indicated to this court that he has, he is familiar with the materials and to be frank with you, he is. *Every expert that we have hired, he has met with on multiple occasions; he has talked with them on multiple occasions. They have given him whenever (sic) they have on that they intend to present, so he knows what that it is.*”

Tr. 1953, ll. 9-19. (emphasis added).

The judge abused his discretion because it was predicated on a non-existent fact. Appellant was prepared to go forward immediately—the trial did not need -- nor was it requested -- to be continued.

The judge also abused his discretion because both the nurse practitioner and Dr. Halavonich informed him that appellant’s medications could be monitored in such a way as to allow him to proceed pro se. The nurse practitioner, Hipp, merely made the observation that an increase in anxiety *may* require more medication. Tr. 1952, l. 13. She did not render an opinion as to whether he would, in fact, need any more medication, or whether any increase in medications would render him incapable of representing himself. Also, Dr. Halavonich cited appellant’s *personality* as the cause of her concern about his ability to actively cross-examine witnesses. Tr. 1960, ll. 19-23. This, of course, was not a proper basis upon which to deny a defendant the right to represent himself. Then she proceeded to suggest to the judge a viable plan for overseeing Appellant’s medications. She suggested Dr. Smith could oversee his medications so they *would not* dull his senses. Tr. 1963, ll. 14-17. As she informed the judge—“[A] little bit can kind of relax you, but if you start getting *too much*, it can make you, your judgment be impaired and make less

appropriate decisions.” Tr. 1961, ll. 12-16. Dr. Halavonich’s testimony informed the court that there was, in fact, a viable way for appellant’s medications to be controlled so that he could represent himself. The trial judge appears to have placed a different interpretation on her remarks, and one not consistent with her actual statements. Concern for his medications was not a sufficient basis to deny appellant’s request, and it was an abuse of the judge’s discretion to do so.

The judge’s abuse of discretion was further enhanced by his unwillingness to allow appellant to address the issue with him. This case is similar to Fuller in the sense that the appellant’s request was made “in an atmosphere of his escalating dissatisfaction” with his attorneys. Id. At 242. In Fuller, the trial court fined defense counsel a few days before trial for being dilatory; and on the day of trial, Fuller complained that trial counsel had been ineffective in preparing for trial. In this case, appellant had been vocal about his dissatisfaction with one attorney for over a year. Appellant informed the court of a physical confrontation with his other attorney a few days before trial, that he wanted to swear out a warrant for his arrest, and he attempted to have them replaced on the day his trial began.

Respectfully to trial counsel, they had certainly been dilatory in their efforts to mount a mitigation case prior to the initial scheduled trial date. One business day before the start of the trial, the state was “forced” to join in the continuance motion given that the defense was unprepared for trial. Obviously, the state sensed the post-conviction action to come if this continuance motion was denied, and the trial court blamed – correctly -- defense counsel for being unprepared for trial since there is “no ineffective assistance of expert.”

In short, the record is replete with examples of appellant's rationally based, understandable unhappiness with his trial counsel. And as in Fuller, the trial judge failed to fully assess the purpose of appellant's request. Had he done so, he would have realized that, as in Fuller, there were significant and fundamental disagreements with counsel about counsel's preparation that underlain appellant's decision to represent himself, and that he was not seeking a strategic advantage with his request.

During the penalty phase, it became quite evident that appellant and his attorneys had divergent views about how the penalty phase was to proceed:

Mr. Wilson: *As you know* the record will reflect that I put up a social, social history through a sociologist, Ms. Oehler, in—regarding the defendant and his history and his family. And the defendant wants me to let the court know that he had asked me not to put up any social history and that I put that up in spite of his objections. And for the record, I'm noting that he did ask me not to put any social history in because he didn't want anything derogatory said about his family. But in my judgment as a lawyer, I felt it was the appropriate thing to do and I did it.

Tr. 2788, ll. 13-23.

Appellant also addressed the court:

"Sir, I'd like to also again put for the record that, that again disobeying what I, I asked him, what I—you know, I told him specifically that I did not want my family dragged through the mud, and he did it anyway."<sup>8</sup>

Tr. 2789, ll. 1-5.

Appellant did not request to proceed pro se in order to delay the trial or otherwise work a strategic advantage. He was dissatisfied with his attorneys, as he informed the court on numerous occasions. The court was simply concerned that appellant would not

do a good job of representing himself. That, however, was not the correct standard for the court to employ. As this Court held in State v. Brewer:

A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed pro se does not justify a denial of the right to self-representation; the only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel.

Id. At 119. See also Faretta v. California, supra; United States v. Bennett, 539 F.2d 45 (10<sup>th</sup> Cir. 1976). See State v. Reed, supra. (“A decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one.”) The judge abused his discretion by failing to acknowledge “that respect for the individual which is the lifeblood of the law” and by “forcing” a lawyer upon an unwilling defendant. Faretta, at 834, 2540-41, supra.

As also argued more fully infra, the trial judge never engaged in a focused colloquy with appellant regarding his right to represent himself. Instead, discussions meandered from his invocation of the right, to issues of his medication, and then to questions regarding the appropriate time for appellant to make the request. At no time did the judge specifically indicate that he was asking questions for purposes of determining whether appellant was making a knowing and voluntary waiver of his right to be represented by counsel. Respectfully, he should have. Additionally, the judge led appellant to believe, on three occasions, that he would have the right to represent himself, should it come to that. Once convicted, and with the penalty phase about to commence, appellant invoked the right that he was led, *by the judge*, to believe that he had—the right to represent himself during that phase. It was an abuse of discretion for the judge to then

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<sup>8</sup> This issue is discussed in detail infra.

disallow him the opportunity. Appellant respectfully submits he should be granted a new sentencing trial.

Alternatively, appellant had the right to represent himself during the penalty phase of his trial under the reasoning of *Faretta*, and his case is not governed by the *Brewer* abuse of discretion standard. Further, it was apparent appellant knew the state's witness against him, that he had been actively involved with the experts, and his requests not to involve his family in his "mitigation case" were reasonable and his decision to make.

Appellant had the right to represent himself at the penalty phase of his trial pursuant to the reasoning of *Faretta*, *supra*.

“The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the state interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master, and the right to make a defense is stripped of the personal character upon which the Amendment insists.”

*Faretta* (Id. At 2533-34). And see *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (“The Counsel Clause itself, which permits the accused “to have the Assistance of Counsel for his defense,” implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel’s trial.”).

Appellant should not have been forced to proceed during the penalty phase of his trial with counsel with whom he was clearly, and with plenty of reason in the record vocally, displeased.

The justifications underlying *pro se* representation are no less present in the context of a capital trial penalty phase hearing than exist in a garden-variety criminal

trial. Indeed, given the extremely personal quality of a penalty phase hearing, those considerations are, in fact, even more compelling. The language of Lockett v. Ohio, 438 U.S. 586 (1978) is no less instructive in the context of this self-representation issue:

Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases. . . . The non-availability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Id. At 2965.

Other jurisdictions have acknowledged the personal quality of penalty phase litigation and have held, for example, that a defendant may dispense with counsel altogether and waive mitigation in its entirety. See Hojan v. State of Florida, 3 So.3d 1204, 1211 (2009) (“Competent defendants who are represented by counsel maintain the right to make choices in respect to their attorneys’ handling of their cases. This includes the right to either waive presentation of mitigation evidence or to choose what mitigation evidence is introduced by counsel.”); Cowans v. Bagley, 2008 WL 4452578 (S.D. Ohio, 2008) (finding the record sufficient to demonstrate that petitioner’s waiver of the right to present mitigation evidence—whatever the scope and constitutional magnitude of that right—was knowing, intelligent, and voluntary and that petitioner was competent to waive that right); Chapman v. Commonwealth of Kentucky, 265 S.W. 3d 156 (2007) (“Once the trial court allowed Chapman to proceed pro se, Chapman himself became the arbiter of what, if any, evidence he wanted to offer, including a right to waive his right to

present mitigation evidence”), reconsideration denied; People v. Miller, 153 Cal.App.4<sup>th</sup> 1015, 62 Cal.Rptr.3d 900 (2007) (since request was timely—2 months between penalty and sentencing phases—defendant had an absolute right to represent himself); ; Lamarca v. State, 931 So.2d 838 (2006) (defendant represented himself during penalty phase and therefore cannot claim that trial counsel was deficient for decisions he made in conducting his defense through this stage); Commonwealth v. Davido, 582 Pa.52, 868 A.2d 431 (2005) (“A criminal defendant has the right to decide whether mitigating evidence will be presented on his behalf. We will not remove that right and compel admission of such evidence. Defense counsel has no duty to introduce and argue evidence of mitigating circumstances where his client has specifically directed otherwise”).

In United States v. Davis, 285 F.3d 378 (5<sup>th</sup> Cir. 2002), the defendant was allowed to present his own penalty case because he did not desire to present traditional mitigation evidence. Instead, he wished to focus on attacking the government’s case as to guilt. Id. At 380. The Court of Appeals reversed the district court’s decision that did not allow the defendant to represent himself because the “right to self-representation does not extend to criminal sentencing.” Id. The Court found the district court failed[ed] to “take into consideration the strength and nature of the right to self-representation.” Id. At 384.

“Faretta teaches us that the right to self-representation is a personal right. It cannot be impinged upon merely because society, or a judge, may have a difference of opinion with the accused as to what type of evidence, if any, should be presented in a penalty phase.”

Id.



The core of a defendant's right to pro se representation is his ability to preserve actual control over the case he chooses to present to the jury. Id. At 385. See also McKaskle v. Wiggins, supra. That appellant's rights were violated by the judge's disallowing him to represent himself during the penalty phase is nowhere more apparent than when counsel placed on the record that they pursued a penalty phase strategy at odds with what their client directed them to do. Appellant did not want his family dragged "through the mud," but despite his wishes, counsel presented the jury with appellant's social history over his *known* objections.

Significantly, the mitigation case that appellant did not want presented to the jury was one focused exclusively on his family history. Wilson called Te Anne Oehler, a licensed social worker, to the stand to testify about the family. She did not portray a very positive portrait of the family—appellant's father drank excessively and was controlling, and his mother was not a happy person. Tr. 2752, l. 8—Tr. 2754, l. 15. Ultimately they divorced. Tr. 2757, ll. 21-25.

Oehler met with a number of appellant's family members to prepare for this testimony. Tr. 2776, l. 24—Tr. 2777, l. 2. At trial, appellant's counsel called a number of appellant's family members to testify over appellant's objection,—Karen Reeves, a sister; Rick Winkler, a brother; Jody McDougal, another sister; and appellant's mother, JoAnne Winkler. Each of these witnesses essentially begged the jury to spare their loved one's life. Ms. Reeves, apparently, was crying. Tr. 2750, ll.5-7; Tr. 2795, ll.15-16; Tr. 2795, ll. 16-18; Tr. 2796, ll. 17-18; Tr. 2801, ll.2-7; Tr. 2801, ll. 23-24; Tr. 2804, ll.17-21; Tr. 2805, ll. 13-14; Tr. 2808, ll. 18-24.

Appellant clearly did not wish to put his family through this ordeal -- and to beg for his life -- which he had the right to decide. Nevertheless, over his objections, defense counsel proceeded with the case they believed they were entitled to present. Appellant was denied his right to self-representation as guaranteed by Faretta, and appellant respectfully submits that this Court should remand for a new sentencing hearing.

The court erred by failing to properly provide appellant with *Faretta* warnings, during a focused waiver hearing, when appellant invoked his right to represent himself, and his attorneys told the court that appellant was ready and willing to represent himself and that no delay in the trial was necessary.

According to Faretta:

“Although a defendant need not have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’”

Id. At 835 (quoting Adams v. United States ex rel. McCann, 317 U.S. at 279).

The Faretta colloquy in this case was inadequate because the judge focused on appellant’s legal acumen, and not on his knowing and voluntary waiver of the right to represent himself. The judge’s approach, then, violated Faretta. Also, the judge failed to conduct a proper colloquy to explore the reasons surrounding appellant’s request to represent himself. As in State v. Fuller, supra this omission requires reversal. Id. At 242.

The judge’s Faretta colloquy was insufficient because the judge focused on appellant’s ability to adequately represent himself, and not whether he was knowingly and voluntarily waiving his right to counsel. Repeatedly the judge asked appellant about sophisticated rules of evidence and the death penalty statute. As seen supra, appellant understood what a leading question was, but he did not know the nature of an excited utterance. Under the judge’s exacting standard, only an attorney—and likely, only a

criminal defense attorney—would ever been entitled to represent himself in a death penalty trial. This clearly was not what Faretta contemplates.

Additionally, the judge should have looked to this state's law to determine if appellant's waiver was knowing and voluntary. The judge should have considered the following factors: (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation, (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew of legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment. Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002); State v. Cash, 309 S.C. 40, 419 S.E.2d 811 (Ct.App.1992).

Under these factors, it is apparent that appellant was capable of making a knowing and voluntary waiver of his rights. However, as seen above, the trial judge essentially brushed aside even the state's assertion that he should engage appellant in a full Faretta colloquy stating he thought he had done so. He had not, and in this instance he should have heeded the solicitor's advice, and the continued representations of defense counsel that appellant was able to represent himself. Further, the judge told defense counsel

Wilson that he had “heard enough” when Wilson informed him appellant wished to address the court on this subject.

As in State v. Fuller, supra, the failure to engage appellant in a full and focused Faretta waiver hearing was reversible error.

The court erred alternatively by allowing defense counsel to present mitigating social history evidence and call appellant's family members as mitigation witnesses over his objection since appellant still had the right to control the case in mitigation and waive mitigation evidence he did not want the jury to consider even where the judge denied appellant the right to represent himself.

### **Relevant facts**

As seen, the trial judge ordered defense counsel to keep him informed every two weeks about the progress on the preparation of appellant's defense and case in mitigation of sentence. July 13, 2007 order R. p. \*. The judge had thus injected himself into overseeing the defense in this case in a highly unusual manner.

After social worker Te Anne Oehler testified that appellant's father drank excessively and was controlling, and that his mother was not a happy person, and that they ultimately divorced,<sup>9</sup> the following occurred:

The Court: Mr. Wilson?

Mr. Wilson: As you know, the record will reflect that I put a social, social history through a sociologist, Ms. Oehler, in - - regarding the defendant and his history and his family. And the defendant wants me to let the court know that he had asked me not to put up any social history and that I put that up in spite of his objections. And for the record, I'm noting that he did ask me not to put any social history in because he didn't want anything derogatory said about his family. But in my judgment as a lawyer, I felt it was the appropriate thing to do and I did it.

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<sup>9</sup> Tr. 2752, l. 8 — 2757, ll. 21-25.

The Court: All right. That's noted. Be noted. Thank y'all very much. All right.

The Defendant: Sir, I'd like to also again put for the record that, that again disobeying what I, I asked him, what I - - you know, I told him specifically that I did not want my family dragged through the mud, and he did it anyway.

I'm asking again for a new lawyer. This is the third time that he's done that. He did it on the witness stand earlier today, and it's - - everything I'm asking him to do, he's going against me. I asked him for a recess, he ignored me while that was going on, while his, while his - - Ms. Te Anne was doing that, and he ignored me.

The Court: All right. That's noted. That's noted, Mr. Winkler. Noted for the record.

The Defendant: Thank you.

The Court: All right. Do you have your next witness in the courtroom, Mr. Wilson?

Mr. Wilson: Yes.

The Court: Okay. Bring the jury in, please.

(The jury enters at 6:36 p.m.)

Tr. 2788, l. 5 – 2789, l. 19.

With the judge's approval for placing "mitigation evidence" before the jury over appellant's objection appellant's counsel then called a number of appellant's family members to testify over appellant's objection. As seen above, they were Karen Reeves, a sister; Rick Winkler, a brother; Jody McDougal, another sister; and appellant's mother, JoAnne Winkler. Each of these witnesses essentially begged the jury to spare their loved one's life. Ms. Reeves, apparently, was crying. Tr. 2750, ll.5-7; Tr. 2795, ll.15-16; Tr.

2795, ll. 16-18; Tr. 2796, ll. 17-18; Tr. 2801, ll.2-7; Tr. 2801, ll. 23-24; Tr. 2804, ll.17-21; Tr. 2805, ll. 13-14; Tr. 2808, ll. 18-24.

### **Discussion**

Appellant had the right to prevent his attorneys from calling social worker Oehler to the stand to provide his social history, and he had the right to keep them, also, from calling his family members.

If this Court determines that appellant did not have the right to fire his attorneys and conduct the penalty phase of his trial pro se, and if the Court further determines that the judge did not abuse his discretion in forbidding appellant from proceeding pro se, then appellant still had the right to exercise control over the mitigation evidence his attorneys presented on his behalf. As this Court will recall in Hojan v. State of Florida, supra, the Supreme Court of Florida acknowledged a defendant's right to control the mitigation case presented on his behalf. The court specifically acknowledged that "[T]he defendant, not the attorney, is the captain of the ship." Id. At 1211 (*quoting Nixon v. Singletary*, 758 So.2d 618, 625 (Fla. 2000)). Here, conversely, the judge did not credit appellant's dissatisfactions. The judge essentially gave the defense team *carte blanche* in their handling of appellant's mitigation case despite his meticulous oversight of it prior to trial.

Appellant's counsel had requested that the judge allow appellant to represent himself during the penalty stage. As seen above, the judge then approved of counsel presenting mitigation evidence over appellant's objection. It is clear from the judge's response to appellant's complaints about the case being presented on his behalf that he simply did not recognize that appellant had any right to exercise any control over the case



being presented by the attorneys. The judge's actions failed to acknowledge the highly personal quality of penalty phase litigation, and failed to acknowledge that the Federal Constitution provides for the "assistance" of counsel and not the right of counsel to exercise sole discretion in the presentation of mitigation on a defendant's behalf. See McKaskle v. Wiggins, supra ("The Counsel Clause itself, which permits the accused "to have the Assistance of Counsel for his defense," implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel's trial."). Respectfully, this Court should grant appellant a new sentencing hearing.

7.

The court erred by refusing to direct a verdict on the statutory aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime, since there was lack of evidence to support it.

The aggravating circumstance at issue in the case is “the murder of a witness or a potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.” See S.C. Code § 16-3-20(C)(a)(11). There was no evidence to support that aggravating circumstance being sent to the jury. See State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007); State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000).

Defense counsel correctly moved for a directed verdict on this aggravating circumstance: “I would submit to the court that while there has certainly been evidence produced of a crime, [but] there has been no evidence produced that it was for the purpose of deterring or impeding the criminal procedure which would have followed.” The trial judge responded, “I was thinking that also, Mr. Wilson, that – what was going to be introduced in that regard.” However, the judge then stated that he thought “[t]here’s sufficient evidence, Mr. Wilson, circumstantially for a jury to accept beyond a reasonable doubt. They may not, but they could find that’s an aggravating circumstance based on circumstantial evidence.” Tr. 2307, l. 2 -2309, l. 7.

Defense counsel renewed his motion at the close of the evidence. The trial judge again denied the motion. Tr. 2317, ll. 4-15.

There was certainly no direct evidence appellant killed the decedent for the purpose of impeding the criminal prosecution against him. Interestingly as to motive, as seen, Jonathan Grainger admitted that his mother was seeing his father (whom Officer Knoch said he told him was the killer) again, and that his father had stayed with his mother overnight at their condominium. Further, Jonathan acknowledged that his father was expected at their home at about 6 p.m. that day. The murder occurred at approximately 5:30. Jonathan also said that his father was upset that his mother ever “got with Mick,” and that his father “didn’t have any particular love for Mick.” Tr. 1445, l. 21 – 1454, l. 5. If anything, given the entire record, this appears to be a crime of passion.

The opinion of the North Carolina Supreme Court in State v. Oliver, 302 N.C. 28, 274 S.E.2d 183, 204 (1981), is instructive given that there was no evidence here, for example, of a pending court date, evidence the decedent was cooperating in a prosecution, evidence appellant had a criminal lawyer, or of any plea discussions. There was simply a failure of evidence on this aggravating circumstance. The Oliver court held: “Where it is doubtful whether a particular aggravating circumstance should be submitted, the doubt should be resolve in favor of the defendant.” When “a person’s life is at stake . . . the jury should not be instructed upon one of the (aggravating) statutory circumstances in a doubtful case. State v. Goodman, 298 N.C. at 30, 257 S.E.2d at 588, supra.”

Here, the jury was being asked to find this aggravating circumstance beyond a reasonable doubt merely because the decedent may have been a witness in some future trial, and because appellant had been arrested. The statutory aggravating circumstance requires that *the motive for the murder* was for “the purpose of impeding or deterring

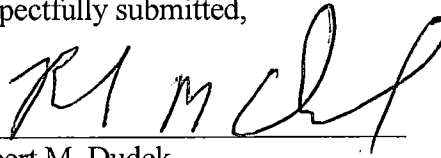
prosecution.” The state simply failed to prove that in this case. The jury was asked to speculate that because appellant had been arrested for a crime against the decedent, that he murdered her to keep her from testifying at some trial to be held at some point in the future. Such speculation has never been sufficient to survive a directed verdict motion because it would authorize a verdict based on suspicion. See State v. Mitchell, 341 S.C. 404, 409, 535 S.E.2d 126, 127 (1999). “Suspicion” implies a belief as to guilt based upon facts or circumstances which do not amount to proof. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001).

Further, the remaining burglary aggravator was tainted by the fact that Jonathan Grainger’s interview with Detective Pitts was improperly admitted as a prior consistent statement. As seen, during that interview Jonathan stated that appellant kicked in the door, entering without consent, and that is what constituted the burglary. See Interview at 3-4; R. p. \*. As stated above, the improperly admitted interview of the only eyewitness to the crime, Jonathan, improperly bolstered his own testimony to the detriment of appellant’s testimony. Appellant testified that he had been to his estranged wife’s new home often, and that he entered with consent. Since the only remaining aggravating circumstance, the burglary, pursuant to S.C. Code § 16-3-20 (C)(a)(1)(c) was tainted by this improper evidence, appellant’s death sentence must be vacated since after the elimination of the invalid aggravator, appellant’s death sentence no longer rests on firm ground. See Tuggle v. Netherland, 516 U.S. 10, 13 (1995).

### CONCLUSION

By reason of the forgoing arguments, appellant's conviction should be reversed and this case remanded to the Horry County Court of General Sessions for a new trial. In the alternative, appellant's death sentence should be vacated, and this case remanded for a new sentencing trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Deputy Chief Appellate Defender for Capital Appeals

Elizabeth A. Franklin-Best  
Appellate Defender

ATTORNEYS FOR APPELLANT.

August 21, 2009

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

---

**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

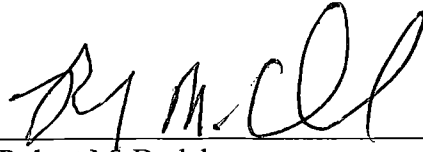
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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Entire trial transcript;
- (3) All pre-trial transcripts;
- (4) State's exhibit 1 (911 tape);
- (5) State's 35 for identification (Transcript of the 911 tape);
- (6) State's 51 (tape of Jonathan Grainger's statement)
- (7) Court's exhibit # 20 (interview with Jonathan Grainger);
- (8) Court's exhibit 24 (Transcript of interview with L. Winkler);
- (9) Judge Lockemy's August 20, 2007 Continuance Order;
- (10) Court's exhibit 21 (jury note on 911 tape);
- (11) All trial exhibits, motions and memorandum relevant to the seven issues on appeal.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 21, 2009

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek  
Deputy Chief Appellate Defender for Capital Appeals

Elizabeth A. Franklin-Best  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1343

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

---

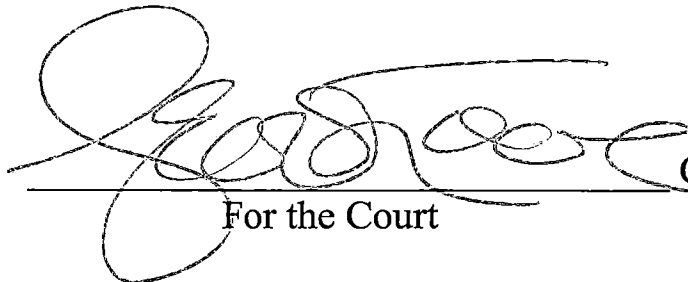
## ORDER

---

Appellant seeks an extension until August 21, 2009 to serve and file the Initial Brief of Appellant and Designation of Matter in the above entitled matter. The opposing party consents to the extension.

The request is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extensions will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

  
C.J.  
For the Court



Columbia, South Carolina

July 23, 2009

cc: Deputy Chief Appellate Defender for Capital Appeals  
Robert M. Dudek  
Assistant Appellate Defender Elizabeth Franklin-Best  
Assistant Deputy Attorney General Donald J. Zelenka



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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E-Mail: executive@sccid.sc.gov

T. Patton Adams, Esq., Executive Director  
Hugh Ryan, Deputy Director and General Counsel  
Lisa A. Graves, Assistant Director

July 22, 2009

The Honorable Daniel E. Shearouse  
Clerk of Court  
The South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

RECEIVED

JUL 22 2009

S.C. SUPREME COURT

Dear Mr. Shearouse:

In the absence of Patton Adams, Executive Director of the South Carolina Commission on Indigent Defense and Hugh Ryan, Deputy Attorney and General Counsel for the South Carolina Commission on Indigent Defense and pursuant to instructions from Mr. Ryan, I ask that you accept this cover letter as an attempt to comply with the Court's order dated March 18, 2009, in regard to extension requests.

In the attached motion for an extension of time, Deputy Chief Appellate Defender for Capital Appeals, Robert M. Dudek seeks a final thirty day extension of time to file the initial brief and designation. Based on that and his extremely heavy case load, as outlined in the motion, he was unable to complete the initial brief and designation.

Thank you for allowing me to bring this to your attention. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Lisa Campbell  
Assistant Director  
South Carolina Commission on  
Indigent Defense

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Horry County  
James E. Lockemy, Circuit Court Judge

---

RECEIVED

JUL 22 2009

RESPONSE TO SUPREME COURT

THE STATE,

V.

LOUIS MICHAEL WINKLER,

APPELLANT

---

**PETITION FOR EXTENSION TO FILE  
INITIAL BRIEF OF APPELLANT AND  
DESIGNATION OF MATTER BASED ON EXTRAORDINARY  
CIRCUMSTANCES**

---

The undersigned counsel would respectfully request a **final** thirty day extension in which to file the initial brief of appellant and designation of matter in the above-referenced death penalty case based on extraordinary circumstances. In support of this motion, counsel would respectfully show the Court:

1. The initial brief of appellant and designation of matter in this case are due to be served and filed today having been extended by prior orders of this Court. The transcripts in this death penalty case are in excess of 3,300 pages long. Counsel and co-counsel met with appellant on death row last week after the issues to be raised before this Court were identified. This meeting led to the discovery of a June 15, 2006 transcript that had not previously been brought to the attention of this office, and which is probative on one of the issues to be raised in the brief of appellant before this Court. That transcript has been

forwarded today to this Court, and opposing counsel, Donald J. Zelenka. In addition, counsel will be going to the Horry County Courthouse -- probably this Friday -- to review exhibits, penalty phase photographs and listen to audiotape exhibits that the court reporter did not transcribe but which were played for the jury during the trial.

2. In addition to work on this death penalty case, counsel filed an initial reply brief in the case of State v. Tracy B. in the Court of Appeals on Monday, July 20, 2009. Counsel on Wednesday, July 8, 2009, filed an initial brief with the Court of Appeals in the murder case of State v. D'el Grant. Counsel also filed a petition for rehearing with the Court of Appeals on Friday, July 10, 2009. Counsel has also been doing work on the death penalty competency remand case of State v. Jeffrey Motts, including documents needed for the Department of Mental Health evaluation. Counsel also has an extremely heavy caseload of mostly murder and death penalty cases at this time. Counsel is working to limit extension requests in the future by working first, with all deliberate speed, on those cases that have been extended the most while recognizing that death penalty cases and murder cases involve longer transcripts and often many more exhibits to view.

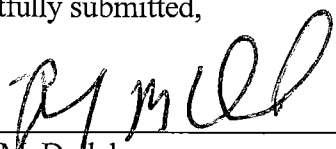
3. Co-counsel, Elizabeth Franklin-Best, on June 15, 2009, filed the initial brief of appellant and designation of matter in State v. Kieve Milik Smith and petitions for writ of certiorari and appendices in Alvin B. Zellers v. State and Jeriod J. Price v. State. On June 22, 2009, co-counsel filed the petition for writ of certiorari and appendix in Derrick B. Woods v. State. On June 23, 2009, co-counsel filed the initial briefs of appellant and designations of matter in State v. Trince Hardy, State v. Sammie Leon Gordon. On July 8, 2009, co-counsel filed the petitions for writ of certiorari and appendices in Arthur Shane Beck v. State and Deborah A. Watkins v. State. On July 9, 2009, co-counsel filed the petitions for writ of certiorari and appendices in Andrew Cheeks v. State and Jerome Will James v. State. On July 14, 2009

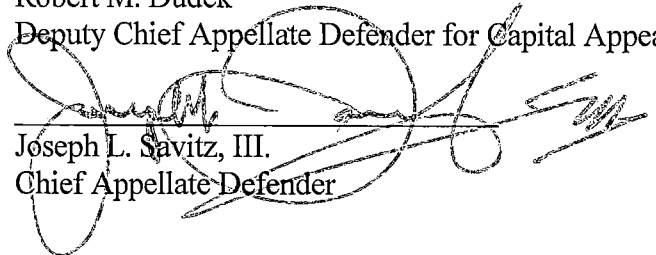
co-counsel filed a petition for writ of certiorari and appendix in Mario Prioleau v. State and on July 15, 2009 co-counsel file an initial brief of appellant and designation of matter in State v. Eric Jermole Dade. Co-counsel is working diligently to bring the number of extensions required down. This request is made in good faith, and not for purposes of delay.

4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a **final** thirty day extension in which to file the initial brief of appellant and designation of matter in this case based upon the above extraordinary circumstances. Counsel requests that time limits for filing the initial brief of appellant be held in abeyance pending a ruling on this motion.

Respectfully submitted,

By:   
Robert M. Dudek  
Deputy Chief Appellate Defender for Capital Appeals

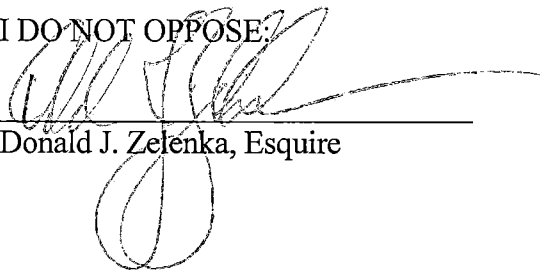
  
Joseph L. Savitz, III.  
Chief Appellate Defender

---

T. Patton Adams, IV  
Executive Director or  
J. Hugh Ryan, III  
General Counsel

July 22, 2009

I DO NOT OPPOSE:



---

Donald J. Zelenka, Esquire



# SCCID

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Joseph L. Savitz, III, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

July 22, 2009

RECEIVED

JUL 22 2009

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk of Court  
The South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

Re: The State v. Louis M. Winkler (Capital Case)

Dear Mr. Shearouse:

I have attached a copy of the June 15, 2006 transcript that was apparently transcribed at the request of trial attorney Ralph Wilson, Esquire. We were not made aware of this transcript. Counsel and co-counsel met with appellant on death row last week after the issues to be raised before this Court were identified. This meeting led to the discovery of this June 15, 2006 transcript, and the transcript is probative on one of the issues to be raised in the brief of appellant before this Court.

Please contact me if you have any questions.

Sincerely,

Robert M. Dudek  
Deputy Chief Appellate Defender for Capital Appeals

RMD/mwl

Enclosure

cc: Donald J. Zelenka, Esquire

1 STATE OF SOUTH CAROLINA ) COURT OF GENERAL SESSIONS  
2 COUNTY OF HORRY )  
3 )  
4 STATE )  
5 VERSUS ) TRANSCRIPT OF RECORD  
6 LOUIS MICHAEL WINKLER )  
7 ) June 15, 2006  
 ) Conway, South Carolina  
 )

8 B E F O R E:  
9 HONORABLE JAMES LOCKEMY, Judge.

10 A P P E A R A N C E S:  
11 GREG HEMBREE, ESQ.  
12 SOLICITOR FOR THE FIFTEENTH JUDICIAL CIRCUIT  
13 ATTORNEY FOR THE STATE  
14 PAUL RATHBUN, ESQ.  
15 ASSISTANT PUBLIC DEFENDER FOR HORRY COUNTY  
16 RALPH WILSON, ESQ.  
17 ATTORNEYS FOR DEFENDANT  
18  
19  
20

21 DIXIE COX EUBANK  
22 CIRCUIT COURT REPORTER  
23 FIFTEENTH JUDICIAL CIRCUIT  
24  
25



1 (THE FOLLOWING TAKES PLACE ON JUNE 15, 2006.)

2 THE COURT: All right. This is the matter of the State  
3 versus Louis M. Winkler, a ---

4 Mr. Hembree, do you have the indictment numbers at this  
5 time?

6 MR. HEMBREE: Yes, Your Honor.

7 THE COURT: I see (2101).

8 MR. HEMBREE: It's (06-GS-26-2101).

9 THE COURT: And Mr. Winkler is charged with the crime  
10 of murder, as well as burglary in the first degree, assault  
11 and battery of a high and aggravated nature, and escape.

12 MR. HEMBREE: That's correct, Your Honor. It was  
13 indicted by the May Grand Jury, true-billed by the May Grand  
14 Jury.

15 THE COURT: Now, when Mr. Winkler first appeared in  
16 court Judge Cottingham appointed Ms. Orrie West to represent  
17 him for the purposes of his appearance there, and until  
18 someone had been assigned to represent him Ms. West was there  
19 and -- I don't see Ms. West in the courtroom now. Is she  
20 coming?

21 MR. RATHBUN: She's -- they are trying to find her,  
22 bring -- she's on the floor somewhere.

23 THE COURT: Mr. Hembree, as I understand it, you all  
24 served Ms. West who was, at the time, appointed by Judge  
25 Cottingham as his attorney. You served her with written

1 notice that you intended to seek the death penalty if the  
2 Defendant were convicted of the crime of murder and  
3 aggravating circumstances. I assume burglary and maybe  
4 something else.

5 MR. HEMBREE: That's correct, Your Honor. That was  
6 served, in writing, on April the 13th, in open court, upon Ms.  
7 West, as well as the Defendant personally.

8 THE COURT: Okay.

9 Mr. Rathbun, how did you get involved in this case, sir?

10 MR. RATHBUN: Your Honor, I am still employed with the  
11 Public Defender's Office. As the Court is aware I have  
12 primarily been doing Family Court work. I have asked Ms. West  
13 to allow me to help and assist -- we have a number of murders  
14 in the office. I have some spare time that I can use to do  
15 research, that kind of thing. It has never been my intention  
16 to sit first chair, but to sit second chair, to ---

17 THE COURT: Well, Mr. Rathbun, I recall when I was here  
18 as Chief Administrative Judge about six years ago you were  
19 doing principally General Sessions work as a Public Defender.

20 MR. RATHBUN: That's correct, Your Honor. I did that  
21 for ---

22 THE COURT: So you spent many years doing General  
23 Sessions work as a Public Defender.

24 MR. RATHBUN: About five years, Your Honor.

25 THE COURT: Did you do any trials?

1           MR. RATHBUN: I did trials. I did a number of trials,  
2 actually.

3           THE COURT: Okay. Felony trials?

4           MR. RATHBUN: Yes sir.

5           THE COURT: Have you ever done a murder trial?

6           MR. RATHBUN: I have never done a murder trial.

7           THE COURT: Armed robbery?

8           MR. RATHBUN: Armed robbery, yes sir.

9           THE COURT: Burglary?

10          MR. RATHBUN: Not a burglary. I've done an armed  
11 robbery. I've done criminal sexual conduct, drug charges.

12          THE COURT: Well, have you been appointed by anyone to  
13 represent Mr. Winkler, in any capacity?

14          MR. RATHBUN: I believe that the Clerk of Court has  
15 appointed the ---

16          THE COURT: Ms. West, you are now here.

17          MS. WEST: Yes, Your Honor. Excuse me.

18                When a file comes into the office, and it's just murder,  
19 then one of the attorneys gets assigned to it, then we send  
20 over the certificate of representation, file a copy with the  
21 Clerk of Court, and give a copy to the Solicitor's Office.  
22 Mr. Rathbun -- we did that process for him.

23          THE COURT: So, in essence, your -- but see, I have an  
24 Order from Judge Cottingham appointing you, for the purpose of  
25 that hearing.

1           And by the way, Ma'am, do you verify that you received  
2 written notice from the Solicitor that they intended to seek  
3 the death penalty on this case?

4           MS. WEST:   Yes, I did, Your Honor, and it's in our  
5 file.

6           THE COURT:   All right. And -- but any event, within  
7 your office, as Chief Public Defender you have assigned this  
8 matter to Mr. Rathbun?

9           MS. WEST:   Yes, Your Honor.

10          MR. HEMBREE:   Your Honor, one other matter that might  
11 be helpful. We have received an Order of Appointment from the  
12 Public Defender's Office, indicating that Mr. Rathbun would be  
13 the attorney for Mr. Winkler.

14          MS. WEST:   And Your Honor, Mr. Winkler and I met  
15 briefly the day he was served the Notice. We were not as  
16 compatible as we could be. He appeared to be far more  
17 compatible with Mr. Rathbun, if that matters.

18          THE COURT:   Ms. West, is that why you chose not to  
19 continue with him, or ---

20          MS. WEST:   That is one of the reasons, yes, it is, Your  
21 Honor.

22          THE COURT:   Okay.

23          MS. WEST:   And additionally, the Office has a  
24 substantial number of homicides, and we are doing a lot of  
25 juggling. Mr. Rathbun's schedule in the Family Court that

1 he's in gives him much more opportunity to spend quality time  
2 with this Defendant than some of the other attorneys in my  
3 office.

4 THE COURT: Well, you've worked with Mr. Rathbun now  
5 for many years.

6 MS. WEST: Yes.

7 THE COURT: And you feel he is competent to handle this  
8 matter, as long as he's not first chair?

9 MS. WEST: Yes, Your Honor, he is. Yes, he is.

10 THE COURT: Mr. Rathbun, have you met with Mr. Winkler?

11 MR. RATHBUN: I have met with him on three occasions at  
12 J. Reuben Long. I did not meet him last week, and it's my  
13 intention to be with him this week. I have made an obligation  
14 to him that I would meet with him at least once a week.

15 THE COURT: All right. Now, once I was aware, by  
16 phone, that Mr. Rathbun was involved, and that he would not be  
17 qualified to serve as the lead counsel in this matter, I began  
18 to determine who could be a lead counsel on the matter. I was  
19 aware of the former Solicitor here. Mr. Ralph Wilson, has  
20 handled several murder cases, and he's handled some death  
21 penalty cases, I know on the prosecutorial side.

22 What about on the defense side, Mr. Wilson.

23 MR. WILSON: Yes sir. Your Honor, unfortunately, I  
24 have done numerous death penalty cases on the defense --  
25 probably somewhere between seven and nine, is what I remember.

1           THE COURT: All right. And you are certified, or at  
2 least on the list of the Supreme Court.

3           MR. WILSON: I am certified.

4           THE COURT: Yes sir.

5           Now, I asked Mr. Wilson if he would represent Mr.  
6 Winkler. He felt he could do so. He agreed to talk with Mr.  
7 Winkler, and then today I was going to determine whether or  
8 not I was going to appoint him as lead counsel.

9           Mr. Wilson, have you met with Mr. Winkler?

10          MR. WILSON: Yes sir, I have, Your Honor. I went out  
11 to jail, spent about an hour and a half, two hours with him on  
12 yesterday evening, and I have some concerns. My concern about  
13 him is whether or not he is able to communicate, at this  
14 point, in a very rational fashion. I am not satisfied that he  
15 can at this point, and we talked a good bit. I'm just  
16 concerned that he needs some kind of medical treatment or  
17 attention before we go much further.

18          THE COURT: Okay.

19          Mr. Winkler, would you stand up for me, please sir.

20          A. Yes sir.

21          THE COURT: Mr. Winkler, have you met with Mr. Wilson  
22 there, sir?

23          A. I have, yesterday.

24          THE COURT: And with Mr. Rathbun?

25          A. Several times.

1           THE COURT:    Okay. Now, Mr. Winkler, do you feel that  
2 Mr. Wilson would be an attorney who would represent you  
3 aggressively, and do the best he could for you?

4           A.       Sir, at this time I only met him one time. I have -- I  
5 don't really know if my family is still -- I was trying to get  
6 an attorney myself.

7           THE COURT:    Okay. Well ---

8           A.       And several times my family has -- and I gave him a  
9 number to call to check on the status of that, but I did meet  
10 with him yesterday, but I haven't had a -- I mean, I -- I  
11 can't tell how he's going to be a lawyer for me. I'm sure he  
12 is an adequate lawyer, but at this time I'll ---

13           THE COURT:    Well, the last time you were before the  
14 Court was in April with Judge Cottingham. That was two months  
15 ago.

16           A.       Yes sir.

17           THE COURT:    And as of two months no one has met with  
18 you, no attorney other than Mr. Rathbun, now Mr. Wilson?

19           A.       No, there wasn't another one.

20                   Mr. Bellamy came in four times since I've been in J.  
21 Reuben Long, and talked to me, but then I was told -- he is  
22 representing me on a previous case. Then I was told he is not  
23 yet attained (s.i.c.) for this trial.

24           THE COURT:    Well, he has informed the Court that he is  
25 definitely not going to be representing you on this matter.

1 A. Okay. Well, then they will be ---

2 THE COURT: So Mr. Bellamy ---

3 A. ---Then they are looking into another one. I don't  
4 know. I really don't have access to all that at this time.

5 MR. RATHBUN: If I may, Your Honor. I have spoken with  
6 Mr. Winkler's sister and she has informed me that the family  
7 does not intent to provide the funds to hire a private  
8 attorney.

9 A. Your Honor, if I may.

10 THE COURT: Yes sir.

11 A. I didn't know you called my sister and talked to her.  
12 I wasn't -- I wasn't aware of that.

13 When did you talk to her.

14 MR. RATHBUN: Two weeks ago.

15 THE COURT: Well, Mr. Winkler, let me ask you this.  
16 Assuming you get no other counsel, do you have any concerns at  
17 this time of Mr. Wilson?

18 A. The Pub --- no. No, I do not.

19 THE COURT: And what about Mr. Rathbun?

20 A. The Public -- as I understand he's a private attorney,  
21 Mr. ---

22 THE COURT: Mr. Wilson, yes.

23 A. Yes. Well, the Public Defender's Office I have found  
24 to be very inadequate. The day that I was at the hearing, the  
25 first hearing, Ms. West called me Dave.



1           THE COURT: I know, but at this time Mr. Rathbun has  
2 seen you. You got any problems with Mr. Rathbun individually?

3           A. The only problem I have with that, sir, is -- and I'll  
4 try and be brief about it, but when I first met with him he  
5 told me that he had never tried a murder trial before. He  
6 said, well, the first thing we are going to do is get you a  
7 bond, and I said, well, from what I understand, at the first  
8 hearing the Judge had stated to me that there is not a bond on  
9 -- when the prosecution is going for the death penalty, and he  
10 said, oh, that's right. Now that's a simple matter of a  
11 process, and if I knew that and he didn't, I can't see how he  
12 would be at all anywhere near being adequate for my counsel.  
13 I mean, I had to correct him on a simple point.

14           This is my life I'm talking about here, and I have  
15 nothing against him, but as far as adequate for that, no, I do  
16 not think that the Public Defender's Office has even come  
17 close to -- I mean, when she called me Dave to start with, and  
18 then told me that my mother called and hired her, and  
19 everybody knows that they were appointed, not hired, and she,  
20 you know, well ---

21           THE COURT: Well, sir, that's the past. Ms. West is  
22 not representing you.

23           A. Well, it's ---

24           THE COURT: I'll consider that, Mr. Winkler ---

25           A. Thank you.

1 THE COURT: ---But obviously at this time I think Mr. -  
2 --

3 Mr. Wilson, if I appoint you I assume you are going to  
4 request to have Mr. Winkler evaluated?

5 MR. WILSON: Yes sir.

6 THE COURT: Mr. Winkler, do you have a past background  
7 of any mental health treatment at all, sir?

8 A. No sir.

9 THE COURT: Okay. What type of work did you do before  
10 you were arrested?

11 A. For thirteen years I was a site manager for Tilghman  
12 Lakes by the Sea in North Myrtle Beach.

13 THE COURT: All right.

14 MR. RATHBUN: Your Honor, perhaps my client  
15 misunderstood your question. But he was talking about seeing  
16 a doctor, and having a doctor. He suffers from anxiety, and  
17 he was on prescription of Paxil, and I believe that anxiety  
18 does qualify for a ---

19 THE COURT: Well, I should have said emotional health.

20 A. Actually the Paxil is not something that -- it was  
21 Prelazon, or something like that, but I've been on that now --  
22 -

23 THE COURT: All right. I think at this time, Mr.  
24 Wilson, I'm going to appoint you to represent Mr. Winkler.

25 Mr. Rathbun, let me consider a little bit more about

1 that as we go on. We are nowhere at a crucial point now that  
2 I've got to make that.

3 MR. RATHBUN: Yes sir.

4 THE COURT: Let me look at a couple of things first.

5 Now, Mr. Wilson, since you are now -- I'm going to sign  
6 an order appointing you, sir. I find that you are qualified.  
7 You are certified by the State. You have done several of  
8 these matters before, in the past, and I feel you would fully  
9 represent the interests of Mr. Winkler.

10 And we are nowhere in -- right now of setting any type  
11 of trial date, but -- other than a time frame, but do you want  
12 to put in ---

13 Does the State oppose an evaluation of Mr. Winkler?

14 MR. HEMBREE: No, Your Honor.

15 THE COURT: All right. Do you want to put something in  
16 writing, Mr. Wilson, or ---

17 MR. WILSON: Yes sir. I will prepare -- yes sir, a  
18 motion, and ---

19 THE COURT: I don't want to delay it though. Can you  
20 get that to me by the first of the week?

21 MR. WILSON: Yes sir.

22 THE COURT: Okay.

23 Ms. Wilson -- Ms. West ---

24 MS. WEST: Your Honor, we can have it over to you in an  
25 hour. Would you like both of them?

1           THE COURT: I assume we are going to do both McNaghten  
2 and Competency.

3           MR. RATHBUN: Yes, Your Honor.

4           MR. WILSON: Yes sir. Yes, Your Honor. Thank you.

5           THE COURT: Does the State have any desire regarding  
6 time frame of trial? The matter is relatively new. The  
7 charges arose out of instances this year, did they not?

8           MR. HEMBREE: That's correct, Your Honor.

9           THE COURT: I see Judge Cottingham signed it on April  
10 the 13th.

11           Let's see what your warrants say when the alleged  
12 matters occurred.

13           MR. RATHBUN: March the 6th, Your Honor.

14           THE COURT: March the 6th. Okay. So, we are dealing  
15 with something that right now is about -- a little over three  
16 months old.

17           The State got any time frame in mind?

18           MR. HEMBREE: Your Honor, time -- our time frame, we  
19 were thinking in the Spring of 2007.

20           THE COURT: That sounds like a reasonable time frame.

21           All right. Well, let's -- anything we need to hand now,  
22 other than going ahead and sign the issues regarding  
23 evaluation? Anybody got anything they wish to handle? Mr.  
24 Hembree?

25           MR. HEMBREE: Yes, Your Honor. Just a couple of

1 matters. One, on the appointment of counsel, I don't know if  
2 the Court has required this in the past. It seems it has been  
3 our custom that, once counsel was appointed they would submit  
4 affidavits of their experience to the Court, affidavits of  
5 their qualification, just for purposes of the record, and  
6 submit those -- submit those to the Court.

7 THE COURT: Well, of course, we've got the record with  
8 Mr. Wilson telling me his past, and right now I haven't  
9 decided on Mr. Rathbun's situation there, but I don't know of  
10 any statute that requires any written affidavit and -- and  
11 that's another thing.

12 By the way, Mr. Wilson ---

13 MR. WILSON: Yes sir.

14 THE COURT: ---My direction, at this time, is that  
15 every hearing we have you request a transcript.

16 MR. WILSON: Yes sir.

17 THE COURT: I want to make sure I know every court  
18 reporter we have, want to have a copy of the transcript.  
19 That, in my experience in P.C.R. matters, really comes in to  
20 assist if you know what court reporter heard what, so you are  
21 to request from Ms. Eubank a copy of the transcript today ---

22 MR. WILSON: All right, sir.

23 THE COURT: ---Because we don't know whether she would  
24 be the next court reporter.

25 And I find you qualified. Let that be on the record. I

1 don't think I need an affidavit.

2 What about the issue of arraignment?

3 MR. HEMBREE: Your Honor, we are prepared to go forward  
4 with arraignment today, as well as service of the certified  
5 copy of the indictment on the Defendant.

6 MR. WILSON: Judge, I would ask that the arraignment be  
7 delayed until he is examined. As I said, I have some real  
8 serious question about his ability to understand.

9 THE COURT: Well, Mr. Hembree, I don't see any need for  
10 us not to delay it until then. Do you have any reason ---

11 MR. HEMBREE: Your Honor, I have no objection to that  
12 at all, none whatsoever.

13 I would like to go ahead and serve the certified copy of  
14 the indictment, unless Mr. Wilson would ---

15 MR. WILSON: I'm sorry.

16 MR. HEMBREE: We will wait on -- we can just wait on  
17 all of that, do that all at one time.

18 THE COURT: That would be something you did right after  
19 the arraignment when you ---

20 MR. HEMBREE: Yes sir. We would do it at that time.

21 THE COURT: That's all part of one process.

22 All right. Mr. Wilson, review, and get an order for me.  
23 I'm going to wait a while, a little while here. If not, I  
24 think I'll have my law clerk -- I have a -- to be -- at two  
25 o'clock I've got to be at another matter, so if you have to

1 look for a while -- I'll just have my law clerk wait and he'll  
2 bring it with him, and I will sign it and get it back to you  
3 in the mail.

4 Now, for purposes of address, Mr. Wilson, go ahead and  
5 give me your address and phone numbers, if you would, for my  
6 law clerk here.

7 MR. WILSON: My mailing address, Your Honor, it would  
8 be Post Office Box 1827, Conway, South Carolina, 29527. My  
9 telephone number is (843-381-0765), and my fax number is  
10 area -- (843-381-0767).

11 THE COURT: All right.

12 And Mr. Hembree, of course, we know the official address  
13 there.

14 MR. HEMBREE: Thank you.

15 THE COURT: Mr. Wilson, have you worked with Mr.  
16 Rathbun before?

17 MR. WILSON: Not directly. I don't we've -- have we  
18 ever had anything? I don't think we've had anything ---

19 MR. RATHBUN: We've never been opposing or worked  
20 together, no sir, other than Family Court.

21 THE COURT: Mr. Winkler, am I to understand, sir, you  
22 do not wish Mr. Rathbun to represent you?

23 MR. WILSON: We did have that one case ---

24 A. Your Honor, I -- I -- I'd like to -- I don't know. I  
25 mean, if I had to give him a simple -- like I said again -- I

1 don't want to beat -- to go into that again, but I just -- I  
2 don't think he's adequate for a murder trial. I mean, he  
3 was -- we are talking about my life, and this -- he wanted to  
4 give me a bond hearing, which is not legal.

5 THE COURT: Remember, Mr. Wilson would be your lead  
6 counsel, sir.

7 A. Yes sir. I have no objection to that.

8 THE COURT: I know, but do you have an objection to Mr.  
9 Rathbun as second chair?

10 A. Yes, I do. He doesn't get along -- he argued with me  
11 more than anything so far, so -- I mean, he's telling me  
12 points ---

13 THE COURT: All right. Let me consider that while we  
14 are having the evaluation done.

15 Anything else?

16 MR. WILSON: Yes sir. Your Honor, in terms of getting  
17 some money for investigators, or for any other expenses that  
18 we have, how do we -- I know most of that is done ex parte.  
19 How do we do that? Do we just ---

20 THE COURT: Ex parte.

21 MR. WILSON: I just wanted to be clear, if that's okay.  
22 That's -- all right, sir.

23 THE COURT: Let me know what you need, and we will go  
24 from there.

25 MR. WILSON: All right, sir. That's fine.



1           THE COURT:   Mr. Wilson, what are your thoughts -- let  
2 me ask you, what are your thoughts about having Mr. Rathbun?  
3 You have no problem either way?

4           MR. WILSON:   I am extremely comfortable with that. You  
5 know, that's more than satisfactory with me.

6           THE COURT:   All right. Let me think about it.  
7 Anything else from the State?

8           MR. HEMBREE:   Nothing from the State, Your Honor.

9           THE COURT:   All right. Let's just wait and get a time  
10 frame of how long it will be before the evaluation has been  
11 completed, but I'm assuming here that we might get back  
12 together sometime in August, or maybe September, I'm just  
13 guessing. If it's going to be looking like we are being  
14 delayed a lot longer than that, then I'll be on the phone  
15 myself to push things a little forward, because obviously, in  
16 a matter of this nature it shouldn't be six months to get an  
17 evaluation done.

18           And Mr. Wilson, you might want to make sure they  
19 understand the nature of this case.

20           MR. WILSON:   I will.

21           THE COURT:   Does the for -- the orders have what the  
22 charges are, and what the State is seeking, because once they  
23 know that I think it puts this matter so that it might go  
24 ahead of some of the other cases.

25           MR. RATHBUN:   Your Honor, at this time I have received

1 discovery from the State, and we are in the process of copying  
2 that for delivery to Mr. Winkler.

3 THE COURT: You have served them with a Rule 5?

4 MR. RATHBUN: We have.

5 THE COURT: Okay.

6 MR. RATHBUN: And -- but of course, from this one I'm  
7 going to continue to do that.

8 THE COURT: Mr. Hembree, what you have at this stage  
9 you have given to Mr. Rathbun?

10 MR. HEMBREE: That's correct, Your Honor.

11 THE COURT: All right. And you know -- you do realize  
12 it's a continuing Rule 5.

13 MR. HEMBREE: Yes sir.

14 THE COURT: I'm sure you are aware of that.

15 All right. Well, you give that to Mr. Wilson at this  
16 time, what you have, and I'm sure Mr. Wilson will determine if  
17 he needs to make any further requests.

18 MR. WILSON: I just need to ask one question of the  
19 Solicitor, Your Honor, and I know that there are some  
20 additional pending charges, and I don't know the status of  
21 those charges at this point, and I guess what I'm asking ---

22 THE COURT: These are charges that arose before this  
23 incident?

24 MR. WILSON: Yes sir.

25 MR. HEMBREE: That's correct, Your Honor.

1           MR. WILSON:   And I would like to ask the State if they  
2   are proceeding with those charges prior to the disposition of  
3   the death case?

4           MR. HEMBREE:   We do not intend to proceed with those  
5   before the death penalty case.

6           THE COURT:   Has there been any other Order other than  
7   the Order by Judge Cottingham? That's the only Order, right?

8           MR. HEMBREE:   That's the only Order, yes sir.

9           THE COURT:   Okay. I've got it.

10          All right. Now, do I not have -- do I have copies of  
11   the indictments and the warrants?

12          MR. HEMBREE:   You have copies of the indictment, Your  
13   Honor. I'll be glad to get you a copy of the warrant.

14          THE COURT:   I'd like to have copies of the warrants  
15   too.

16          Okay. So I have the indictments, the warrants, the  
17   Judge -- Judge Cottingham's Order, as well as the orders I'm  
18   going to sign regarding evaluation, and then any other  
19   judicial functions, or any other matters that don't affect  
20   either side, that I don't have a copy of, and that will be  
21   done later. Other than the thing you gave Ms. West? I've got  
22   that. I've got that here, Judge Cottingham's Order regarding  
23   that.

24          MR. HEMBREE:   Yes sir. Well, you should have a copy of  
25   the actual letter that's the Notice of Intent to Seek the

1 Death Penalty.

2 THE COURT: I have that too.

3 MR. HEMBREE: Your Honor, as a matter of course we  
4 typically prepare a very brief order confirming what occurred  
5 in court ---

6 THE COURT: That's a good idea.

7 MR. HEMBREE: ---In this hearing, and we will provide  
8 that to the Court. We will prepare that, provide it to  
9 defense counsel. Assuming there is no conflict in that we  
10 will send it along to you for your signature and filing with  
11 the Clerk of Court's Office.

12 THE COURT: Very good. That will be fine.

13 MR. RATHBUN: To facilitate matters, Your Honor, if you  
14 do choose -- allow me to sit second chair I'll provide Mr.  
15 Hayes (s.i.c.) with my contact information.

16 THE COURT: Do that, if you would, Mr. Rathbun. I  
17 appreciate it.

18 All right. All right. Listen, thank you very much.

19 Mr. Winkler, you will be notified about when you will  
20 be transported to Columbia for evaluation, and we will see  
21 everybody again in about two, two and a half months from now.

22 MR. WILSON: All right, sir.

23 MR. RATHBUN: Thank you, Your Honor.

24 MR. WILSON: Thank you, Your Honor.

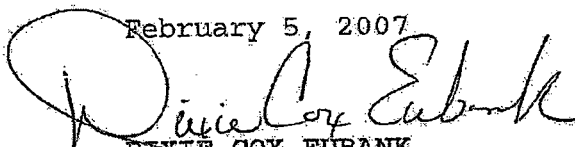
25 -----END OF REQUESTED TRANSCRIPT OF RECORD-----

C E R T I F I C A T E

I, the undersigned, DIXIE COX EUBANK, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the MOTIONS HEARING of the captioned case, relative to appeal, in the COURT OF GENERAL SESSIONS for HORRY COUNTY, SOUTH CAROLINA, on the 15th day of June, 2006.

I DO FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

February 5, 2007



DIXIE COX EUBANK

CIRCUIT COURT REPORTER

FIFTEENTH JUDICIAL CIRCUIT

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

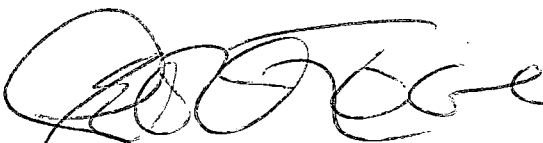
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## ORDER

---

Appellant seeks a fifth extension of time to serve and file the Initial Brief of Appellant and Designation of Matter and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted until July 22, 2009. Any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extensions will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

  
\_\_\_\_\_  
For the Court C.J.

Columbia, South Carolina

June 23, 2009

cc: Deputy Chief Appellate Defender for Capital Appeals  
Robert M. Dudek  
Assistant Appellate Defender Elizabeth Franklin-Best  
Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Horry County  
James E. Lockemy, Circuit Court Judge

---

ORIGINAL

RECEIVED

JUN 22 2009

THE STATE,

S.C. SUPREME COURT  
RESPONDENT,

V.

LOUIS MICHAEL WINKLER,

APPELLANT

---

**PETITION FOR EXTENSION TO FILE  
INITIAL BRIEF OF APPELLANT AND  
DESIGNATION OF MATTER BASED ON EXTRAORDINARY  
CIRCUMSTANCES**

---

The undersigned counsel would respectfully request a thirty day extension in which to file the initial brief of appellant and designation of matter in the above-referenced death penalty case. In support of this motion, counsel would respectfully show the Court:

1. The initial brief of appellant and designation of matter in this case are due to be served and filed today having been extended by prior orders of this Court. The transcripts in this death penalty case are in excess of 3,300 pages long.

2. Counsel has added Elizabeth Franklin-Best as co-counsel in this case. Counsel on Friday had oral surgery, and he has also had to expend time in the transition of his elderly mother from Health South to another physical rehabilitation facility. Counsel filed a brief in the murder case of State v. Christian Kelly Bryson with the Court of Appeals on Thursday, June 18, 2009. Counsel has an oral argument in the case of



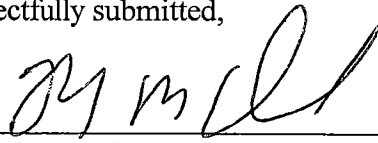
State v. Kevin Odem before the Court of Appeals on Tuesday, June 23, 2009 at 10:00 a.m. In addition, counsel had an oral argument in the murder case of State v. Lemond Holland with the Court of Appeals on, Tuesday, June 9, 2009. Counsel has also been working with co-counsel, Michael O'Connell, on reconstructing the testimony of William "Bill" Gunter -- after this Court remand -- in the death penalty case of John Edward Weik v. The State in which a final hearing is scheduled for January 29, 2009. Counsel also has a very heavy caseload of mostly murder and death penalty transcripts which involve lengthy transcripts.

3. This request is made in good faith, and not for purposes of delay. Counsel will work with co-counsel diligently to meet this deadline but given his caseload and personal responsibilities as power of attorney for his mother he would appreciate any and all consideration this Court can give to this not being a final extension -- given that an extra week or two after the thirty days requested -- would be critical. Counsel is working to limit extension requests in the future by working first, with all deliberate speed, on those cases that have been extended the most.

4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension in which to file the initial brief of appellant and designation of matter in this case based upon the above extraordinary circumstances. Counsel requests that time limits for filing the initial brief of appellant be held in abeyance pending a ruling on this motion.

Respectfully submitted,



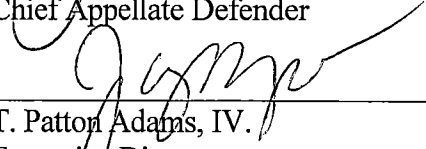
Robert M. Dudek

Deputy Chief Appellate Defender for Capital Appeals



Joseph L. Savitz, III.

Chief Appellate Defender



T. Patton Adams, IV.

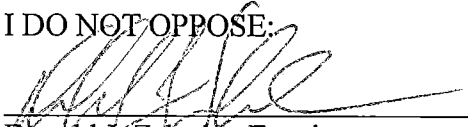
Executive Director or

J. Hugh Ryan, III

General Counsel

June 22, 2009

I DO NOT OPPOSE:



Donald J. Zelenka, Esquire

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

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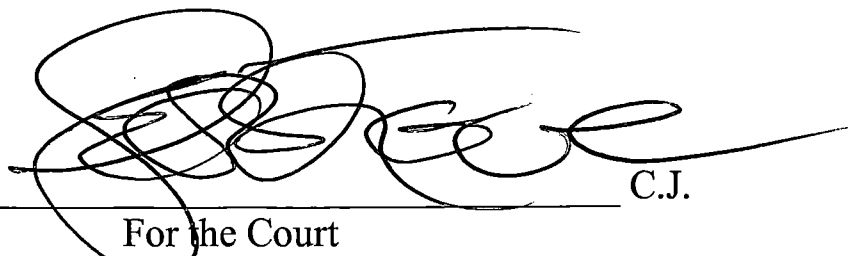
## ORDER

---

Appellant seeks a fourth extension of time to serve and file the Initial Brief of Appellant and Designation of Matter, and asserts that extraordinary circumstances justify this extension. The opposing party does not oppose the motion.

The request for an extension is granted until June 22, 2009. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

  
\_\_\_\_\_  
For the Court C.J.

Columbia, South Carolina

May 22, 2009

cc: Deputy Chief Appellate Defender for Capital Appeals  
Robert M. Dudek  
Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED

MAY 21 2009

Appeal from Horry County  
James E. Lockemy, Circuit Court Judge

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER,

APPELLANT

**PETITION FOR EXTENSION TO FILE  
INITIAL BRIEF OF APPELLANT AND  
DESIGNATION OF MATTER**

The undersigned counsel would respectfully request a thirty day extension in which to file the initial brief of appellant and designation of matter in the above-referenced death penalty case. In support of this motion, counsel would respectfully show the Court:

1. The initial brief of appellant and designation of matter in this case are due to be served and filed on Friday, May 22, 2009 having been extended by prior orders of this Court. The transcripts in this death penalty case are in excess of 3,300 pages long.

2. Counsel filed a petition for writ of certiorari in the United States Supreme Court on Wednesday, May 20, 2009 in the death penalty case of State v. Kevin Mercer. This petition presents extraordinary circumstances because two weeks of counsel's time was dominated with the filings and stays of execution in the death penalty case of *Thomas Treshawn Ivey v. Jon Ozmint, Commissioner, South Carolina Department of*

*Corrections, and Henry Dargan McMaster, Attorney General of South Carolina* which ended on Friday, May 8, 2008. This Court voted two to two on the stay of execution on Wednesday, May 6, 2008 in that case which denied the stay. Another stay of execution and a petition for writ of certiorari was filed in the United States Supreme Court from the 3-1 denial of the petition for writ of habeas corpus in the original jurisdiction of this Court. The next stay of execution and petition for a writ of certiorari was from Petitioner Ivey's Fed. R. Civ. Proc. 60(b)(6) motion which began in the United States District Court, went to the Fourth Circuit Court of Appeals, and was denied by the United States Supreme Court on the afternoon of Friday, May 8, 2009, together with Petitioner Ivey's other stay of execution. The work on the Ivey case detracted from counsel's ability to work on his other murder and death penalty cases. Counsel is also working on the death penalty competency to waive appeals and be executed case of State v. Jeffrey Motts, which is on remand before the Honorable Larry Patterson. Counsel also filed the return to the state's motion to vacate the trial judge's suppression order with the Court of Appeals on Wednesday, May 13, 2009 in State v. Samuel Whitner. Counsel also filed the petition for rehearing in the case of State v. Denise Edwards in the Court of Appeals on Tuesday, May 12, 2009. Counsel also had oral argument in the case of State v. Jonathan Vick in the Court of Appeals on Tuesday, May 12, 2009. Counsel also has a very heavy caseload of mostly murder and death penalty transcripts which involve lengthy transcripts.

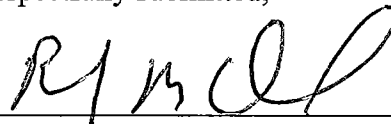
3. This request is made in good faith, and not for purposes of delay. Counsel would appreciate any and all consideration this Court can give to this not being a final extension given the length of the transcript, and the fact he has a very heavy caseload of mostly murder and death penalty cases involving very long transcripts. Counsel is working

to limit extension requests in the future by working first, with all deliberate speed, on those cases that have been extended.

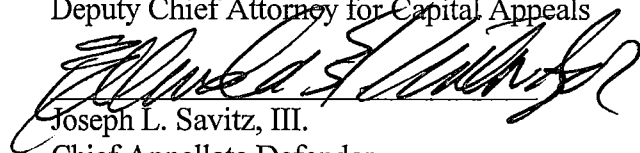
4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension in which to file the initial brief of appellant and designation of matter in this case based upon the above extraordinary circumstances. Counsel requests that time limits for filing the initial brief of appellant be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Robert M. Dudek  
Deputy Chief Attorney for Capital Appeals



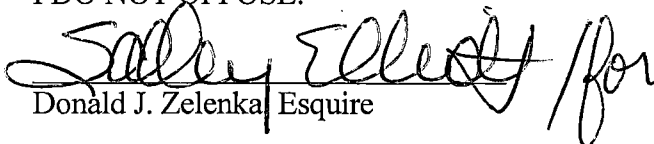
Joseph L. Savitz, III.  
Chief Appellate Defender



T. Patton Adams, IV.  
Executive Director or  
J. Hugh Ryan, III  
General Counsel

May 22, 2009

I DO NOT OPPOSE:



Donald J. Zelenka Esquire

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

---

## ORDER

---

For good cause having been shown, the request for an extension until May 22, 2009 to serve and file the Initial Brief of Appellant and Designation of Matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLERK

Columbia, South Carolina

April 23, 2009



cc: Chief Appellate Defender Joseph L. Savitz, III  
Deputy Chief Appellate Defender for Capital Appeals  
Robert M. Dudek  
Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Horry County  
James E. Lockemy, Circuit Court Judge

---

RECEIVED

APR 22 2009

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER,

APPELLANT

---

**PETITION FOR EXTENSION TO FILE  
INITIAL BRIEF OF APPELLANT AND  
DESIGNATION OF MATTER**

---

The undersigned counsel would respectfully request a thirty day extension in which to file the initial brief of appellant and designation of matter in the above-referenced death penalty case. In support of this motion, counsel would respectfully show the Court:

1. The initial brief of appellant and designation of matter in this case are due to be served and filed today, having been extended by two prior orders of this Court. The transcripts in this death penalty case are in excess of 3,300 pages long.

2. Counsel has an oral argument in this Court today in the case of State v. Kenneth Navy. Counsel has been working on the United States petition for writ of certiorari in the death penalty case of Thomas Ivey v. State since a death warrant was issued following the 3-1 denial of the petition for writ of habeas corpus in the original jurisdiction of this Court that was issued on Friday, April 10, 2009. Petitioner Ivey also

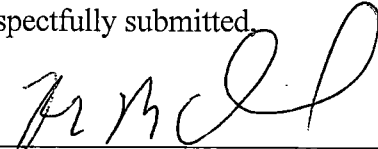
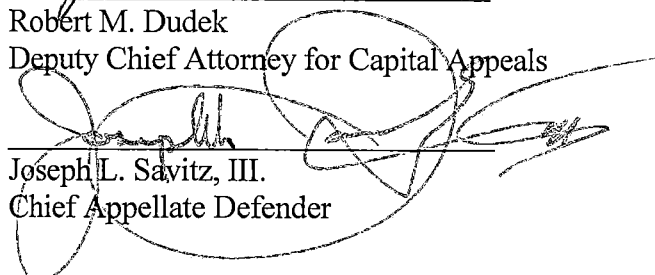
has Rule 60(b)(6) motion pending in the United States District Court with pro-bono co-counsel Hank Ehli. Petitioner Ivey is scheduled to be executed on Friday, May 8, 2009, and counsel will undoubtedly have to work on this case as events unfold in the next two weeks. Counsel also filed a brief in the murder case of State v. Jabez Batiste on Friday, April 10, 2009 in this Court. In addition, counsel filed the initial reply brief in the murder case of State v. Darian Robinson in this Court on Thursday, April 9, 2009. In yet another matter, counsel had an oral argument in the death penalty case of State v. Jeffrey Jones on Tuesday, April 7, 2009 in this Court. Counsel filed a two issue brief in the murder trial case of State v. Thomas Bryant with this Court on Friday, April 3, 2009. Counsel also filed a brief in the case of State v. Demareo Mack on Friday, April 3, 2009 with the Court of Appeals. In addition, counsel filed a petition for rehearing in the murder case of State v. Fred Halcomb with the Court of Appeals on Thursday, March 26, 2009. Counsel also has a very heavy caseload of murder and death penalty cases. Counsel's current death penalty cases include Jeffrey Jones, Thomas Ivey, Jeffrey Motts, Louis Winkler, Christopher Williams, Steven Bixby, John Weik, Quincy Allen, and Kevin Mercer. Counsel is also working on the reply brief in the death penalty case of State v. Steven Bixby with co-counsel Charles Grose.

3. This request is made in good faith, and not for purposes of delay. Counsel would appreciate any and all consideration this Court can give to this not being a final extension as he has a very heavy caseload of mostly murder and death penalty cases involving very long transcripts.

4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

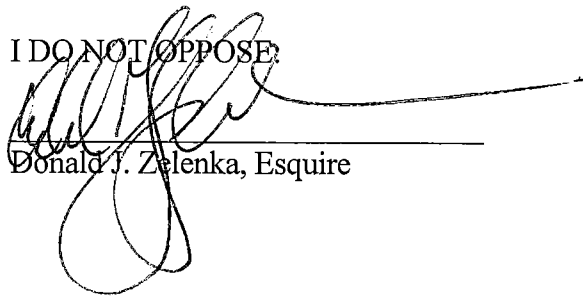
WHEREFORE, the undersigned counsel would respectfully request a thirty day extension in which to file the initial brief of appellant and designation of matter in this case based upon the above exigent circumstances. Counsel requests that time limits for filing the initial brief of appellant be held in abeyance pending a ruling on this motion.

Respectfully submitted,

  
\_\_\_\_\_  
Robert M. Dudek  
Deputy Chief Attorney for Capital Appeals  
\_\_\_\_\_  
Joseph L. Savitz, III.  
Chief Appellate Defender

April 22, 2009

I DO NOT OPPOSE:

  
\_\_\_\_\_  
Donald J. Zelenka, Esquire

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

---

## ORDER

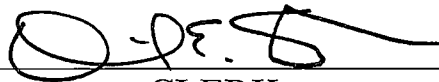
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For good cause having been shown, the request for an extension of time until April 22, 2009 to serve and file the Initial Brief of Appellant and Designation of Matter in the above entitled matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

March 24, 2009

cc: Chief Appellate Defender Joseph L. Savitz, III  
Deputy Chief Appellate Defender for Capital Appeals  
Robert M. Dudek  
Assistant Deputy Attorney General Donald J. Zelenka

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED

MAR 23 2009

Appeal from Horry County  
James E. Lockemy, Circuit Court Judge

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER,

APPELLANT

**PETITION FOR EXTENSION TO FILE  
INITIAL BRIEF OF APPELLANT AND  
DESIGNATION OF MATTER**

The undersigned counsel would respectfully request a thirty day extension in which to file the initial brief of appellant and designation of matter in the above-referenced case.

In support of this motion, counsel would respectfully show the Court:

1. The initial brief of appellant and designation of matter in this case are due to be served and filed today, having been extended by one prior order of this Court.

1. Counsel is filing a two issue brief in the murder case of State v. Joseph Haymes with the Court of Appeals today. The transcript in that case is 725 pages long. Counsel is also today filing a petition for writ of certiorari from the Court of Appeals to this Court in the cases of State v. Robdrecko Niles (trafficking in cocaine) and State v. Amos Mattison (murder). Counsel filed a brief in the case of State v. Dontavious Mack with the Court of Appeals on Wednesday, March 18, 2009. Counsel also had an oral argument in

this Court in the case of State v. Brandi Holder on Wednesday, March 18, 2009. Counsel is also working on the death penalty competency to be executed remand case of State v. Jeffrey Motts which is before the Honorable Larry Patterson. In addition, counsel filed a brief of appellant with the Court of Appeals in the case of State v. Harold Wilson on Friday, March 13, 2009. Counsel also filed petitions for rehearing with the Court of Appeals in State v. Jomer Hill (murder case) on Wednesday, March 11, 2009, and State v. Kevin Mercer (ABIK) on Tuesday, March 10, 2009.

2. This request is made in good faith, and not for purposes of delay.

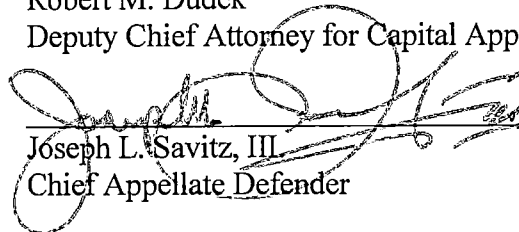
4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension in which to file the initial brief of appellant and designation of matter in this case based upon the above exigent circumstances. Counsel requests that time limits for filing the initial brief of appellant be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Robert M. Dudek  
Deputy Chief Attorney for Capital Appeals

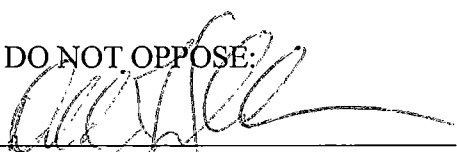


Joseph L. Savitz, III  
Chief Appellate Defender

March 23, 2009



I DO NOT OPPOSE:



---

Donald J. Zelenka, Esquire



# The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy  
Horry County  
Trial Court Case No. 2006-GS-26-02101

---

## ORDER

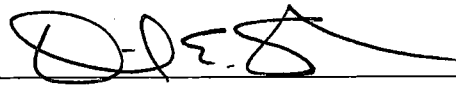
---

For good cause having been shown, the time for serving and filing the Initial Brief of Appellant and Designation of Matter in the above entitled matter is hereby extended until March 23, 2009.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

February 20, 2009

cc: Deputy Chief Appellate Defender for Capital Appeals  
Robert M. Dudek  
Assistant Deputy Attorney General Donald J. Zelenka



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

February 19, 2009

RECEIVED

FEB 19 2009

Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

S.C. SUPREME COURT

Re: The State v. Louis Michael Winkler (capital case)

Dear Mr. Shearouse:

The initial brief of appellant and designation of matter in the above referenced case is due to be served and filed on Friday, February 20, 2009. However, because of my current caseload, I have been unable to complete this brief for service. Therefore, I am requesting a thirty day extension in which to file and serve the brief.

By copy of this letter, I am informing Donald J. Zelenka, Esquire, of the Attorney General's Office, of my request.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek  
Deputy Chief Appellate Defender for Capital Appeals

RMD/mwl

cc: Donald J. Zelenka, Esquire



# SCCID

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January 14, 2009

RECEIVED

JAN 14 2009

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
PO Box 11330  
Columbia, SC 29211

Re: The State v. Louis Michael Winkler, Jr. (Capital Case)

Dear Mr. Shearouse:

Enclosed is a proposed order in the above case. We are requesting that these juror questionnaires be transported to the Court so that we can copy them. The reason for this order is that based on my experience these questionnaires tend to be voluminous. By copy of this letter, we are also forwarding a copy of this proposed order to Donald J. Zelenka. Thank you for your assistance in this matter.

Sincerely,

Robert M. Dudek  
Deputy Chief Appellate Defender for Capital Appeals

RMD/mwl

cc: Donald J. Zelenka, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Horry County

Honorable James E. Lockemy, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

---

O R D E R

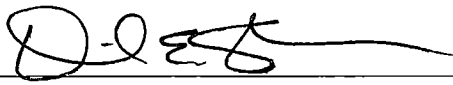
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On motion of Robert M. Dudek, attorney for appellant, it is hereby

ORDERED that Court's Exhibit C-2-A (Juror Questionnaire: 313 – McPherson); Court's Exhibit C-3-A (Juror Questionnaire: 200 – Hardwick); Court's Exhibit C-4-B (Juror Questionnaire: 374 – Randall); Court's Exhibit C-5-E (Juror Questionnaire: 469 – Wallace); Court's Exhibit C-6-F (Juror Questionnaire: 496 – Wright); Court's Exhibit C-7-G (Juror Questionnaire: 11 – Ballen); Court's Exhibit C-8-H (Juror Questionnaire: 486 – Wilson); Court's Exhibit C-9-J (Juror Questionnaire: 170 – Gilleland); Court's Exhibit C-10-J (Juror Questionnaire: 470 - Wallingford); Court's Exhibit C-11-E (Criminal Record: 33 – Bosley); Court's Exhibit C-12-K (Juror Questionnaire: 402 – Scaggs); Court's Exhibit C-13-K (Juror Questionnaire: 466 – Walden); Court's Exhibit C-14-L (Juror Questionnaire: 434 – Staton); Court's Exhibit C-15-M (Juror Questionnaire: 125 – Dozier); Court's Exhibit C-16-M (Juror Questionnaire: 439 – Stewart); Court's Exhibit C-17-N (Juror Questionnaire: 317 – Metzner) , be released to the Office of the Attorney General, or its designee, for transporting to the Supreme Court of South Carolina for

purposes of review by the Court for the above-captioned case.

JEAN H. TOAL, CHIEF JUSTICE

By \_\_\_\_\_  
CLERK

Columbia, South Carolina

January 15, 2009

Copies to: - The Honorable Melanie Huggins  
Robert M. Dudek, Esquire  
Donald J. Zelenka, Esquire



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

December 23, 2008

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

The State v. Louis Michael Winkler, Jr.

12/22/2008

I would appreciate you beginning our time limits from the above dates, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Melinda W. Long  
Legal Assistant

RECEIVED  
DEC 23 2008  
S.C. SUPREME COURT



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

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Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

December 19, 2008

RECEIVED

DEC 19 2008

S.C. SUPREME COURT

Ms. Desiree Allen  
S.C. Court Administration  
1015 Sumter Street, 2nd Floor  
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

| <u>Court Reporter</u> | <u>Due Date</u> | <u>Case Name</u>           |
|-----------------------|-----------------|----------------------------|
| Ms. Elizabeth Harris  | 11/13/08        | Louis Michael Winkler, Jr. |

Trial Date: January 28, 2008 - February 8, 2008

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office





# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

November 24, 2008

RECEIVED

NOV 24 2008

S.C. SUPREME COURT

Ms. Desiree Allen  
S.C. Court Administration  
1015 Sumter Street, 2nd Floor  
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

| <u>Court Reporter</u> | <u>Due Date</u> | <u>Case Name</u>           |
|-----------------------|-----------------|----------------------------|
| Ms. Elizabeth Harris  | 11/13/08        | Louis Michael Winkler, Jr. |

Trial Date: January 28, 2008 - February 8, 2008

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



# SCCID

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September 24, 2008

RECEIVED

SEP 24 2008

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk of Court  
The South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

Re: The State v. Louis M. Winkler (Capital Case)

Dear Mr. Shearouse:

Enclosed is a letter from Sue Powell, Legal Assistant for Ralph J. Wilson, Esquire stating that there was not a court reporter present at the telephone conference held on December 18, 2006.

Please contact me if you have any questions. I will let the Court know when the other transcripts have been received.

Sincerely,

Melinda W. Long  
Legal Assistant

/mwl

cc: Attorney General's Office



LAW OFFICES OF  
**RALPH J. WILSON**  
ATTORNEY AT LAW, P.A.

1411 FIRST AVENUE 29526  
POST OFFICE BOX 1827  
CONWAY, SOUTH CAROLINA 29528

RALPH J. WILSON, SR.  
RALPH J. WILSON, JR.

TELEPHONE: (843) 381-0765  
FACSIMILE: (843) 381-0767  
EMAIL: Attorney@ralphjwilson.net

September 19, 2008

Melinda Long  
S.C.C.I.D.  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211

Re: Winkler Case - Phone conference of 12/18/06

Dear Ms. Long

Thank you for your patience as I've researched through files in storage. This call was apparently simply a scheduling conference with Judge Lockemy. There was no court reporter on our end. I have spoken with Judge Lockemy's assistant, Patricia, who has informed me that the Judge does not recall using the court reporter.

If I can be of further assistance, please do not hesitate to contact me.

With kind regards, I remain

Sincerely,

Sue Powell

Legal Assistant

RECEIVED

SEP 24 2008

S.C. SUPREME COURT

RECEIVED  
SEP 24 2008



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
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Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

September 23, 2008

RECEIVED

SEP 23 2008

S.C. SUPREME COURT

Ms. Desiree Allen  
S.C. Court Administration  
1015 Sumter Street, 2nd Floor  
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

Court Reporter

Ms. Elizabeth Harris

Due Date

9/13/08

Case Name

Louis Michael Winkler, Jr.

Trial Date: January 28, 2008 - February 8, 2008

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



# SCCID

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Facsimile: (803) 734-1397

August 4, 2008

The Honorable Daniel E. Shearouse  
Clerk of Court  
The South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

RECEIVED

AUG - 4 2008

S.C. SUPREME COURT

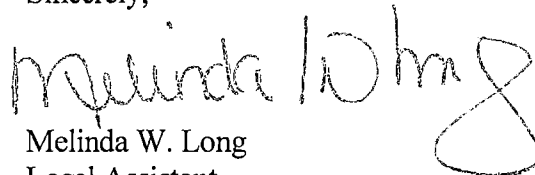
Re: The State v. Louis M. Winkler (Capital Case)

Dear Mr. Shearouse:

This is just to inform your office that we received the transcript from the January 24, 2007 hearing on Wednesday, July 23, 2008.

Please contact me if you have any questions. I will let the Court know when the other transcripts have been received.

Sincerely,



Melinda W. Long  
Legal Assistant

/mwl

cc: Attorney General's Office



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

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Joseph L. Savitz, III, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
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Facsimile: (803) 734-1397

July 2, 2008

RECEIVED

JUL - 2 2008

The Honorable Daniel E. Shearouse  
Clerk of Court  
The South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

S.C. SUPREME COURT

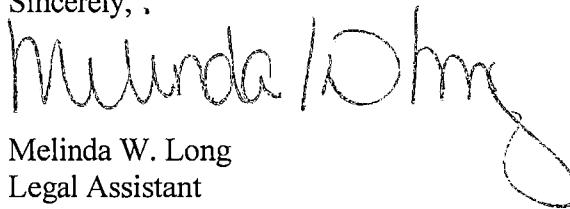
Re: The State v. Louis Winkler (Capital Case)

Dear Mr. Shearouse:

We are in the process of trying to obtain all of the transcripts in the above-referenced death penalty case. I have been informed by email from court reporter Elizabeth Harris that there was an *ex parte* hearing held before Judge Lockemy on January 24, 2007 in this case. I am requesting this transcript today from court reporter Pamela Green.

Please contact me if you have any questions or need any additional information. I will contact this Court once the transcript has been received.

Sincerely, .



Melinda W. Long  
Legal Assistant

/mwl

Enclosure

cc: Attorney General



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

July 2, 2008

RECEIVED

JUL - 2 2008

Ms. Pamela E. Green  
Circuit Court Reporter  
121 Bradford Crossing Drive  
Roebuck, SC 29376

S.C. SUPREME COURT

Dear Ms. Green:

Our office has been requested to perfect the appeal arising out of:

The State v. Louis Michael Winkler, Jr.                      Indictment #:    06-GS-26-02101

County:    Horry                      Date of Trial:    January 24, 2007 (Ex Parte Hearing)

Presiding Judge: James E. Lockemy

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

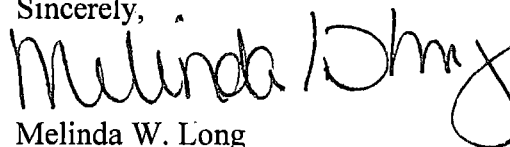
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Pamela E. Green  
July 2, 2008  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W. Long". The signature is written in a cursive, flowing style. The first name "Melinda" is written in a larger, more prominent script, and the last name "Long" is written in a slightly smaller, more compact script. The signature is positioned to the right of the word "Sincerely,".

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office





# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

RECEIVED

JUN 16 2008

S.C. SUPREME COURT

June 16, 2008

Ms. Desiree Allen  
S.C. Court Administration  
1015 Sumter Street, 2nd Floor  
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

| <u>Court Reporter</u> | <u>Due Date</u> | <u>Case Name</u>           |
|-----------------------|-----------------|----------------------------|
| Ms. Elizabeth Harris  | 5/12/08         | Louis Michael Winkler, Jr. |

Trial Date: January 28, 2008 - February 8, 2008

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

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Columbia, South Carolina 29211-1589  
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Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

June 16, 2008

Ms. Desiree Allen  
S.C. Court Administration  
1015 Sumter Street, 2nd Floor  
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

| <u>Court Reporter</u>    | <u>Due Date</u> | <u>Case Name</u>           |
|--------------------------|-----------------|----------------------------|
| Ms. Pamela Ozment-Cartee | 5/12/08         | Louis Michael Winkler, Jr. |

Trial Date: December 18, 2006 (Telephone Confe

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office

RECEIVED

JUN 16 2008

S.C. SUPREME COURT



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

May 22, 2008

RECEIVED

MAY 22 2008

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk of Court  
The South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

Re: The State v. Louis M. Winkler (Capital Case)

Dear Mr. Shearouse:

This is just to inform your office that we received the transcript from the February 16, 2007 hearing on Tuesday, May 20, 2008.

Please contact me if you have any questions. I will let the Court know when the other transcripts have been received.

Sincerely,

Melinda W. Long  
Legal Assistant

/mwl

cc: Attorney General's Office



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

May 14, 2008

Jo Rice  
Circuit Court Reporter  
401 Wardlaw Street  
Abbeville, SC 29620

Re: The State v. Louis Michael Winkler, Jr.  
06-GS-26-2101

Dear Ms. Rice:

I am writing to you concerning the letter that I received from you in the above-referenced case. You stated in your letter that do not remember participating in a telephone conference held on January 29, 2007 before the Honorable James E. Lockemy in Newberry County. After contacting the trial attorney and Court Administration, I have learned that this hearing did indeed take place and you were the court reporter.

I am requesting that you double check your records to see if you have anything pertaining to this hearing. Please contact me at your earliest convenience if you still have no record of this hearing so that I may continue my search for the correct court reporter.

I look forward to hearing from you.

**RECEIVED**

MAY 15 2008

**S.C. SUPREME COURT**

Sincerely,

Melinda W. Long  
Legal Assistant

/mwl

cc: Supreme Court  
Desiree Allen



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

March 26, 2008

RECEIVED  
MAR 26 2008  
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk of Court  
The South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

Re: The State v. Louis M. Winkler (Capital Case)

Dear Mr. Shearouse:

This is just to inform your office that we received the transcripts in the above-referenced capital case.

|                             |                            |
|-----------------------------|----------------------------|
| January 3, 2006 Transcript  | Received on March 24, 2008 |
| January 11, 2008 Transcript | Received on March 24, 2008 |
| July 6, 2007 Transcript     | Received on March 25, 2008 |

Please contact me if you have any questions. I will let the Court know when the other transcripts have been received.

Sincerely,

  
Melinda W. Long  
Legal Assistant

/mwl

cc: Attorney General's Office



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

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Telephone: (803) 734-1330  
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Joseph L. Savitz, III, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

March 20, 2008

RECEIVED

MAR 21 2008

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk of Court  
The South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

Re: The State v. Louis M. Winkler (Capital Case)

Dear Mr. Shearouse:

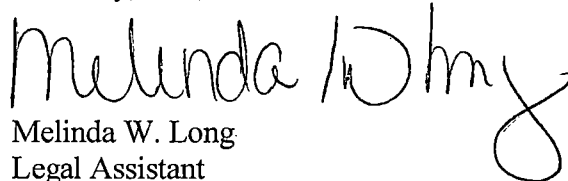
This is just to inform your office that we received the transcripts in the above-referenced capital case.

April 16, 2007 Transcript  
December 13, 2007 Transcript  
July 3, 2007 Transcript

Received on March 18, 2008  
Received on March 18, 2008  
Received on March 14, 2008

Please contact me if you have any questions. I will let the Court know when the other transcripts have been received.

Sincerely,

  
Melinda W. Long  
Legal Assistant

/mwl

cc: Attorney General's Office



# SCCID

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Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

March 12, 2008

RECEIVED  
MAR 13 2008  
S.C. SUPREME COURT

Ms. Brenda R. Babb  
Circuit Court Reporter  
4668 River Road  
Little River, SC 29566-7927

Dear Ms. Babb:

Our office has been requested to perfect the appeal arising out of:

The State v. Louis Michael Winkler, Jr.      Indictment #:      06-GS-26-02101

County: Horry      Date of Trial: July 6, 2007

Presiding Judge: James E. Lockemy

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

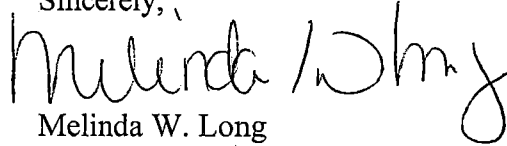
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Brenda R. Babb  
March 12, 2008  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely, \

A handwritten signature in cursive script, appearing to read "Melinda W. Long".

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office





# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

March 11, 2008

RECEIVED

MAR 11 2008

S.C. SUPREME COURT

Ms. Pamela Ozment-Cartee  
Circuit Court Reporter  
531 East Carolina Avenue  
Hartsville, SC 29550

Dear Ms. Ozment-Cartee:

Our office has been requested to perfect the appeal arising out of:

The State v. Louis Michael Winkler, Jr.

Indictment #: 06-GS-26-02101

County: Dillon

Date of Trial: December 18, 2006 (Telephone Conference)

Presiding Judge: James E. Lockemy

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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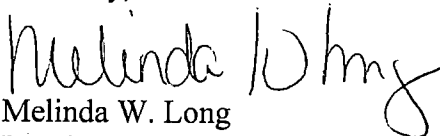
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Ms. Pamela Ozment-Cartee  
March 11, 2008  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Melinda W. Long". The signature is written in dark ink and is positioned to the right of the typed name.

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

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Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

March 11, 2008

RECEIVED

MAR 11 2008

S.C. SUPREME COURT

Mr. H. Eugene Buckner  
Circuit Court Reporter  
PO Box 1462  
Conway, SC 29528-1462

Dear Mr. Buckner:

Our office has been requested to perfect the appeal arising out of:

The State v. Louis Michael Winkler, Jr.

Indictment #: 06-GS-26-02101

County: Horry

Date of Trial: January 3, 2007 (Competency Hearing)

Presiding Judge: James E. Lockemy

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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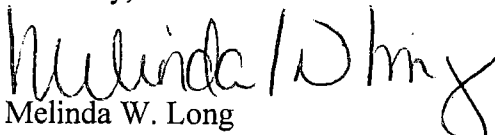
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Mr. H. Eugene Buckner  
March 11, 2008  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

  
Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

March 11, 2008

RECEIVED

MAR 11 2008

S.C. SUPREME COURT

Ms. Jo Rice  
Circuit Court Reporter  
401 Wardlaw Street  
Abbeville, SC 29620

Dear Ms. Rice:

Our office has been requested to perfect the appeal arising out of:

The State v. Louis Michael Winkler, Jr.

Indictment #: 06-GS-26-02101

County: Newberry

Date of Trial: January 29, 2007 (Telephone Conference)

Presiding Judge: James E. Lockemy

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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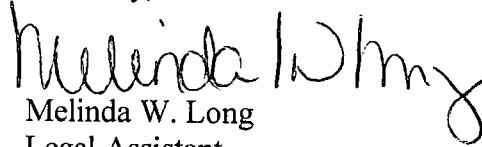
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Ms. Jo Rice  
March 11, 2008  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

  
Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
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Columbia, South Carolina 29201-3332

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Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

March 11, 2008

RECEIVED

MAR 11 2008

S.C. SUPREME COURT

Ms. Brenda C. Cooley  
Circuit Court Reporter  
726 Inlet Drive  
Mt. Pleasant, SC 29464

Dear Ms. Cooley:

Our office has been requested to perfect the appeal arising out of:

The State v. Louis Michael Winkler, Jr.

Indictment #: 06-GS-26-02101

County: Charleston

Date of Trial: February 16, 2007 (Competency Hearing)

Presiding Judge: James E. Lockemy

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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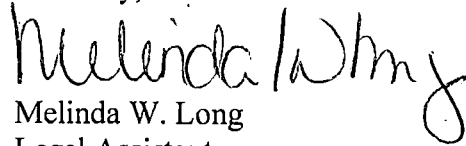
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Ms. Brenda C. Cooley  
March 11, 2008  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

  
Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office





Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

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Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

March 11, 2008

RECEIVED

MAR 11 2008

S.C. SUPREME COURT

Ms. Bonnie H. Kelly  
Circuit Court Reporter  
P O Box 50614  
Columbia, SC 29250-0614

Dear Ms. Kelly:

Our office has been requested to perfect the appeal arising out of:

The State v. Louis Michael Winkler, Jr.                      Indictment #:    06-GS-26-02101

County: Dillon                      Date of Trial: April 26, 2007 (Status Conference)

Presiding Judge: James E. Lockemy

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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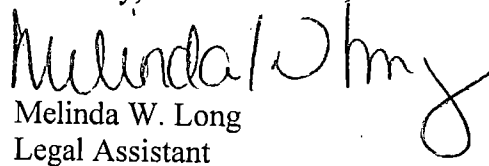
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Ms. Bonnie H. Kelly  
March 11, 2008  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

  
Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



Division of Appellate Defense  
1330 Lady Street, Suite 401  
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Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

March 11, 2008

RECEIVED

MAR 11 2008

S.C. SUPREME COURT

Ms. Elizabeth Harris  
Circuit Court Reporter  
3008 Barnes Springs Road  
Columbia, SC 29204

Dear Ms. Harris:

Our office has been requested to perfect the appeal arising out of:

The State v. Louis Michael Winkler, Jr.                      Indictment #:    06-GS-26-02101

County:    Horry                      Date of Trial:    July 3, 2007 (Status Conference)

Presiding Judge:    James E. Lockemy

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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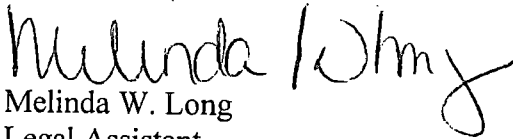
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Ms. Elizabeth Harris  
March 11, 2008  
Page Two

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Thank you for your kind cooperation in this matter.

Sincerely,

  
Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



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Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

March 11, 2008

RECEIVED

MAR 11 2008

S.C. SUPREME COURT

Ms. Pamela Ozment-Cartee  
Circuit Court Reporter  
531 East Carolina Avenue  
Hartsville, SC 29550

Dear Ms. Ozment-Cartee:

Our office has been requested to perfect the appeal arising out of:

The State v. Louis Michael Winkler, Jr.                      Indictment #:    06-GS-26-02101

County: Dillon                      Date of Trial: December 13, 2007 (Blair Hearing)

Presiding Judge: James E. Lockemy

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

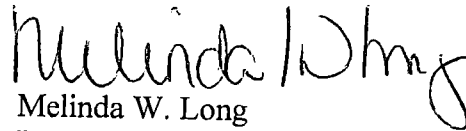
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Pamela Ozment-Cartee  
March 11, 2008  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda W. Long". The signature is fluid and cursive, with the first name "Melinda" being more prominent than the last name "Long".

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

March 11, 2008

RECEIVED

MAR 11 2008

S.C. SUPREME COURT

Mr. H. Eugene Buckner  
Circuit Court Reporter  
PO Box 1462  
Conway, SC 29528-1462

Dear Mr. Buckner:

Our office has been requested to perfect the appeal arising out of:

The State v. Louis Michael Winkler, Jr.                      Indictment #:    06-GS-26-02101

County: Horry                                      Date of Trial: January 11, 2008

Presiding Judge: James E. Lockemy

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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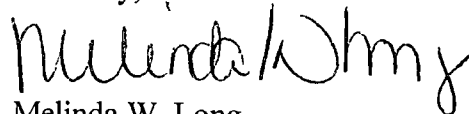
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Mr. H. Eugene Buckner  
March 11, 2008  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda W. Long". The signature is fluid and cursive, with the first name "Melinda" being more prominent than the last name "Long".

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office





# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney  
Wanda H. Carter, Deputy Chief Attorney

March 11, 2008

Ms. Elizabeth Harris  
Circuit Court Reporter  
3008 Barnes Springs Road  
Columbia, SC 29204

Dear Ms. Harris:

RECEIVED

MAR 11 2008

S.C. SUPREME COURT

Our office has been requested to perfect the appeal arising out of:

The State v. Louis Michael Winkler, Jr.      Indictment #:      06-GS-26-02101

County:      Horry      Date of Trial:      January 28, 2008 - February 8, 2008

Presiding Judge:      James E. Lockemy

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

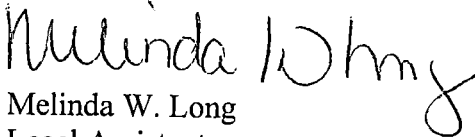
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Elizabeth Harris  
March 11, 2008  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Melinda W. Long". The signature is written in dark ink and is positioned to the right of the typed name.

Melinda W. Long  
Legal Assistant

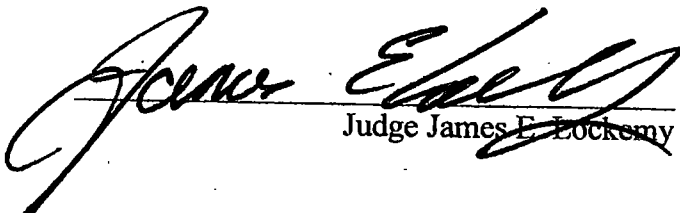
xc: S.C. Supreme Court  
Attorney General's Office

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )  
The State, )  
vs. )  
Louis Michael Winkler, )  
Defendant. )

IN THE COURT OF GENERAL SESSIONS

DEATH PENALTY SENTENCING REPORT  
2006-GS-26-2101

- A. Name of Trial Judge: **James E. Lockemy**  
B. Name of Defendant: **Louis Michael Winkler**  
C. Names of Defense Attorneys: **Ralph Wilson, Paul Rathbun**  
D. Date Sentenced: **February 7, 2008**  
E. Copy of verdict form is attached.

  
Judge James E. Lockemy

Conway, South Carolina

Dated:

*Feb 7, 2008*

RECEIVED

FEB 13 2008

S.C. SUPREME COURT

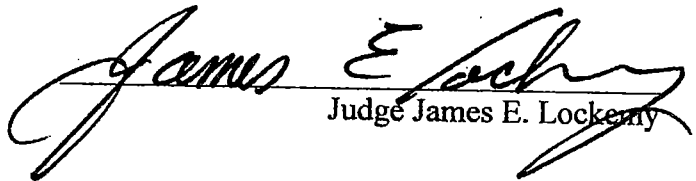
STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )  
The State, )  
vs. )  
Louis Michael Winkler, )  
Defendant. )

IN THE COURT OF GENERAL SESSIONS

SENTENCE  
2006-GS-26-2101

The Defendant, Louis Michael Winkler, has been found by the jury to be guilty of the offense of murder. The jury has recommended that the Defendant should be sentenced to death.

It is, therefore, the judgment of the law and the Sentence of the Court that the Defendant, Louis Michael Winkler, be taken to the J. Reuben Long Detention Center, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the 10 day of March 2008, upon which day between the hours of six o'clock P.M. and six o'clock A.M., or upon an Order of Execution issued by the South Carolina Supreme Court, the Defendant, Louis Michael Winkler, shall suffer death by electrocution or by lethal injection in the manner provided by law.

  
Judge James E. Locken

Conway, South Carolina

Dated: 8 February 2008



Ralph J. Wilson  
Attorney at Law, P.A.  
1411 First Avenue  
Post Office Box 1827  
Conway, South Carolina 29528

RECEIVED  
FEB 29 2008  
S.C. SUPREME COURT

TELEPHONE (843) 381-0765

FACSIMILE (843) 381-0767

February 26, 2008

Supreme Court of South Carolina  
Honorable Daniel Shearouse  
Post Office Box 11330  
Columbia, SC 29211

South Carolina Court of Appeals  
Honorable Kenneth Richstad  
Post Office Box 11629  
Columbia, SC 29211

Re: NOTICE OF INTENT TO APPEAL  
State of South Carolina v. Louis Michael Winkler, Jr.  
2006-GS-26-2101

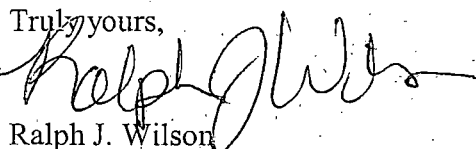
Dear Mr. Shearouse and Mr. Richstad:

Enclosed please find the Amended Proofs of Service relative to the above Death Penalty case.

By copy of this letter, I am forwarding these documents to Solicitor J. Gregory Hembree of the 15<sup>th</sup> Circuit Solicitor's Office, the South Carolina Attorney General, and the South Carolina Office of Appellate Defense.

If there should be any questions, please feel free to contact my office.

With kind regards, I am

Truly yours,  
  
Ralph J. Wilson

RJW/amg  
Enclosure

cc: Solicitor J. Gregory Hembree (w/enc.)  
SC Office of Appellate Defense (w/enc.)  
SC Attorney General /enc.)

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

FEB 29 2008

S.C. SUPREME COURT

APPEAL FROM Horry COUNTY  
Court of General Sessions

Honorable James E. Lockemy, Presiding Judge

Indictments: 2006-GS-26-2101

State of South Carolina,

Respondent,

v.

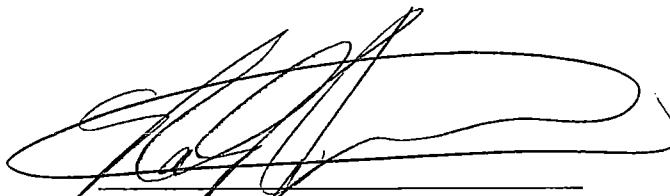
Louis Michael Winkler, Jr.,

Appellant.

**AMENDED PROOF OF SERVICE**

I, Ralph J. Wilson, Attorney at Law, hereby certify that I have served the Notice of Intent to Appeal upon the Respondent by having mailed the same on February 11, 2008, via U.S. Mail, first class postage prepaid, to Henry McMaster of the South Carolina Attorney General's Office addressed as follows:

The Honorable Henry McMaster  
South Carolina Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211



Ralph J. Wilson, Attorney at Law  
1411 First Avenue  
PO Box 1827  
Conway, South Carolina 29526

February 21, 2008  
Conway, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

FEB 29 2008

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY  
Court of General Sessions

Honorable James E. Lockemy, Presiding Judge

Indictments: 2006-GS-26-2101

State of South Carolina,

Respondent,

v.

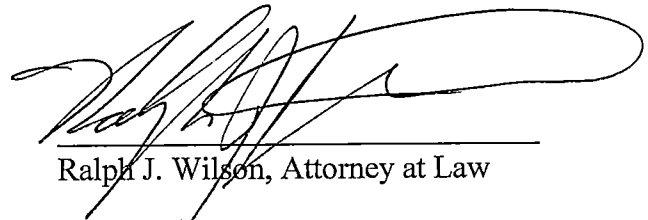
Louis Michael Winkler, Jr.,

Appellant.

**AMENDED PROOF OF SERVICE**

I, Ralph J. Wilson, Attorney at Law, hereby certify that I have served the Notice of Intent to Appeal upon the South Carolina Appellate Defense by having mailed the same on February 11<sup>th</sup>, 2008 via U.S. Mail, first class postage prepaid, to South Carolina Appellate Defense Office addressed as follows:

South Carolina Appellate Defense  
P.O. Box 11433  
Columbia, S.C. 29211-1433



Ralph J. Wilson, Attorney at Law

February 21, 2008  
Conway, South Carolina

Post Office Box 1827  
1411 First Avenue  
Conway, South Carolina 29526  
Phone (843) 381-0765  
Fax (843) 381-0767

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

FEB 29 2008

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY  
Court of General Sessions

Honorable James E. Lockemy, Presiding Judge

Indictments: 2006-GS-26-2101

State of South Carolina,

Respondent

v.

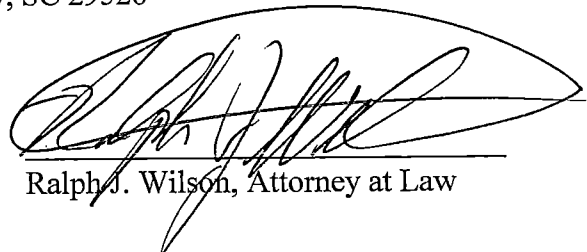
Louis Michael Winkler, Jr.,

Appellant

**AMENDED PROOF OF SERVICE**

I, Ralph J. Wilson, Attorney at Law, hereby certify that on the 11<sup>th</sup> day of February 2008 I served the foregoing Notice of Appeal upon the Respondent by having mailed same via U.S. Mail, first class postage prepaid, to J. Gregory Hembree of the 15<sup>th</sup> Circuit Solicitor's Office addressed as follows:

J. Gregory Hembree, Solicitor  
15<sup>th</sup> Circuit Solicitor's Office  
PO Box 1276  
Conway, SC 29526



Ralph J. Wilson, Attorney at Law

February 21, 2008  
Conway, South Carolina

Post Office Box 1827  
1411 First Avenue  
Conway, South Carolina 29526  
Phone (843) 381-0765  
Fax (843) 381-0767





**Ralph J. Wilson**  
**Attorney at Law, P.A.**  
1411 First Avenue  
Post Office Box 1827  
Conway, South Carolina 29528

TELEPHONE (843) 381-0765

FACSIMILE (843) 381-0767

February 26, 2008

Supreme Court of South Carolina  
Honorable Daniel Shearouse  
Post Office Box 11330  
Columbia, SC 29211

South Carolina Court of Appeals  
Honorable Kenneth Richstad  
Post Office Box 11629  
Columbia, SC 29211

Re: NOTICE OF INTENT TO APPEAL

State of South Carolina v. Louis Michael Winkler, Jr.

2006-GS-26-2101

Dear Mr. Shearouse and Mr. Richstad:

Enclosed please find the Amended Proofs of Service relative to the above Death Penalty case.

By copy of this letter, I am forwarding these documents to Solicitor J. Gregory Hembree of the 15<sup>th</sup> Circuit Solicitor's Office, the South Carolina Attorney General, and the South Carolina Office of Appellate Defense.

If there should be any questions, please feel free to contact my office.

With kind regards, I am

Truly yours,

*Ralph J. Wilson*  
Ralph J. Wilson

**RECEIVED**

FEB 29 2008

**S.C. SUPREME COURT**

RJW/amg

Enclosure

cc: Solicitor J. Gregory Hembree (w/enc.)  
SC Office of Appellate Defense (w/enc.)  
SC Attorney General /enc.)

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM HORRY COUNTY  
Court of General Sessions

Honorable James E. Lockemy, Presiding Judge

---

Indictments: 2006-GS-26-2101

---

State of South Carolina,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

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**AMENDED PROOF OF SERVICE**

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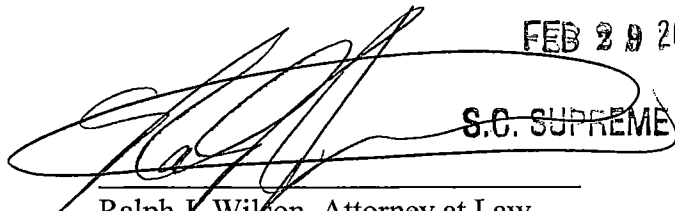
I, Ralph J. Wilson, Attorney at Law, hereby certify that I have served the Notice of Intent to Appeal upon the Respondent by having mailed the same on February 11, 2008, via U.S. Mail, first class postage prepaid, to Henry McMaster of the South Carolina Attorney General's Office addressed as follows:

The Honorable Henry McMaster  
South Carolina Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211

**RECEIVED**

FEB 29 2008

**S.C. SUPREME COURT**



Ralph J. Wilson, Attorney at Law  
1411 First Avenue  
PO Box 1827  
Conway, South Carolina 29526

February 21, 2008  
Conway, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

FEB 29 2008

APPEAL FROM HORRY COUNTY  
Court of General Sessions

S.C. SUPREME COURT

Honorable James E. Lockemy, Presiding Judge

Indictments: 2006-GS-26-2101

State of South Carolina,

Respondent,

v.

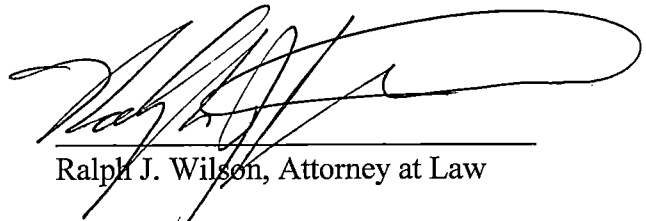
Louis Michael Winkler, Jr.,

Appellant.

**AMENDED PROOF OF SERVICE**

I, Ralph J. Wilson, Attorney at Law, hereby certify that I have served the Notice of Intent to Appeal upon the South Carolina Appellate Defense by having mailed the same on February 11<sup>th</sup>, 2008 via U.S. Mail, first class postage prepaid, to South Carolina Appellate Defense Office addressed as follows:

South Carolina Appellate Defense  
P.O. Box 11433  
Columbia, S.C. 29211-1433



Ralph J. Wilson, Attorney at Law

February 21, 2008  
Conway, South Carolina

Post Office Box 1827  
1411 First Avenue  
Conway, South Carolina 29526  
Phone (843) 381-0765  
Fax (843) 381-0767

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM HORRY COUNTY  
Court of General Sessions

Honorable James E. Lockemy, Presiding Judge

RECEIVED

FEB 29 2008

S.C. SUPREME COURT

Indictments: 2006-GS-26-2101

State of South Carolina,

Respondent

v.

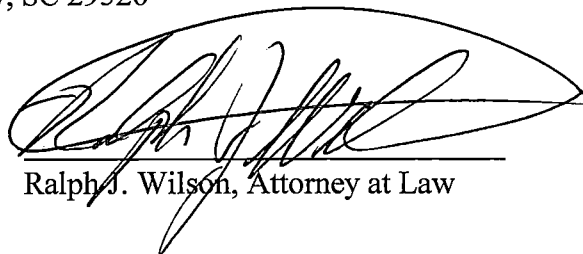
Louis Michael Winkler, Jr.,

Appellant

**AMENDED PROOF OF SERVICE**

I, Ralph J. Wilson, Attorney at Law, hereby certify that on the 11<sup>th</sup> day of February 2008 I served the foregoing Notice of Appeal upon the Respondent by having mailed same via U.S. Mail, first class postage prepaid, to J. Gregory Hembree of the 15<sup>th</sup> Circuit Solicitor's Office addressed as follows:

J. Gregory Hembree, Solicitor  
15<sup>th</sup> Circuit Solicitor's Office  
PO Box 1276  
Conway, SC 29526



Ralph J. Wilson, Attorney at Law

February 21, 2008  
Conway, South Carolina

Post Office Box 1827  
1411 First Avenue  
Conway, South Carolina 29526  
Phone (843) 381-0765  
Fax (843) 381-0767



# The South Carolina Court of Appeals

KENNETH A. RICHSTAD  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
[www.sccourts.org](http://www.sccourts.org)

February 19, 2008

Ralph J. Wilson, Esquire  
P.O. Box 1827  
Conway, SC 29526

Re: The State v. Winkler, Louis Michael Jr.

Dear Mr. Wilson:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 238(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

**Please be advised that pursuant to Rule 602, SCACR and the order of the Chief Justice dated December 12, 1997, if you expect the Office of Indigent Defense to pursue this appeal, you must provide that office with all information required to proceed with this appeal, failing which, this office will consider you counsel of record.**

**This is to inform you that according to Rule 203 of the South Carolina Appellate Court Rules, you will need to send an amended Proof of Service containing the date that opposing counsel was served.**

**Kindly provide the requested document within fourteen (14) days of the date of this letter.**

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within thirty(30) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

**NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:**

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,

  
Kenneth A. Richstad  
CLERK

KAR/mm

cc: Chief Attorney Joseph L. Savitz, III  
Assistant Deputy Attorney General Salley W. Elliott  
J. Gregory Hembree, Solicitor

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

FEB 15 2008

SC Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of General Sessions

Honorable James E. Lockemy, Presiding Judge

PM:

POS:

Indictments: 2006-GS-26-2101

State of South Carolina,

Respondent,

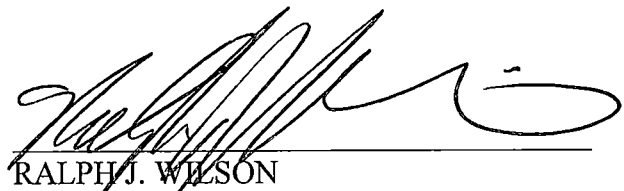
v.

Louis Michael Winkler, Jr.,

Appellant.

**NOTICE OF INTENT TO APPEAL**

Louis Michael Winkler, Jr., by and through his court-appointed trial counsel, hereby gives notice of his intent to appeal his conviction and sentence entered on or about February 8, 2008 before the Honorable James E. Lockemy in the Horry County Court of General Sessions.

  
RALPH J. WILSON

P.O. Box 1827

Conway, SC 29528

(843) 381-0765

*Court Appointed Trial Counsel*

**Other Counsel of Record Served:**

J. Gregory Hembree, Solicitor

15<sup>th</sup> Circuit Solicitor's Office

PO Box 1276

Conway, SC 29526

ORIGINAL

Dated: February 11, 2008

Set order  
2/15/08  
dhf

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM HORRY COUNTY  
Court of General Sessions

Honorable James E. Lockemy, Presiding Judge

---

Indictments: 2006-GS-26-2101

---

State of South Carolina,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

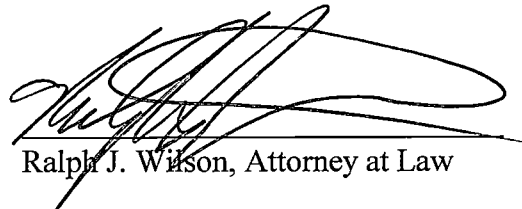
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**PROOF OF SERVICE**

---

I, Ralph J. Wilson, Attorney at Law, hereby certify that I have served the Notice of Intent to Appeal upon the Respondent by having mailed the same via U.S. Mail, first class postage prepaid, to Henry McMaster of the South Carolina Attorney General's Office addressed as follows:

The Honorable Henry McMaster  
South Carolina Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211



Ralph J. Wilson, Attorney at Law

February 11, 2008  
Conway, South Carolina

**ORIGINAL**



THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM HORRY COUNTY  
Court of General Sessions

Honorable James E. Lockemy, Presiding Judge

---

Indictments: 2006-GS-26-2101

---

State of South Carolina,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

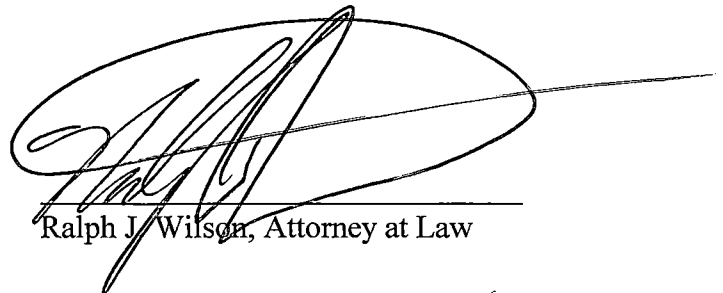
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**PROOF OF SERVICE**

---

I, Ralph J. Wilson, Attorney at Law, hereby certify that I have served the Notice of Intent to Appeal upon the South Carolina Appellate Defense by having mailed the same via U.S. Mail, first class postage prepaid, to South Carolina Appellate Defense Office addressed as follows:

South Carolina Appellate Defense  
PO Box 11433  
Columbia, SC 29511-1433



Ralph J. Wilson, Attorney at Law

February 11, 2008  
Conway, South Carolina

**ORIGINAL**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM HORRY COUNTY  
Court of General Sessions

Honorable James E. Lockemy, Presiding Judge

---

Indictments: 2006-GS-26-2101

---

State of South Carolina,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

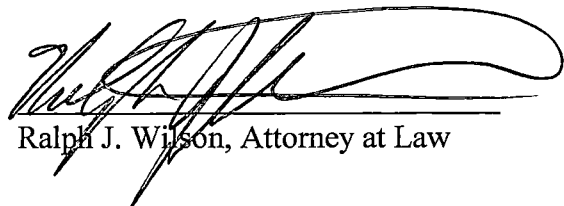
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**PROOF OF SERVICE**

---

I, Ralph J. Wilson, Attorney at Law, hereby certify that I have served the Notice of Intent to Appeal upon the Respondent by having mailed the same via U.S. Mail, first class postage prepaid, to J. Gregory Hembree of the 15<sup>th</sup> Circuit Solicitor's Office addressed as follows:

J. Gregory Hembree, Solicitor  
15<sup>th</sup> Circuit Solicitor's Office  
PO Box 1276  
Conway, SC 29526



Ralph J. Wilson, Attorney at Law

February 11, 2008  
Conway, South Carolina

**ORIGINAL**



RECEIVED

FEB 16 2008

Ralph J. Wilson  
Attorney at Law, P.A.

1411 First Avenue  
Post Office Box 1827  
Conway, South Carolina 29528

RECEIVED  
COT  
FEB 13 2008  
S.C. Court of Appeals

SC SUPREME COURT

FACSIMILE (843) 381-0767

February 11, 2008

Supreme Court of South Carolina  
Honorable Daniel Shearouse- Clerk of Court  
Post Office Box 11330  
Columbia, SC 29211

Re: NOTICE OF INTENT TO APPEAL  
State of South Carolina v. Louis Michael Winkler, Jr.  
2006-GS-26-2101

Dear Mr. Shearouse:

Enclosed for filing please find the original and three (3) copies of Defendant's Notice of Intent to Appeal and corresponding Proofs of Service relative to the above case which are to be filed in the South Carolina Supreme Court. Kindly file the original and return two(2) clocked copies at your earliest convenience.

Also, enclosed is a copy of Defendant's Notice of Intent to Appeal and corresponding Proof of Service that was filed here in Horry County.

By copy of this letter, I am forwarding these documents to Solicitor J. Gregory Hembree of the 15<sup>th</sup> Circuit Solicitor's Office. I am also forwarding a copy to the South Carolina Office of Appellate Defense since I served as court -appointed counsel on this case and have not been retained to file an appeal.

With kind regards, I am

Truly yours,

Ralph J. Wilson

RJW/amg  
Enclosure

cc: Solicitor J. Gregory Hembree (w/enc.)  
SC Office of Appellate Defense (w/enc.)  
Attorney General Henry McMaster(w/enc.)

**FILE COPY**

STATE OF SOUTH CAROLINA )

COUNTY OF HORRY )

The State, )

vs. )

Louis Michael Winkler, )

Defendant. )

IN THE COURT OF GENERAL SESSIONS

RECOMMENDATION OF SENTENCE  
DEATH PENALTY  
2006-GS-26-2101

We, the jury in the above-entitled case, having found beyond a reasonable doubt the existence of the following statutory aggravating circumstance(s), to wit: 1. The murder was committed while in the commission of burglary in any degree. 2. The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

now recommend to the Court that the Defendant, Michael Louis Winkler, be sentenced to death.

[Signature] Foreperson

Jason Wallingford Juror

Thomas Standish Juror

Andrea Thompson Juror

Lorene H. Wright Juror

Vicki W. Beck Juror

[Signature] Juror

[Signature] Juror

K. R. B. Juror

Stephanie Morris Juror

Glenn Cole Juror

[Signature] Juror

Conway, South Carolina

Dated: 02/08/08

STATE OF SOUTH CAROLINA )

COUNTY OF HORRY )

The State, )

vs. )

Louis Michael Winkler, )

Defendant. )

IN THE COURT OF GENERAL SESSIONS

AGGRAVATING CIRCUMSTANCES  
2006-GS-26-2101

We, the jury in the above-entitled case, find beyond a reasonable doubt the following statutory aggravating circumstance(s): 1. The murder was committed while in the commission of burglary in any degree. 2. The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Conway, South Carolina

Dated: 02/07/08

STATE OF SOUTH CAROLINA )

COUNTY OF HORRY )

The State, )

vs. )

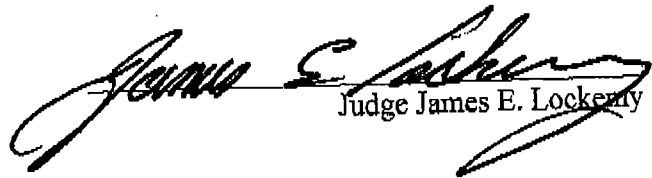
Louis Michael Winkler, )

Defendant. )

IN THE COURT OF GENERAL SESSIONS

AFFIRMATION OF DEATH SENTENCE  
2006-GS-26-2101

As the Trial Judge in the above-entitled action, and prior to the imposition of the death sentence upon the Defendant, Louis Michael Winkler, I find as an affirmative fact that the evidence of the case warrants the imposition of the death penalty and its imposition is not a result of prejudice, passion, or any other arbitrary factor.

  
Judge James E. Lockerty

Conway, South Carolina

Dated: 8 February 2008

STATE OF SOUTH CAROLINA )

COUNTY OF HORRY )

The State, )

vs. )

Louis Michael Winkler, )

Defendant. )

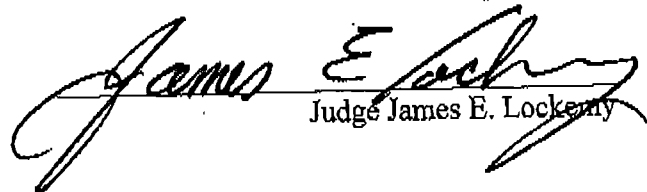
IN THE COURT OF GENERAL SESSIONS

SENTENCE

2006-GS-26-2101

The Defendant, Louis Michael Winkler, has been found by the jury to be guilty of the offense of murder. The jury has recommended that the Defendant should be sentenced to death.

It is, therefore, the judgment of the law and the Sentence of the Court that the Defendant, Louis Michael Winkler, be taken to the J. Reuben Long Detention Center, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the 10 day of March 2008, upon which day between the hours of six o'clock P.M. and six o'clock A.M., or upon an Order of Execution issued by the South Carolina Supreme Court, the Defendant, Louis Michael Winkler, shall suffer death by electrocution or by lethal injection in the manner provided by law.

  
Judge James E. Lockery

Conway, South Carolina

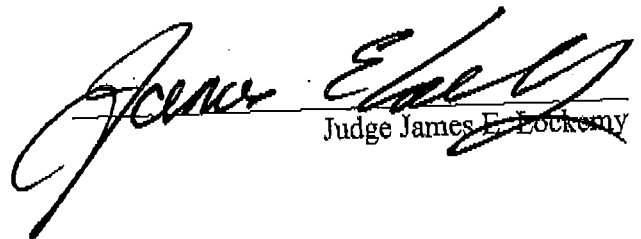
Dated: 8 February 2008

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )  
The State, )  
vs. )  
Louis Michael Winkler, )  
Defendant. )

IN THE COURT OF GENERAL SESSIONS

DEATH PENALTY SENTENCING REPORT  
2006-GS-26-2101

- A. Name of Trial Judge: **James E. Lockemy**
- B. Name of Defendant: **Louis Michael Winkler**
- C. Names of Defense Attorneys: **Ralph Wilson, Paul Rathbun**
- D. Date Sentenced: **February 7, 2008**
- E. Copy of verdict form is attached.

  
Judge James E. Lockemy

Conway, South Carolina

Dated: Feb 7, 2008