No. _____

IN THE

Supreme Court of the United States

JEROME JENKINS, JR.,
Petitioner,

-v.s.-

STATE OF SOUTH CAROLINA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

*Robert M. Dudek
Attorney at Law

Kathrine H. Hudgins
Attorney at Law

1330 Lady Street, Suite 401
Columbia, South Carolina 29201
RDudek@sccid.sc.gov
(803) 734-1955

Attorneys for Petitioner
Counsel of Record

QUESTIONS PRESENTED

CAPITAL CASE

1.

Could a South Carolina trial judge who had told Petitioner he would sentence him to death if he pled guilty still rule, consistent with Hurst v. Florida, 577 U.S. 92 (2016), that Petitioner had to waive jury sentencing and be sentenced by him alone if Petitioner's choice under the state statute was to plead guilty and accept responsibility for his crimes?

2.

Whether the decision by the South Carolina Supreme Court in this case conflicts with this Court's opinion in Green v. Georgia, 442 U.S. 95 (1979) which instructed that a defendant's fundamental right to present critical mitigating evidence in his or her defense should not be excluded during the penalty stage of a capital trial due to the mechanical application of state hearsay evidence rules?

TABLE OF CONTENTS

APPENDIX INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioner Jerome Jenkins, Jr., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina.

OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported at State v. Jerome Jenkins Jr., 436 S.C. 362, 872 S.E.2d 620 (2022). App. 1.

JURISDICTION

The Supreme Court of South Carolina issued its opinion on April 6, 2022. Petitioner timely filed a petition for rehearing which was denied on June 7, 2022. App. 27. This Court's jurisdiction in invoked pursuant to 28 U.S.C. §1257 (a), Petitioner having asserted below and asserting herein the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . ." Amendment VI, United States Constitution.

"[N]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . ." Amendment XIV, United States Constitution.

STATEMENT OF THE CASE

Procedural history

Petitioner Jerome Jenkins was indicted at the April 23, 2015 term of the Horry County grand jury for the offenses of murder, attempted murder, and armed robbery for an incident which occurred in Horry County on January 2, 2015. R. 3733. Petitioner

was twenty years-old when the crime occurred, and his older co-defendants were thirty-three years old and twenty-years-old respectively. R. 2082, ll. 9-10.

As will be seen below, at one of the numerous pre-trial hearings, on March 7, 2019, while discussing the right to plead guilty, the trial judge told Petitioner he would sentence him to death if he pled guilty before him alone as the state statute commanded. Petitioner responded: "Not a chance." R. 3163, l. 19 – 3165, l. 16.

Petitioner filed a motion to declare South Carolina's death penalty statute unconstitutional inasmuch as it forced him to waive jury sentencing if he pled guilty. App. 29. The deputy solicitor claimed he did not want to deny Petitioner the benefits of accepting responsibility for his crime by pleading guilty but he insisted that Petitioner could not plead guilty and have jury sentencing under the South Carolina Death Penalty Statutory Complex. R. 3433, ll. 13-25. The judge denied the motion to declare the Death Penalty Statute unconstitutional on the grounds that it impermissibly forced a waiver of jury sentencing in order to plead guilty. R. 3434, ll. 1-12; R. 3428, l. 18 – 3434, l. 13.

Petitioner's case was then called to trial on May 6, 2019 before the Honorable Robert E. Hood, and a jury. Ralph Wilson and Brana Williams represented Petitioner. Solicitor Jimmy Richardson and Deputy Solicitor Scott Hixson represented the state. R. 1.

On May 11, 2019, the jury found Petitioner guilty of murder, attempted murder, and armed robbery. R. 1672, l. 15 – 1673, l. 6. After the mandatory twenty-four-hour waiting period, the sentencing phase trial began on May 13, 2019. R. 1681, ll. 1-2.

On May 16, 2019, the jury returned with a sentence of death. R. 2348, l. 17 – 2349, l. 16. Judge Hood then sentenced Petitioner to death on the murder count, thirty years' imprisonment for attempted murder, and thirty years' imprisonment for armed robbery. R. 2363, ll. 6-15.

Petitioner's conviction and death sentence were affirmed by the South Carolina Supreme Court upon mandatory review in State v. Jerome Jenkins Jr., 436 S.C. 362, 872 S.E.2d 620 (2022). App. 1-26. Petitioner's petition for rehearing was denied on June 7, 2022. App. 27. Petitioner filed a petition for a stay of execution with the South Carolina Supreme Court to seek certiorari from this Court. That Court then issued a stay of execution. App. 34.

Relevant trial and appellate facts

An on-the-record status conference was held on March 7, 2019 before the Honorable Robert E. Hood. Ralph Wilson and Brana Williams represented Petitioner. Scott Hixson was the deputy solicitor. R. 3140. The judge noted that the status conference was being held about sixty days before the beginning of the trial. R. 3142-3156. The deputy solicitor said that Petitioner was now back in the local detention center in accordance with the judge's latest order. R. 3142, l. 20 – 3143, l. 3.

After some preliminary matters were discussed, the judge stated, "[O]ne of the things that I need to understand is are there any plea offers that are on the table? Is there a plan on any plea offers? Have plea offers expired? Is that not an option at all? Where is the State with that?" R. 3154, l. 12 – 3155, l. 3.

Deputy Solicitor Hixson responded, "There are no plea offers. There has never

been a plea offer in it. Once we served notice [of intent to seek the death penalty], we have no intention absent an order of incompetency or something by the Court to retract that notice. As such, there has not been and there are none and as such, there's not set to expire." R. 3154, l. 12 – 3155, l. 3.

Hixson also told the judge that defense counsel Wilson had told him, "[W]e can take care of this if you let him plead to life and offers that in a discussion. And he has been relentless in working for his client in that regard, I will tell you that." R. 3155, ll. 8-14.

After Petitioner confirmed to the judge that he had been moved back to J. Reuben Long Detention Center in Conway, South Carolina where the courthouse and his defense counsel were both located, the judge told Petitioner they were in "what I would call crunch time, you're about sixty days out from trial." The judge told Petitioner he had him moved back to the county detention center so his attorneys would have "more access to you." R. 3163, ll. 10-18. The following then occurred between Petitioner and the judge:

> THE DEFENDANT: I have a question. Is it legal for *them to make me go to trial?*
>
> THE COURT: Make you go to trial?
>
> THE DEFENDANT: *Basically, they made me go to trial. I didn't get no plea or nothing. So is it legal?*
>
> THE COURT: *I mean, you have the right to plead guilty if you want to plead guilty.*
>
> THE DEFENDANT: *Plead guilty to the death sentence?*
>
> THE COURT: *Right. I mean, we both are kind of smiling at*

each other as we say that, but I mean, there are some people that believe criminal defendants do not have a right to plead guilty. You know, I don't think you can stop somebody from pleading guilty as charged. But, you know –

THE DEFENDANT: *So if I plead guilty to the death sentence, I would be on death row?*

THE COURT: *Yeah.*

THE DEFENDANT: *Not a chance.*

R. 3163, l. 19 – 3165, l. 16.

The South Carolina Supreme Court wrote of this colloquy:

> "We wish to be very clear this was error by the trial court. *See generally* Crisp, 362 S.C. at 415-16, 608 S.E.2d at 431-32[1] (discussing the propriety of a trial court's statements to a capital defendant concerning his right to a trial by jury); State v. Owens, 362 S.C. 175, 178, 607 S.E.2d 78, 79-80 (2004) (same). In Crisp and *Owens*, we relied on a series of four cases in which the trial court made erroneous statements to a defendant concerning his right to testify or to remain silent. Crisp, 362 S.C. at 416-17, 608 S.E.2d at 431-32; Owens, 362 S.C. at 177-78, 607 S.E.2d at 79-80. The central premise of these six cases is that while discussing with a defendant a choice the defendant must make about a constitutional right, the trial court may not make an inaccurate statement of law nor inject its personal opinion into the defendant's analysis. In this case, the trial court made an inaccurate statement of law that Jenkins appears to have interpreted as the trial court's personal opinion—formed before hearing any evidence—as to whether Jenkins deserved the death penalty. This is error."

State v. Jenkins, 436 S.C. 362, 872 S.E.2d 620, 626-27 (2022). App. 7.

Following this exchange, a Jackson v. Denno, 378 U.S. 268 (1964) hearing was held about six weeks later on April 25, 2019. Ralph Wilson and Brana Williams

[1] State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005).

represented Petitioner. Solicitor Jimmy Richardson and Deputy Solicitor Scott Hixson represented the state. R. 3237.

How the federal issue was raised below

During the motion hearing, defense counsel Wilson referenced his motion to find S.C. Code § 16-3-20 (b) unconstitutional and to "allow the defendant to plead guilty and be sentenced by a jury of his peers." App. 29; R. 3428, ll. 18-22; R. 3480. Defense counsel told the judge that "this defendant would today plead guilty to all of the charges that the State has against him. He is not denying any of the charges. *He would plead guilty to all of those charges, but he's simply saying I want to be sentenced by a jury, not by the Court.*" R. 3429, l. 23 – 3430, l. 9. (emphasis added).

Deputy Solicitor Hixson told the judge the state would not allow Petitioner to plead guilty and have jury sentencing. Petitioner would have to waive jury sentencing in order to plead guilty. Defense counsel repeated that Petitioner wanted to plead guilty and "[h]e's not asking for any special favors. He's not asking for anything. He is saying I'm guilty of everything you said I have done, and here I am. I'm pleading guilty. *The State is saying you can't even do that because we have to agree to it.*" R. 3431, ll. 21-25. (emphasis added).

The deputy solicitor responded that the statute did not allow Petitioner to plead guilty and have jury sentencing, and he claimed: "*It is not that we want you to keep you from accepting responsibility*, it is, yeah, I want to get rid of this because the evidence of guilt appears to be overwhelming, but I want to go through all of the effort of getting capital jury, and I think that is what the statute and rule [Criminal Procedure Rule 14]

contemplates."[2] R. 3433, ll. 13-25.

The judge then ruled that the statute was not unconstitutional. "If he wants to plea, *I'm not going to stop him, but we're not going to have a sentencing jury that is in place.* The statute could not be any clearer about that. It is not confusing. It is not, you know—if that is something—you know, I just think that the statute is just as clear as it can be, you know. So I don't know that he has a Constitutional right to a jury trial on sentencing issues." R. 3434, ll. 1-12; R. 3428, l. 18 – 3434, l. 13. (emphasis added).

The South Carolina Supreme Court affirmed the trial judge's ruling on appeal:

> Jenkins argues the Supreme Court's 2016 decision in Hurst v. Florida, 577 U.S. 92 (2016), requires that a jury impose the sentence in all capital cases, effectively overruling Allen[3], Crisp, Wood[4], and Downs[5]. In Hurst, the Supreme Court stated, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 577 U.S. at 94. Hurst is distinguishable from this case, however, for the same reason we distinguished Ring v. Arizona[6] in Allen, Crisp, Wood, and Downs. Hurst dealt with a Florida statute under which "the jury renders an 'advisory sentence' of life or death," after which, "Notwithstanding the recommendation of a majority of the jury, the [trial] court ... shall enter a sentence of life imprisonment or death." 577 U.S. at 95-96 (quoting Fla. Stat. § 921.141(2)-(3) (Supp. 2012)). The Florida procedure applied even in cases in which the defendant exercised his right to a trial by jury. As we explained in Allen, Crisp, Wood, and Downs, the situation is different when the defendant makes a valid waiver of his right to a trial by jury as a predicate to pleading guilty. *See,*

---

[2] Rule 14(b), SCRCrimP states "a defendant may waive his right to jury trial only with the approval of the solicitor and the trial judge."

[3] State v. Allen, 386 S.C. 93, 687 S.E.2d 21 (2009).

[4] State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004).

[5] State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004).

[6] Ring v. Arizona, 536 U.S. 584 (2002).

> *e.g.*, Crisp, 362 S.C. at 418-19, 608 S.E.2d at 433 ("The constitutionality of Section 16–3–20(B) ... rests ... on whether the statute comports with the right to a jury trial as established by this Court and the United States Supreme Court in interpreting the state and federal constitutions."); Downs, 361 S.C. at 146, 604 S.E.2d at 380 ("Ring did not involve jury-trial waivers and is not implicated when a defendant pleads guilty."). Thus, we disagree Hurst has any impact on Allen, Crisp, Wood, or Downs. We once more affirm the constitutionality of the subsection 16-3-20(B) requirement that a capital defendant who pleads guilty to murder must be sentenced by the trial court.

App. 5-6.

As seen, the South Carolina Supreme Court had also held that the trial judge telling Petitioner he would sentence him to death if he pled guilty was error. App. 6-7.

REASON THE WRIT SHOULD BE GRANTED

The South Carolina trial judge's ruling that Petitioner had to waive jury sentencing to plead guilty and be sentenced by him alone in order to plead guilty as mandated by the state statute violated this Court's holding in *Hurst v. Florida*, 577 U.S. 92 (2016). The judge had told Petitioner he would sentence him to death if he pled guilty, as he desired, pursuant to the statute. However, Petitioner not only had the right to plead guilty under the statute -- he had the right to an impartial sentencer deciding whether the state had proven an aggravating circumstance if he pled guilty, and that could only be a jury under these unique circumstances.

A defendant in a South Carolina death penalty trial can plead guilty and have judge only sentencing or he or she can plead not guilty and have jury sentencing. See S.C. Code §16-3-20 (B). App. 30. Those are the choices.

Unfortunately, in this truly unique case, Petitioner had no choice even though he wanted to plead guilty and accept responsibility for his part in the crime because the trial judge told him he would sentence him to death if he chose to plead guilty. The South Carolina Supreme Court correctly found it was error for the trial judge to announce his intention to sentence Petitioner to death before he heard any evidence. App. 7.

Petitioner then sought to plead guilty and have jury sentencing. This was the only acceptable solution consistent with Petitioner's right to an impartial sentencer and Due Process since the trial judge arbitrarily left Petitioner without his state statutory choice of pleading guilty and having an impartial judge impose the sentence. The ship

sailed on the judge only sentencing option under the statute once the judge told Petitioner pre-trial he would sentence him to death if he pled guilty. Under these unique circumstances, Petitioner had the due process right to plead guilty and have an impartial jury sentence him. This would include the sentencing jury determining if the State of South Carolina proved a statutory aggravating circumstance necessary for the imposition of a sentence of death. See Hurst v. Florida, 577 U.S. 92 (2016).

South Carolina is not a "weighing state," and the aggravating circumstances outweighing the mitigating circumstances is not controlling. The sentencing jury or judge is always free to impose a life sentence in South Carolina for "any reason or no reason at all, including as an act of mercy." See Rosemond v. Catoe, 383 S.C. 320, 329-30, 680 S.E.2d 5, 10-11 (2009).

Acceptance of responsibility by pleading guilty is the most powerful mitigating evidence available to a criminal defendant. For example, the federal sentencing guidelines provide for a substantial downward departure if a defendant accepts responsibility for his crime and pleads guilty. "[I]f the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by two levels." See U.S.S.G §3E1.1(a) 18 U.S.C.A. Acceptance of Responsibility.

U.S.S.G §3E1.1(b) further provides an additional, one-level downward adjustment if the defendant's offense level prior to the application of U.S.S.G §3E1.1(a) is 16 or greater and he: (2) *timely [notifies the] authorities of his intention to enter a plea of guilty,* thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently. See United States

v. Lancaster, 112 F.3d 156, 158 (4th Cir. 1997).

Acceptance of responsibility is universally considered extremely strong evidence in mitigation of punishment. For example, after conviction, it does not violate a defendant's right against self-incrimination to force him to accept responsibility for his crime in order to have the benefits of treatment programs that likely will lessen the maximum time he must serve. See McKune v. Lile, 536 U.S. 24, 122 (2002). Further, parole boards routinely consider a defendant's acceptance of responsibility or his refusal to admit his guilt.

In the realm of capital punishment, "individualized consideration [is] a constitutional requirement." Therefore, the defendant has the right to have the sentencer consider any evidence in mitigation of punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Zant v. Stephens, 462 U.S. 862, 879 (1983).

Petitioner unquestionably had the right to a particularized consideration of his evidence in mitigation by his sentencer. Lockett v. Ohio, supra. Here, however, as defense counsel correctly argued, Petitioner was forced to waive jury sentencing, and accept judge sentencing, in order to have his most powerful mitigating evidence -- his plea of guilty -- considered during the penalty stage. However, the plea of guilty and sentencing in this case would be before a judge who had already confirmed to Petitioner that he would be pleading "guilty to a death sentence." R. 3163, l. 19 – 3165, l. 16. The judge had already decided the state had proved an aggravating circumstance necessary for his consideration of a death sentence prior to hearing any evidence, and he had also

telegraphed that mitigating evidence would play no role in his predetermined decision to impose the death penalty. This violated this Court's holdings in Hurst v. Florida, 577 U.S. 92 (2016), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586, 605 (1978).

Prior South Carolina Supreme Court precedent

This was extraordinarily significant since the South Carolina Supreme Court had always reversed trial judges in capital cases when they told or instructed a defendant that the sentencer may not follow the law.[7] For example, in State v. Pierce, 289 S.C. 430, 434, 346 S.E.2d 707, 710 (1986), that Court reversed where the trial judge told a capital defendant that while the jury could not hold it against him if he did not testify: "I tell you that the jury, will hold it against you, the fact that you did not testify ... I am going to charge them that the law does not permit them to hold it against you, but they are human beings and you know and I know that any twelve people who have been called upon to resolve some dispute cannot help but have it in their mind and wonder why he did not tell us his side of it." The state supreme court held these comments by the trial judge were "erroneous, improper and contrary to South Carolina law," and it reversed and remanded for a new trial. State v. Pierce, 289 S.C. 430, 434, 346 S.E.2d 707, 710 (1986),[8] overruled on other grounds State v. Torrence, 305 S.C. 45,

---

[7] Petitioner is not aware of any other death penalty case in which the South Carolina Supreme Court found the trial judge mischaracterized the law or told the defendant that the law would not be followed where that Court, with the exception of this case, affirmed.

[8] Petitioner also argued to the South Carolina Supreme Court that while the prejudice from the judge's improper remarks about sentencing Petitioner to death if he pled guilty in this case was apparent, it is telling that the South Carolina Supreme Court had summarily dispatched a lack of prejudice claim by the state in Pierce where the defendant did not testify despite the judge's "warning" that the jury would hold it against him. "Although Pierce did not testify, he had the right to make that decision

406 S.E.2d 315 (1991).

In State v. Crisp, 362 S.C. 412, 415-16, 608 S.E.2d 429, 432 (2005), the state supreme court also reversed where the defendant pled guilty to murder, and was sentenced to death where the judge had told the defendant if he went to trial that there were jurors who would claim to be for the death penalty so they could get on the jury, in order to "let someone go" or express "their agenda against the death penalty." The Court held, *citing* "virtually identical facts" in State v. Owens, 362 S.C. 175, 178, 607 S.E.2d 78, 80 (2004): "Although the trial court must strive to ensure that a criminal defendant's waiver of the right of a jury trial is knowing and voluntary, the court should never inject its personal opinion into that decision. The comments here impermissibly did so."

None of these prior death penalty reversals were as egregious as this one where the trial judge told Petitioner that he would "be pleading guilty to the death sentence." The judge, just like the jury, would have had the legal obligation pursuant to S.C. Code §16-3-20 (C) to determine whether an aggravating circumstance was proven beyond a reasonable doubt, and then to consider the mitigating circumstances before arriving at his verdict and sentence. Again, that judge, even if the aggravating circumstances substantially outweighed any mitigating circumstances, could still impose a life sentence for any reason or no reason at all, or simply as an act of mercy.

The fact that Petitioner here immediately responded: "Not a chance," when the

---

free of any influence or coercion from the trial judge. It is virtually impossible to determine the actual effect the judge's improper statements had on Pierce; but we do not agree with the state's position that, because Pierce did not testify, the judge's comments are harmless error." State v. Pierce, 289 S.C. 430, 434, 346 S.E.2d 707, 710 (1986).

trial judge confirmed that a plea of guilty was going to result in a death sentence, showed the power of the judge's improper remark in this case, and the South Carolina Supreme Court properly found this was error.[9] However, the South Carolina Supreme Court nonetheless ruled that its prior cases, which predated Hurst v. Florida, 577 U.S. 92 (2016), had held that a defendant in a death penalty case had no right to plead guilty and have jury sentencing still controlled despite the fact this Petitioner could not agree to judge sentencing as a condition of his guilty plea given the state trial judge's improper pronouncement that he would sentence Petitioner to death if he pled guilty. See State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004); State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004).

The state supreme court's prior reasoning that guilty plea capital cases did not implicate Ring, and that a jury trial capital sentencing waiver was not any different from the waiver of any other constitutional right should not have controlled here. See State v. Wood, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004); State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004). Again, Petitioner could not waive jury sentencing and plead guilty since the trial judge admitted he would sentence Petitioner to death if he pled guilty. Petitioner should not have been forced to forfeit the substantial mitigating evidence of pleading guilty and accepting responsibility for his crimes in order to have

[9] The South Carolina Supreme Court's reasoning that defense counsel had an obligation to urge the trial judge to tell Petitioner that he could be impartial despite that judge already telling Petitioner he would sentence him to death if he pled guilty was fanciful. App. 10. Waiving sentencing by a unanimous twelve person jury in order to have a single government official, the trial judge, sentence the defendant is difficult enough for trial counsel to explain in a subsequent post-conviction relief proceeding where the judge sentenced the defendant to death and where that counsel is alleged to be ineffective for urging that judge only choice. Explaining why counsel urged a defendant who had been told by the trial judge that he would sentence him to death if he plead guilty to nonetheless plead guilty and have that judge sentence him would border on the impossible.

jury sentencing where the trial judge improperly denied Petitioner a sentencing choice under the statute.

Hurst v. Florida, 577 U.S. 92 (2016) mandates reversal

Petitioner also urged the South Carolina Supreme Court to accept the recent reasoning of a South Carolina circuit court judge who had filed an order in a death penalty post-conviction relief case on April 21, 2020, in Jerry Buck Inman v. State, 2012-CP-39-918, ruling that the Sixth Amendment of the United States Constitution protected a defendant's right to be tried by an impartial jury, and that S.C. Code §16-3-20 (B), which mandated -- following a plea of guilty -- that "the sentencing proceeding must be conducted before the judge" was unconstitutional under "that test laid down in Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016)." The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. Since S.C. Code §16-3-20 (B) mandates that a judge and not a jury determines whether a statutory aggravating circumstance necessary for consideration of the death penalty exists, S.C. Code §16-3-20 (B) is unconstitutional to that extent.[10] Order in Inman; R. 3536.

Petitioner argued before the South Carolina Supreme Court that its reliance on its prior holdings in State v. Wood, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004) and its reasoning in State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004) that a waiver of jury sentencing solved the Sixth Amendment right to jury sentencing problem cannot

[10] As of the filing of this petition for writ of certiorari with this Court, Jerry Buck Inman, a/k/a Jerry Buck Inmon v. State, Appellate Case No. 2020-000881 (S.C.) is pending on cross-petitions for writs of certiorari in the South Carolina Supreme Court on this and other non-related issues. Inman does not involve the judge's improper denial of a sentencing option under the state statute that is present in this case.

survive this Court's holding of Hurst v. Florida, 577 U.S. 92 (2016) that a jury must make the critical findings needed for the imposition of a death sentence. That Petitioner's jury here determined the existence of a statutory aggravating circumstance or circumstances did not change the fact that Petitioner was denied the strongest mitigating evidence possible that he pled guilty and accepted responsibility for his crimes.

The mechanical insistence that judge only sentencing was mandated by statute, S.C. Code §16-3-20 (B), upon a plea of guilty even though the judge here had already told Petitioner that a sentence of death would result if he exercised his statutory choice to plead guilty was improper. That death penalty predisposed lone government official, the trial judge, would be the sentencer who would determine whether the state had proved an aggravating circumstance necessary for consideration of the death penalty and that cannot stand following this Court's holding in Hurst v. Florida, 577 U.S. 92 (2016). The denial of Petitioner's request here to plead guilty and have jury sentencing, under these unique circumstances, also violated Petitioner's constitutional right to jury sentencing wherein it has long been held that he was entitled to have his sentencing jury consider any evidence which mitigated against a sentence of death – his acceptance of responsibility and his guilty plea attesting to that acceptance of responsibility. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586, 605 (1978). Certiorari should be granted on this issue.

2.

The South Carolina Supreme Court erred in finding that the trial judge did not abuse his discretion by prohibiting, as hearsay, testimony underlying an expert's opinion pertaining to the critical statutory mitigating circumstance during the penalty phase of the capital trial when applying the rules against hearsay in such a mechanistic fashion denied Petitioner his right to Due Process and a fair trial on the issue of punishment in derogation of *Green v. Georgia*, 442 U.S. 95 (1979).

Relevant trial facts

The trial judge prohibited, during the penalty stage of the capital trial, expert testimony from a forensic psychiatrist that a co-defendant admitted to her that he ordered Petitioner to kill a victim during one of the crime spree armed robberies. The defense sought to show in its case in mitigation that Petitioner, as a young man, operated under the dominion of older co-defendant McKinley Daniels and, to a lesser extent, the older James Daniels. Prior to the testimony of forensic psychiatrist Dr. Donna Schwartz-Maddox, Deputy Solicitor Hixson objected to Dr. Maddox testifying as to certain information in her report, Defense Exhibit 12, that the state considered hearsay. R. 3544; R. 2150, l. 21 – 2163, l. 20. Specifically, the state objected to Dr. Maddox's testimony under the opinion section of Defense Exhibit 12 pertaining to Petitioner operating under the "domination of another" wherein it stated that "Mr. Daniels admits he told JJ [Petitioner Jerome Jenkins] to kill Ms. Stull." R. 3557. Ms. Stull was a victim in one of the convenience store robberies.

Defense counsel Wilson told the judge that Dr. Maddox would testify that co-defendant McKinley Daniels' admission that he told Petitioner to kill Ms. Stull was part of the basis of Dr. Maddox's opinion that Petitioner was acting under the dominion of others, which was a mitigating circumstance in this case. See S.C. Code §16-3-20 (C)(b)(5); App. 32; R. 2161, l. 13 – 2166, l. 12; R. 2167, l. 25 – 2170, l. 11. The judge stated he had read Green v. Georgia, 442 U.S. 95 (1979), and "it stands for the proposition that the rules [against hearsay] should not be so—in their words—mechanistically applied as to prevent the ends of justice and prevent someone from being able to present mitigation in the penalty phase of a death penalty case." R. 2174, l. 1 – 2176, l. 12. However, the judge reasoned that Dr. Maddox could just testify: "I believe that Mr. Jenkins was under the dominion and control or the domination of another person and, you know, I've interviewed these people and read their statements, read this and read that." R. 2177, ll. 5-20. The judge ruled he was not going to allow Dr. Maddox to present this testimony because he considered it hearsay during the penalty phase of the trial. R. 2178, l. 6 – 2179, l. 2.

How the federal issue was raised below

Defense counsel repeatedly argued that Dr. Maddox was an expert, and that she could rely on matters other experts normally relied on as experts, and that she was retained here to assist the defense with its mitigation case. Defense counsel cited to Green v. Georgia, 442 U.S. 95 (1979), on the rules of hearsay being loosened in the interests of justice during the penalty phase of a death penalty trial. R. 2151, l. 19 – 2174, l. 13; R. 2177, l. 5 – 2179, l. 15.

The following day, Defense Counsel Wilson argued that Dr. Maddox as an expert had relied on McKinley Daniels' statement that he told Petitioner to shoot Ms. Stull, and that Dr. Maddox as an expert had the right to include that fact in her testimony. Defense counsel said the evidence was not being admitted to prove the truth of the matter asserted under Rule 801(c), SCRE, but instead it was admissible as evidence an expert relied on under Rule 703, SCRE. R. 2184, l. 14 – 2186, l. 7. See State v. Franklin, 318 S.C. 47, 57, 456 S.E.2d 357, 362-63 (1995).

Defense counsel again noted that rules of evidence were relaxed in capital sentencing proceedings, pursuant to Green v. Georgia, 442 U.S. 95 (1979), as a matter of due process. R. 2184, l. 25 – 2189, l. 8. The judge again ruled, "At this point in time, based upon the case law presented to me, the rules of evidence as have been applied and the case law that the Court has reviewed, I'll allow Dr. Maddox to say that she's interviewed these people and that is the basis of her forming her opinion, but she's not allowed to get into the specific statements, unless the state opens the door." R. 2192, ll. 15-22.

The testimony of Dr. Maddox

Dr. Maddox was qualified before the jury as an expert in forensic psychiatry without objection. R. 2196, ll. 17-20. Dr. Maddox testified she had been a witness for the prosecution in the past. R. 2201, l. 18 – 2202, l. 9.

Dr. Maddox interviewed Petitioner three times, and she had also spoken with his co-defendant, McKinley Daniels. R. 2203, ll. 7-22. Dr. Maddox said while obtaining background history on Petitioner, she discovered Petitioner's father had

been sentenced to thirty years in prison when Petitioner was born, and that Petitioner was referred for mental health treatment when he was eight years old. R. 2205, l. 5 – 2206, l. 4. The mental health psychiatrist at that time, Dr. Devenyi, opined Petitioner had depression. "His mother would view his behavior as bad instead of mentally ill or something that needed treatment. She [Dr. Devenyi] noted that his mother was very punitive. She was not supportive to him." R. 2206, ll. 1-11.

Dr. Maddox testified that Petitioner was "very hyperactive," but his mother would not allow him to be medicated or sedated. R. 2207, l. 6 – 2208, l. 7. Instead, Petitioner was often beaten with a "hose pipe, ax handle, rake with tape attached to the end of it, belts, a fan belt, those sorts of things." Petitioner was subjected to teasing and humiliation as a result of these beatings. R. 2208, l. 9 – 2209, l. 2. Petitioner had a learning disability, and he also suffered "a few head injuries." R. 2215, ll. 3-15.

Dr. Maddox diagnosed Petitioner as suffering from post-traumatic stress disorder. R. 2242, l. 17 – 2244, l. 3. She also diagnosed Petitioner as having an unspecified depressive disorder. R. 2244, l. 4 – 2245, l. 6. In addition, Dr. Maddox diagnosed Petitioner as suffering from substance abuse disorder based upon him using Xanax and marijuana. R. 2245, l. 7 – 2246, l. 10.

Dr. Maddox testified that McKinley Daniels was in his thirties and James Daniels was in his late twenties. "So they were substantially older than Mr. Jenkins." R. 2251, ll. 14-21. McKinley and James Daniels also had significant criminal records. When she interviewed McKinley Daniels, they discussed the fact that he had gotten

out of prison a mere four months earlier. He lived across the street from a trailer where Petitioner and his girlfriend were living. "McKinley had no place to live, so he lived there. He stated that at that time that his trailer was kind of the center. People would come by because he was home. People would come in and out, and that is how he met Mr. Jenkins, just through the neighborhood." R. 2252, ll. 2-16.

Dr. Maddox testified that this was a difficult time for Petitioner because they did not have heat, running water, or electricity in the trailer and that Petitioner's girlfriend, Lonice, would withhold the baby, Geo, from him "as leverage" whenever they were fighting. R. 2252, l. 17 – 2253, l. 17. The following occurred between defense counsel and Dr. Maddox:

> Q: Do you have an opinion as to whether or not J.J. was under the influence of James or McKinley Daniels?
>
> A: Yes. It is my opinion he was, absolutely.
>
> MR. WILSON: Bear with me one second, Your Honor. Thank you very much. Answer any questions the Solicitor may have for you.

R. 2254, ll. 3-8.

On cross-examination, Dr. Maddox said she had spent over forty hours going over records, interviewing people, and doing background investigation in this case. R. 2256, l. 22 – 2257, l. 9. Dr. Maddox confirmed she had diagnosed Petitioner as having post-traumatic stress disorder and that was aggravated by the prison environment. "When you are in an environment, prison doors are clanging, there's always inmates yelling, there is a lot of people that don't sleep at night." R. 2264, l. 20 – 2265, l. 9.

South Carolina Supreme Court

The South Carolina Supreme Court held that the trial judge did not abuse his discretion in prohibiting the expert testimony from Dr. Maddox that McKinley Daniels admitted to her that he told Petitioner to kill Ms. Stull. The court discussed an analysis pursuant to Rule 703, SCRE, and then wrote:

> Whether the trial court erred in excluding the statement McKinley made to Dr. Maddox is a close question. Some members of this Court would have admitted the statement, while others agree with the trial court and would have excluded it. The standard is whether the probative value of the statement for explaining Dr. Maddox's opinion "substantially outweighs" the probative value for its truth. Ultimately, we cannot say the trial court's decision to exclude the statement was an abuse of its discretion.

State v. Jenkins, 436 S.C. 362, 872 S.E.2d 620, 632 (2022); App. 16. The only reference to Green v. Georgia, the case relied upon by Petitioner, is in a footnote where the court wrote:

> Jenkins also argues the statement should have been admitted based on Green v. Georgia, 442 U.S. 95, 97, 99 S. Ct. 2150, 2151-52, 60 L. Ed. 2d 738, 741 (1979). We reject this argument. See State v. Blackwell, 420 S.C. 127, 160-61, 801 S.E.2d 713, 731 (2017) (discussing the "limited" applicability of Green); 420 S.C. at 161 n.29, 801 S.E.2d at 731 n.29 (noting the trial court's "application of our state's hearsay rules" was by no means "rote"). As did the trial court in Blackwell, the trial court in this case engaged in a thorough analysis.

State v. Jenkins, 436 S.C. 362, 872 S.E.2d 620, 632 (2022); App. 17. The South Carolina Supreme Court erred in rejecting this Court's holding in Green based on the South Carolina case of State v. Blackwell, a case factually distinguished from the present case.

REASON THE WRIT SHOULD BE GRANTED

The decision by the South Carolina Supreme Court in this case conflicts with this Court's opinion in *Green v. Georgia*, 442 U.S. 95 (1979) which instructed that a defendant's fundamental right to present critical mitigating evidence in his or her defense should not be excluded during the penalty stage of a capital trial due to the mechanical application of state hearsay evidence rules.

During the penalty stage of the capital trial, Petitioner was prohibited from presenting expert mitigation testimony from a forensic psychiatrist that a co-defendant admitted to her that he ordered Petitioner to kill a victim in a convenience store during one of the crime spree armed robberies. "The state cannot preclude the jury from considering `any relevant mitigating evidence' the defendant proffers in support of a sentence less than death." Payne v. Tennessee, 501 U.S. 808, 822 (1991) *citing* Eddings v. Oklahoma, 455 U.S. 104, 114 (1982). This is so because the imposition of death is so profoundly different from all other penalties. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

Any tension between a close call on an evidentiary ruling based on Rule 703, SCRE, as admitted by the South Carolina Supreme Court, and a violation of the fundamental right to Due Process and a fair trial as provided by the Fourteenth Amendment must always be resolved in favor of Due Process in the context of the penalty phase in a capital case. The state supreme court admitted this was such a close case by disclosing that the resolution of this legal issue "[i]s a close question. Some members of this Court would have admitted the statement, while others agree

with the trial court and would have excluded it." State v. Jenkins, 436 S.C. 362, 872 S.E.2d 620, 632 (2022); App. 10. "In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' Chambers v. Mississippi, 410 U.S. 284, 302 (1973)." Green v. Georgia, 442 U.S. 95, 97, 99 (1979).

In Green, this Court held that the exclusion of testimony from a witness that the second defendant confided to that witness that he killed the victim after ordering the defendant to run an errand was relevant to the critical issue in the punishment phase of the trial, and that the exclusion of that testimony denied the defendant a fair trial on the issue of punishment. This Court wrote, "Regardless of whether the proper testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the due process clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial." *Citing* Lockett v. Ohio, 438 U.S. 586, 604-605 (1978).

As in Green, the excluded testimony here was highly relevant to a critical issue in the punishment phase of the trial. One of the statutory mitigating circumstances trial judges in South Carolina charge the jury they may consider is that "the defendant acted under duress or under the dominion of another person." See S.C. Code § 16-3-20 (C)(b)(5). The judge in the present case properly instructed the jury as to this mitigating circumstance. R. 2333, ll. 17-18. The jury however, was not given the proper context in which to consider this mitigating circumstance because the expert testimony from Dr. Maddox that McKinley Daniels admitted to her that

he told Petitioner to kill Ms. Stull was excluded. Dr. Maddox's testimony about Daniels' admission should not have been excluded.

Rule 703, SCRE states, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." See, also State v. Franklin, 318 S.C. 47, 57, 456 S.E.2d 357, 362-363 (1995). Dr. Maddox was limited to testifying only that in her opinion Petitioner was acting under the dominion or influence of McKinley and James Daniels. R. 2254, ll. 3-5. However, a defense expert, such as Dr. Maddox during the penalty phase of a capital trial, was going to be viewed by jurors as a "hired gun" retained to say whatever was helpful to the defense to prevent a death sentence. The admission by Daniels that he told Petitioner to shoot Ms. Trisha Stull was the type of information that was reasonably relied upon by a forensic psychiatrist in forming her opinion. Dr. Maddox's opinion that Petitioner was "under the influence of James or McKinley Daniels" rang hollow and without effect without Dr. Maddox's testimony that this opinion was based in part on the admission by McKinley Daniels that he told Petitioner to shoot Trisha Stull.

An expert may base her opinion "on hearsay testimony which is not admissible, so long as that evidence is the type reasonably relied upon by experts in the field." State v. Franklin, 318 S.C. 47, 57-58, 456 S.E.2d 357, 363 (1995), *citing* Baumholser v. Amax Coal Co., 630 F.2d 550 (7th Cir.1980). State v. Lawson, 653 F.2d 299 (7th

Cir.1981). In State v. Franklin, this Court also noted, "[A]n expert's specific knowledge is neither determinative of his qualifications as an expert nor of the admissibility of his opinions into evidence, but bears on the weight to be given his testimony." *Citing* Henson v. State, 535 N.E.2d 1189, 1193 (Ind. 1989).

Here, Dr. Maddox not only scoured incident reports and discovery material to get background information on McKinley and James Daniels, she also personally interviewed McKinley Daniels. The facts – the admission by McKinley Daniels that he told Petitioner to shoot Ms. Stull – on which Dr. Maddox based her opinion that Petitioner was acting under the domination of others on that admission, were admissible and critical evidence that Dr. Maddox as an expert in forensic psychiatry had the right to impart to the jury. A raw opinion that Dr. Maddox thought Petitioner was operating under the dominion of others without this factual anchor that McKinley Daniels admitted he told Petitioner to shoot Ms. Stull made her opinion appear to be without any foundation.

Petitioner's most important mitigating evidence was that "the defendant acted under the duress or the dominion of another person" pursuant to the mitigating circumstance contained in S.C. Code § 16-3-20(C)(b)(5). The fact that Dr. Maddox's expert opinion was anchored in the admission of McKinley Daniels to her that he ordered Petitioner to kill Trisha Stull was invaluable mitigating evidence in the same category as the improperly excluded hearsay evidence in Green v. Georgia, 442 U.S. 95 (1979).

This Court in Green also observed that there was reason to believe the statement was reliable because it was a statement against interest and there was no reason to believe that the declarant had an ulterior motive in making it. Green v. Georgia, 442 U.S. 95, 97 (1995). In the present case, like in Green, the excluded testimony was not self-serving and contained the indicia of reliability required for admission. There was reason to believe McKinley Daniels' statement to Dr. Maddox admitting that he told Petitioner to shoot Ms. Stull was reliable because it was a statement against interest and there was no reason to believe he had an ulterior motive in making it. The statement was an admission to murder under the theory of accomplice liability. See State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 295 (2000), *quoting* "State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972)(if two or more combine together to commit an unlawful act and a homicide is committed by one of the actors as a probable or natural consequence of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act)."

Importantly, the proffered testimony was not cumulative to other mitigation evidence. Instead, the proffered testimony from the expert provided a foundation for her opinion that Petitioner acted under the dominion of another, McKinley Daniels. In Blackwell, the state court case cited by the South Carolina Supreme Court in affirming the exclusion of the proffered testimony, the defense sought to introduce notes made by two hospital Chaplains while Blackwell was receiving medical treatment. The defense moved to admit the notes during the mitigation stage of the

capital trial to rebut the state's position that Blackwell lacked remorse. The state objected to the admission of the notes and the trial judge sustained the objection and excluded the notes made by the hospital chaplains. The South Carolina Supreme Court found the judge properly excluded the notes. The court found that although the foundational requirement was met for admission of the notes as business records, the notes contained "inadmissible subjective opinions and judgments." The court additionally noted, "Nonetheless, even if the trial court erred in excluding the chaplains' notes, we find the error harmless as the evidence was cumulative to other evidence in the record of Blackwell's remorse." State v. Blackwell, 420 S.C. 127, 160, 801 S.E.2d 713, 730 (2017).

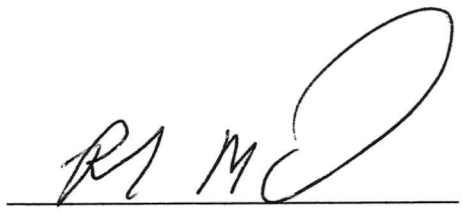
In contrast to Blackwell, the excluded testimony in the present case that McKinley Daniels admitted to the expert that he told Petitioner to shoot the victim was not cumulative to other mitigation evidence. The excluded testimony was critical to support the expert's opinion that Petitioner was acting under the domination of another. The excluded admission in the present case is analogous to the admission in Green. Additionally, the excluded testimony in the present case did not contain subjective opinions and judgments, as in Blackwell. The state court Blackwell case is factually distinct from the present case. The South Carolina Supreme Court erred in rejecting this Court's holding in Green based on State v. Blackwell.

The judge erroneously excluded Dr. Maddox's expert testimony that one basis of her expert opinion that Petitioner was operating under the domination of others was the fact that McKinley Daniels admitted he told Petitioner to shoot Ms. Trisha

Stull, and Petitioner obviously complied with that order by shooting her. See Rule 703, SCRE. This was compelling mitigating evidence Petitioner had the right to have his sentencing jury consider. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586, 604-605 (1978); Green v. Georgia, 442 U.S. 95, 97 (1995). Even if the testimony from Dr. Maddox was hearsay, "In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973)." Green v. Georgia, 442 U.S. 95, 97 (1979).

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should issue to allow full briefing on these issues.



*Robert M. Dudek
Attorney at Law

Kathrine H. Hudgins
Attorney at Law

1330 Lady Street, Suite 401
Columbia, South Carolina 29201
RDudek@sccid.sc.gov
(803) 734-1955

ATTORNEYS FOR PETITIONER

Counsel of Record

This 31st day of August, 2022.