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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT AND HAMPTON COUNTIES
Court of General Sessions

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The Honorable Clifton Newman, Circuit Court Judge

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Appellate Case No. 2023-001493

The State……..Respondent,

vs.

Cory Howerton Fleming……Appellant.

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# FINAL REPLY BRIEF OF APPELLANT

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Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
SC Bar # 72555
3710 Landmark Drive, Ste 113
Columbia, SC 29204
elizabeth@franklinbestlaw.com

Deborah B. Barbier
Deborah B. Barbier, LLC
S.C. Bar # 6639
1811 Pickens Street
Columbia, SC 29201
dbb@deborahbarbier.com

*Attorneys for Appellant*

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Appellant Cory Howerton Fleming respectfully submits this Reply Brief in further support of his appeal from the sentences imposed by the circuit court. This reply addresses the State's contention that all issues are barred by ordinary preservation rules and that the sentencing judge acted within his broad discretion. Those arguments mischaracterize both the nature of the constitutional violations and the record.

## ARGUMENTS

### I. Fleming's challenge is properly preserved for appellate review

The State recasts this appeal as a routine attack on a lawful, within-the-range sentence, arguing that Fleming forfeited all claims by not objecting or moving to reconsider. Respectfully, that position ignores that the primary error is the sentencing judge's categorical refusal—even after the evidence was tendered and repeatedly relied on as mitigation—to consider an entire body of relevant information: the federal sentencing transcript the federal judge asked to be provided "so that he has the benefit" of that proceeding.

South Carolina's preservation rules exist to give the trial court a fair opportunity to address alleged error; they do not license a judge to announce in open court that he deliberately refused to read mitigation materials counsel submitted for sentencing. Here, the error lay in the judge's own on-the-record declaration at the culmination of the proceeding that he "didn't read Judge Gergel's transcript" because he "never deferred to a federal court to guide my sentence as a state court judge," confirming that this was a categorical, not case-specific, refusal. By the time those remarks were made—immediately before sentence—the violation had already occurred and could not be cured by a routine contemporaneous objection.

Moreover, claims that the sentencing process was structurally defective because the judge refused as a matter of law to consider relevant mitigation, and because the sentence was infected by bias, are not easily shoehorned into preservation doctrines built for ordinary evidentiary and sentencing complaints. The State's own authorities emphasize contemporaneous objection to discrete rulings; they do not address a scenario where the judge himself announces that he has consciously declined to consider a major mitigation exhibit that the parties and the federal court had flagged as central. The State offers no South Carolina authority applying a procedural default rule to bar review where the sentencer has expressly refused to consider an entire category of mitigation proffered and accepted into the record.

## II. The circuit court judge abused his discretion when he refused to consider or even read relevant mitigation evidence that was offered by Fleming.

The State does not dispute that the federal sentencing transcript was filed with the court as part of Fleming's sentencing materials, that the federal judge explicitly asked that it be provided to the state court so the state judge could understand the federal sentencing rationale, or that defense counsel relied on the transcript as mitigation. Nor does the State dispute that, near the end of the hearing, the sentencing judge stated he had not read the transcript and explained that he does not "defer to the federal court system" in making his decisions, reiterating that he "didn't read Judge Gergel's transcript."

This was not a dispute about the weight to be given particular mitigating facts; it was an announced refusal to look at them *at all.* South Carolina law recognizes a sentencing judge's wide latitude in the "sources and types" of information considered, but that breadth of discretion assumes that relevant information is at least considered. A willful decision to remain ignorant of a central mitigation exhibit, particularly one highlighting that the same conduct had already been

carefully evaluated and sentenced in another court, is not an exercise of discretion; it is an abdication of the duty to consider information material to punishment.

But additionally, the transcript contained matters the State itself placed in dispute at sentencing. The Attorney General's office and victim's counsel repeatedly asserted that the federal proceedings did not meaningfully address the Pinckney losses and that "today is where there's the first real accountability" for that family. The federal transcript, by contrast, shows the prosecutor expressly explaining that the Pinckney conduct was treated as relevant conduct for guideline and restitution purposes, and that both the factual harm and restitution for that family were built into the federal case. The transcript also documented Fleming's early cooperation, disgorgement, and post-offense conduct relied upon by the federal court as mitigation. By declining to read it, the state judge accepted a one-sided and, in key respects, inaccurate, picture of what had occurred in federal court.

The State attempts to recharacterize these events as nothing more than a discretionary choice about how much weight to afford a separate sovereign's sentence, pointing to the judge's broad authority to fashion punishment within statutory limits. That framing elides the crucial distinction between weighing evidence and refusing to look at it. The constitutional problem arises not because the judge disagreed with Judge Gergel's sentencing philosophy, but because he foreclosed his own consideration of a substantial body of mitigation that spoke directly to how this very conduct had already been evaluated and punished, and that defense counsel had specifically offered for that purpose.

## III. Fleming's sentence violates his due process rights because it was the product of the circuit court judge's bias as evidenced by his failure to consider relevant mitigation evidence and his comments during the sentencing proceeding.

The State insists that the sentence is unreviewable because it is within the lawful range and because the judge's comments merely reflect the gravity of Fleming's crimes. The transcript tells a different story. The judge characterized the case as "unimaginable," "unprecedented," and "the greatest crime for a lawyer in the history of the State of South Carolina," then equated years of uncharged misconduct with having a "record," despite acknowledging Fleming had no prior convictions.

On their face, those remarks go beyond routine emphasis on seriousness; they link Fleming's case to the larger, highly publicized Murdaugh saga the sentencing judge had presided over and signal that the court was viewing Fleming through that lens. That linkage is underscored by the State's own repeated reliance at sentencing on the "Murdaugh" narrative, including analogies to the earlier murder trial and the perceived need for the "state judicial system" to "defend itself." Against that backdrop, the judge's decision not to read the federal transcript—which itself reflects concern about over-sentencing in light of dual sovereignty—takes on constitutional significance: it suggests a predisposition to impose a substantially harsher, symbolic state sentence untethered from an individualized evaluation of Fleming's mitigation.

The State argues that bias claims are unpreserved because no recusal motion or objection was made. Yet the core indicia of bias here—the categorical refusal to read mitigation and the "greatest crime in history" rhetoric—surfaced in the sentencing colloquy itself, at the point when the judge was about to pronounce sentence. The transcript does not reveal a setting in which defense counsel could realistically interrupt or move to recuse without risk of antagonizing the

judge further moments before sentencing. Nor does the State identify any South Carolina authority insisting on a contemporaneous recusal motion as a precondition to review where the alleged bias inheres in the judge's own sentencing explanations given at the close of a multi-hour hearing.

In addition, the record itself demonstrates that, prior to the sentencing comments and refusal to read the federal transcript, defense counsel had publicly expressed confidence in the judge's fairness, undercutting any suggestion that a preemptive recusal motion should have been anticipated. It was only after the judge revealed his unwillingness to consider the key mitigation exhibit, and after he used "unprecedented" and "greatest crime" language while tying Fleming's conduct to broader systemic scandal, that the constitutional dimensions of the bias concern crystallized.

The State repeatedly emphasizes that the 10-year aggregate sentence represents a small fraction of the nearly 195-year maximum exposure and that, by its arithmetic, Fleming received "less than six months per count." That arithmetic does not resolve the constitutional questions presented. A sentence within the statutory range may still violate due process and the Eighth Amendment if it results from a process in which the sentencer refused to consider relevant mitigation as a matter of law or acted out of partiality or bias. The State's own cases recognize that appellate courts lack authority to review ordinary "excessive" sentences where the process is otherwise regular and the sentence is not "the result of partiality, prejudice, oppression or corrupt motive." This appeal challenges precisely that qualifier: the record reflects partiality and a refusal to consider mitigation, not simply an aggressive but lawful sentencing choice.

Nor does the State's preservation analysis grapple with the structural nature of the error. Its authorities address failure to object to discrete rulings, such as specific sentencing conditions,

guideline calculations, or individual remarks, and they reaffirm that South Carolina does not employ a broad "plain error" rule. But they do not decide whether an appellate court is categorically barred from reviewing a sentencing where the judge openly refused to read a central mitigation exhibit and then relied on a narrative of unprecedented infamy intertwined with a different defendant's notorious case. The State's position would insulate from any appellate scrutiny a sentencing process in which the court announces a blanket refusal to consider mitigation that was tendered, accepted, and undisputedly relevant.

The State also suggests that because Fleming ultimately received a shorter sentence than the maximum for a single breach-of-trust count, no constitutional infirmity can arise. That reasoning collapses the distinction between legality of range and constitutionality of process. The issue is not whether the judge could lawfully impose ten years; it is whether that sentence was imposed after an individualized, unbiased assessment of all relevant mitigation, including the federal sentencing record, or instead after a consciously truncated review shaped by external notoriety and a desire for "independent accountability" unmoored from the full evidentiary context.

## CONCLUSION

For these reasons, the Court should reject the State's preservation and jurisdiction arguments, vacate the sentence, and remand for a new sentencing hearing before a different judge who will consider the full mitigation record, including the federal sentencing transcript, and impose sentence free from the taint of categorical non-consideration and bias.

Respectfully submitted,

/s/ Elizabeth Franklin-Best
Elizabeth Franklin-Best
SC Bar No. 72555
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, South Carolina 29204
elizabeth@franklinbestlaw.com
(803) 445-1333

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