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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
The Honorable Benjamin H. Culbertson, Circuit Court Judge

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SC SUPREME COURT

On Writ of Certiorari
Appellate Case No. 2014-000904

LOUIS MICHAEL WINKLER, JR.,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. Trial counsel was not ineffective in not objecting to the trial court's refusal to answer the jury's question on what occurs if the jury could not reach a unanimous verdict, and trial counsel was not ineffective in his handling of the Allen charge given by the trial court.

A. Trial counsel was not ineffective in not objecting to the trial court's refusal to answer the juror's question.

Trial counsel were not deficient when they did not object to the trial judge's decision not to answer the questions. The trial court was well within its discretion in refusing to answer the initial questions asked by the jury, and, as a result, counsel had no basis for objecting. S.C. Code Ann. § 16-3-20(C) states:

> 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).

The South Carolina Supreme Court has held that this sentencing portion of the subsection (C) does not need to be shared with the jury.

> The language of the statute provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.

State v. Adams, 277 S.C. 115, 124, 283 S.E.2d 582, 587 (1981) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Copeland, 278 S.C. 572, 584-85, 300 S.E.2d 63, 70 (1982); see State v. Spann, 279 S.C. 399, 404, 308 S.E.2d 518, 521 (1983)(finding harmless error when judge instructed jury that any sentence for life imprisonment must be unanimous

because jury need not be instructed of legal effect of unalterable divided jury). "[T]he Eighth Amendment does not require that the jurors be instructed as to the consequences of their failure to agree." Jones v. United States, 527 U.S. 373, 381 (1999).

> We have never suggested, for example, that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process. On the contrary, we have long been of the view that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." Allen v. United States, 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896). We further have recognized that in a capital sentencing proceeding, the Government has "a strong interest in having the jury express the conscience of the community on the ultimate question of life or death." Lowenfield v. Phelps, 484 U.S. 231, 238, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (citation and internal quotation marks omitted). We are of the view that a charge to the jury of the sort proposed by petitioner might well have the effect of undermining this strong governmental interest.

Jones, 527 U.S. at 382 (footnote omitted).

The questions posed by the jurors specifically asked what would happen if they did not reach a unanimous verdict. In light of the longstanding precedent against informing jurors of what would occur if they did not reach a unanimous verdict, it was proper for the trial court to not respond to the jurors' questions on that subject. Thus, trial counsel had no basis for objecting to the trial court's refusal to answer the questions. As a result, counsel was not deficient.

As noted in the Brief of Petitioner, this case is not akin to Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187 (1994). Unlike parole eligibility, the underlying issue of the result of a divided verdict in sentencing is not relevant to a jury's determination of a defendant's sentence. To the contrary, an

instruction on the result would instead run the risk of undermining the jury's responsibility to attempt to reach a verdict. See Jones, supra; see also Brogie v. State, 695 P.2d 538, 547 (Okla.Crim.App.1985)("Such an instruction would amount to an invitation to the jury to avoid its difficult duty to pass sentence on the life of an accused."); Justus v. Com., 220 Va. 971, 979, 266 S.E.2d 87, 92 (1980)(noting that such an instruction "would have been an open invitation for the jury to avoid its responsibility and to disagree."); State v. Hutchins, 303 N.C. 321, 353, 279 S.E.2d 788, 807 (1981) (stating "such an instruction is improper because not only would it be of no assistance to the jury, it would also permit the jury to escape its responsibility to recommend the sentence to be imposed.").

Winkler cannot show that he was prejudiced by counsel not objecting to the trial court's refusal to answer those questions from the jury. As already noted, the trial court's refusal to answer the questions was proper. Thus, any objection would have been without merit. See, e.g., Werts v. Vaughn, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); see also Almon v. U.S., 302 F.Supp.2d 575, 586 (D.S.C.2004) ("There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable.").

B. The Allen charge given by the trial court was not unduly coercive, and trial counsel was not ineffective in neither objecting to the charge nor requesting an Allen charge be given earlier.

Winkler asserts trial counsel should have objected to this charge because they were improper and were given in unduly coercive circumstances. The State submits this contention is without merit.

> Neither the Due Process clause nor the Eighth Amendment forbid the giving of an Allen charge in the sentencing phase of a capital proceeding. Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); see also Jones v. United States, 527 U.S. 373, 119 S.Ct. 2090 (1999) (no constitutional requirement that capital jury be informed of consequences of its failure to agree). Whether an Allen charge is unconstitutionally coercive must be judged "in its context and under all the circumstances." Lowenfield, supra.

Tucker v. Catoe, 346 S.C. 483, 490-91, 552 S.E.2d 712, 716 (2001).

> In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel. Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict.

Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (citations omitted).

In determining whether an Allen charge is unconstitutionally coercive, a court should look to whether (1) the charge spoke specifically to the minority juror(s); (2) the judge included in his charge any language such as "You have got to reach a decision in this case;" (3) there was an inquiry into the jury's numerical division, which is generally coercive; and (4) whether the jury returned a verdict shortly after the supplemental charge, which suggests a possibility of coercion; and if so, whether the fact that trial counsel did not object either to the inquiry into whether the jurors believed further deliberation would result in a verdict, nor to the supplemental charge. Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237, 108 S.Ct. 546); see State v. Williams, 386 S.C. 503, 512, 690 S.E.2d 62, 66-67 (2010), cert. denied, 131 S. Ct. 230, 178 L. Ed. 2d 153 (2010).

The Allen charge given in Winkler's case was not coercive. The language utilized in the charge was similar to the language upheld in Lowenfield and to the charge upheld in Williams. Further, the charge did not speak directly to the minority jurors. The trial court never intimated that the jury had to reach a verdict. The trial court never inquired into the jury's numerical division. And while the jury returned its verdict approximately one hour after hearing the charge, there is no indication in the record that such coercion was readily apparent. Since the Allen charge was not coercive, counsel was not deficient in not objecting to the charge.

Winkler also cannot show that he was prejudiced by counsel not objecting to the Allen charge. First, such an objection would have been without merit because the charge was not coercive. Thus, any objection would have been dismissed. The State submits Winkler failed to show that he was otherwise prejudiced by counsel not objecting.

To the extent Winkler contends that counsel should have requested an Allen charge be given in response to one of the jury's earlier questions, the State submits this assertion is without merit. First, the record clearly reflects that all agreed during the trial that it was not clear the jury was indicating it was deadlocked when it sent the first two questions.[1] An Allen charge was therefore not warranted. Furthermore, the State submits that Winkler did not show that requesting an Allen charge earlier would have led to a different result at trial.

[1] (App. 2921-22, 2924-25).

II. The PCR Court did not abuse its discretion in denying Winkler's request for a continuance; the denial is supported by the record.

Winkler asserts the denial of his motion for a continuance was based on the PCR Court's review of a secondary basis for the extension, and the PCR Court did not address the issue related to diabetes. This assertion is undermined by the text of the Order denying the Motion. In the Order, the PCR Court clearly reflects that he understood the bases for the request for a continuance. In the Order, the PCR Court outlines that Winkler was requesting a continuance because

> additional time is needed because he has not been able to obtain a positron emission tomography ("PET") scan because of his diabetes which, prior to being taken to the hospital for his PET scan, went undiagnosed. Applicant's attorneys argue that a PET scan is necessary to determine the applicant's "potential brain damage." Applicant further argues that some agencies have been slow to release documentary evidence pertaining to the applicant and that additional investigation is needed to determine whether the applicant has "mental health disorders."

(2nd Supp. App. 47). The PCR Court's Order also reflects that the reasoning behind its denial of relief was not based solely on the timing of the subpoenas attached to the Motion. To the contrary, the PCR Court specifically noted that it felt Winkler had "ample opportunity" to investigate matters pertaining to his "'potential brain damage' and 'mental health disorder.'" (2nd Supp. App. 47). This reasoning was not directly tied to the timing of the subpoenas.

The PCR Court's explanation for the denial of the continuance request clearly reflects the PCR Court's belief that Winkler could have and should have started his investigation into potential brain damage earlier in the process. This was further suggested by the PCR Court's comments during the proffer at the

beginning of the PCR evidentiary hearing. (See App. 4206, ll 14-20). The record reflects the PCR Court was aware of how Winkler's investigation was progressing by way of *ex parte* requests for funding. (See 3rd Supp. App. 1-4, 6-29).

At issue is whether Winkler was afforded an adequate opportunity to investigate and prepare for trial. The claim in this case is unlike the issue presented in Coleman v. Alabama, 377 U.S. 129 (1964).[2] Winkler was not denied the opportunity to present evidence at the PCR evidentiary hearing. Nor have there been any allegations that the PCR Court unreasonably limited Winkler's ability to investigate by not timely providing funds for experts. Thus, the question remaining is whether the PCR Court was unreasonable in finding that an additional 180 days was not warranted in light of the amount of time already provided for investigation and discovery. The State submits that it was well within the PCR Court's discretion to find enough time had been allotted for

[2] In Coleman, the U.S. Supreme Court found the petitioner was denied due process and his right to equal protection under the Fourteenth Amendment when the state court did not allow the petitioner to present evidence to support his claim that African-Americans were systematically and intentionally excluded from jury duty in violation of the Fourteenth Amendment. Id. at 130-32. In Coleman, the Petitioner had evidence to present in support of his claim by way of testimony, but he was denied the opportunity to present that evidence as the state trial court sustained objections when Petitioner asked witnesses (two circuit solicitors) questions relating to the claim. On appeal, the Alabama Supreme Court considered the claim on the merits and affirmed the denial because the petitioner had not met his burden of establishing discrimination. Id. at 132. The U.S. Supreme Court reversed, noting that "where the state court found that 'the motion was but a mere tender of the issue, unaccompanied by any supporting testimony * * *,' this Court must reverse on the ground that the defendant 'offered to introduce witnesses, to prove the allegations * * * and the court * * * declined to hear any evidence upon the subject * * *." Id. at 133 (quoting Carter v. Texas, 177 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839 (1900)).

investigation, and the denial of the motion for a continuance is supported by the record.

CONCLUSION

The PCR Court erred as a matter of law in granting post-conviction relief. The Order Granting Post-Conviction Relief should be reversed, and Winkler's death sentence should be reinstated. If this Court finds the PCR Court properly granted post-conviction relief, the PCR Court's implementation of a life sentence should be vacated, and the case should be remanded to the Horry County Court of General Sessions for a new sentencing trial. Winkler is not entitled to relief upon his claim that the PCR Court improperly denied his motion for a continuance.

Respectfully submitted,

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PROOF OF SERVICE

I, Alphonso Simon, Jr., of counsel for the Petitioner, certify that I have served two (2) copies of the within Reply Brief of Petitioner via U.S. mail to his attorneys of record, Emily C. Paavola, Esq., Justice 360, f/k/a Death Penalty Resource and Defense Center, 900 Elmwood Avenue, Ste. #200, Columbia, South Carolina 29201, and to John R. Mills, Esq., The Phillips Black Project, 836 Harrison Street, San Francisco, CA 94107.

I further certify that all parties required by Rule to be served have been served.

This 15th day of March, 2016.

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