STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM PICKENS COUNTY
Eugene C. Griffith, Circuit Court Judge

Op. No. 2018-UP-437 (S.C. Ct. App. filed Dec. 5, 2018)

THE STATE,

Respondent,

v.

MARCUS CHANNING JOHNSON,

Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

Appellate Case No. 2019-000443

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PETITIONER'S QUESTION PRESENTED

Did the Court of Appeals err by affirming the trial judge's decision to sentence Petitioner to life imprisonment without the possibility of parole where the sentence was excessive and disproportionate in violation of the Eighth Amendment to the United States Constitution and Article I, section 15 of the South Carolina Constitution in light of Petitioner's intellectual functioning as revealed through neuropsychological data, his level of culpability, and the statistical data illuminating the life expectancy of individuals in the Department of Corrections?

RESPONDENT'S RESTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals properly affirm the plea judge's decision to sentence petitioner to life without parole after petitioner voluntarily chose to plead guilty to remove the possibility of the death penalty, where the judge exercised his discretion after consideration of all information provided at the plea hearing to decide the appropriate sentence for petitioner within the statutory range for murder, and where petitioner's intellectual functioning has never been litigated?

STATEMENT OF THE CASE

Petitioner pled guilty to murder, conspiracy, and possession of a weapon during the commission of a violent crime on February 10, 2017. (R.p.25, lines 3-12; pp.98-104). Bill McGuire and John DeJong represented him. (R.p.1). Solicitor Walt Wilkins and Betty Strom represented the State. (R.p.1). The State served petitioner with a notice of intent to seek the death penalty. (R.p.8, lines 20-24; p.18, lines 2-7). However, through negotiations with counsel, it was agreed petitioner would plead guilty as indicted and leave sentencing in the trial court's discretion. (R.p.18, lines 8-23).

The Honorable Eugene C. Griffith sentenced petitioner to life imprisonment for murder, and concurrent terms of five years each for conspiracy and the weapons charge. (R.p.46, line 25-p.47, line 9).

Petitioner timely filed a notice of appeal and after briefing by both parties, the Court of Appeals issued an unpublished opinion affirming petitioner's convictions and sentences. (App.pp.1-2); *State v. Johnson*, Op. No. 2018-UP-437 (S.C. Ct. App. filed Dec. 5, 2018). On December 14, 2018, petitioner filed a petition for rehearing which the Court of Appeals denied by order dated February 15, 2019. (App.pp.3-18).

On March 21, 2019, petitioner filed a petition for writ of certiorari seeking review from this Court.

This return follows.

WHY CERTIORARI SHOULD BE DENIED

Petitioner's life sentence for murder following a guilty plea does not violate the Eighth Amendment. Critically, the issue of Intellectual Disability has not been litigated, a fact conceded by all parties. Further, such a finding has no bearing on petitioner's sentence as it is an exemption to the death penalty and petitioner avoided that possibility by his voluntary decision to plead guilty. The plea judge's decision to sentence petitioner to life without parole was a proper exercise of his discretion. This Court should deny certiorari review because the Court of Appeals properly affirmed the decision, explaining, among other things, a sentence "is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against" a defendant and noting the "heavy burden" on an appellant to "establish that evolving standards of decency preclude his punishment." (App.p.2). The record shows the plea judge carefully considered all relevant information before him, including facts of the crime and mitigating information.

Contrary to petitioner's assertions that this is a novel issue which conflicts with precedent, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this case. *See* Rule 242(b), SCACR. Indeed, the decision was a straightforward exercise of reviewing and affirming the plea judge's application of established precedent, logic, and practical consideration of the particular facts and circumstances of petitioner's case. Therefore, respondent requests the petition for a writ of certiorari be denied and dismissed.

ARGUMENT

The Court of Appeals properly affirmed the plea judge's decision to sentence petitioner to life imprisonment after he voluntarily chose to plead guilty to remove the possibility of the death penalty, the judge exercised his discretion after consideration of all information provided at the plea hearing to decide the appropriate sentence for petitioner within the statutory range for murder, and because petitioner's intellectual functioning has never been litigated.

This Court should deny certiorari review because the Court of Appeals properly affirmed the plea judge's decision to sentence petitioner to life without parole following a guilty plea to murder. Contrary to petitioner's assertion, his sentence is not excessive and disproportionate and does not violate the Eighth Amendment. Critically, this Court recently held it was unwilling to extend United States Supreme Court Eighth Amendment jurisprudence beyond its "explicit holding" until given the authority to do so. *State v. Slocumb*, Op. No. 27877, at *25-26; *32 (S.C. Sup. Ct. filed Apr. 3, 2019) (Shearouse Adv. Sh. No. 14). This Court should follow its precedent and decline to extend Eighth Amendment protection to a competent adult homicide offender who voluntarily pleads guilty.

The record reveals petitioner's sentence was properly determined after the plea judge considered all the relevant information presented to him at the plea hearing. The judge was within his discretion to sentence petitioner to life after both defense counsel and petitioner conceded they understood the only agreement between the parties was to remove the possibility of a death sentence, and petitioner voluntarily chose to plead guilty to avoid the risk of trial. The judge took into account all the information available to him, including a memorandum prepared by the defense which contained results of testing which petitioner argues demonstrates a diminished level of culpability. This is so even though the results of the neuropsychological testing have never been litigated and no court has ever made a finding of intellectual disability, a

point acknowledged by defense counsel during the plea hearing.

Accordingly, petitioner's sentence is not disproportionate under the Eighth Amendment, the plea judge did not err in making his determination, and Court of Appeals properly affirmed the decision. This Court should deny the petition for certiorari review.

Guilty Plea Hearing

Petitioner pled guilty to the indicted charges of murder, possession of a weapon during the commission of a violent crime, and conspiracy before the Honorable Eugene C. Griffith. (R.p.1; p.25, lines 3-12; pp.98-104). Judge Griffith explained the rights petitioner was giving up by pleading guilty, asked petitioner repeatedly if he understood, and petitioner indicated he did. (R.p.5, line 23-p.7, line 19). The judge also noted petitioner had two "very competent attorneys" advising him and discussing possible defenses and evidence with him, and asked petitioner again if he was waiving his right to a trial "freely and voluntarily," to which petitioner responded, "Yes, sir." (R.p.7, line 20-p.8, line 13).

The State told the plea judge briefly the facts of the case. Crystal Williams (Williams) called 911 at about 3:45 a.m. on January 26, 2014, claiming someone shot her husband, Shane, the victim. (R.p.9, lines 12-18). The couple's ten-year-old son was also in the home in Pickens County, heard gunshots, ran out of his bedroom, and saw his father lying on the floor. (R.p.9, lines 19-21). The investigation subsequently revealed Williams planned the murder with petitioner, communicating using a messaging app.[1] (R.p.9, line 22-p.10, line 13).

Williams gave a statement and admitted to the plan, and told investigators she and petitioner agreed to split the proceeds from an insurance policy. (R.p.10, lines 18-25). The two co-defendants were classmates in junior high and reconnected two to three years before the

[1] The co-defendants used the "Kik" app which allows users to register without providing a phone number and to delete communications after viewing, preserving anonymity. (R.p.10, lines 2-6).

murder. (R.p.10, lines 14-17). Williams stated petitioner sent her pictures of guns, including the one he would use to shoot her husband. (R.p.11, lines 1-4). On the night of the murder, Williams's son and husband each went to bed after watching television while she messaged petitioner to come over. (R.p.11, lines 5-17). Petitioner arrived wearing all black and gloves, and Williams let him inside the home. (R.p.11, lines 18-20). When Williams told petitioner her son was in the house and she was scared, Williams told investigators petitioner responded, "God damn, come on man. Let's go." (R.p.11, lines 20-25). Williams stated petitioner told her to wake the victim up and she did, telling him the wood burning stove needed more firewood, and he left the bedroom and Williams heard gunshots, her husband yell "no," and Williams heard one more shot. (R.p.11, line 25-p.12, line 7).

Investigators obtained a search warrant for petitioner's home and found a gun hidden under a mattress, and a box of ammunition later determined to be consistent with that used in the shooting. (R.p.12, lines 11-21). After being advised of his rights, petitioner also gave a statement to investigators in which he admitted he was involved in the murder. (R.p.12, line 22-p.13, line 5). Petitioner stated he and Williams started planning the crime in October 2013, agreeing they would split the money from the insurance policy. (R.p.13, lines 6-16). On the morning of the murder, Williams messaged petitioner, "Let's go ahead and do it, hurry up and let's go." (R.p.13, lines 21-24). Consistent with Williams's statement, petitioner told investigators the two arranged for Williams to let him in her house, she would wake her husband up and send him out, and petitioner would shoot him. (R.p.13, line 25-p.14, line 9). Petitioner admitted "he emptied the gun as he was walking toward the door of [Williams's] house." (R.p.14, lines 9-11).

At trial, the State was prepared to present evidence of petitioner's written statement, as

well as that of Williams. Further, investigators had evidence petitioner contacted a friend multiple times over Facebook about purchasing a gun and silencer, and could connect physical evidence found at petitioner's home to the shooting. (R.p.12, lines 11-21; p.14, line 16-p.15, line 21). In addition, the State would present the autopsy report which revealed petitioner shot the victim three times. (R.p.15, line 22-p.16, line 7). Other evidence that would have been presented included the messages recovered from the "Kik" app which detailed the plan between petitioner and Williams. (R.p.10, lines 6-8).

Following the State's recitation, the plea judge asked petitioner if the facts were accurate and petitioner replied, "Yes, sir." (R.p.17, line 21-p.18, line 1).

The plea judge also made sure petitioner understood the sentencing possibilities. The case was originally noticed as a death penalty potential trial. (R.p.8, lines 20-24; p.18, lines 2-7). However, through negotiations, it was agreed petitioner would plead guilty and leave sentencing in the judge's discretion—with the understanding the sentence could be anywhere in the statutory range of thirty years to life. (R.p.18, lines 8-18). Defense counsel acknowledged it was "a straight up plea" and there were no negotiations "other than taking the death penalty off the table." (R.p.18, lines 19-23). Petitioner agreed he did not receive the promise of any particular sentence:

> THE COURT: [Petitioner], the same question to you. Were you promised anything else other than not facing a jury and a potential death penalty to get you to plead guilty?
>
> [PETITIONER]: No, sir.
>
> THE COURT: Have you been threatened or coerced by anyone to get you to plead guilty?
>
> [PETITIONER]: No, sir.

(R.p.18, line 24-p.19, line 7). The judge then noted for petitioner the consequences of the guilty

plea, before asking petitioner:

> THE COURT: Are you pleading guilty to these three offenses – murder, possession of a weapon during the commission of a violent crime, and conspiracy – today freely and voluntarily?
>
> [PETITIONER]: Yes, sir.
>
> THE COURT: Are you pleading guilty on those three offenses because you are in fact guilty of committing them?
>
> [PETITIONER]: Yes, sir.

(R.p.19, line 8-p.20, line 18; p.25, lines 3-12). The judge found the plea was freely, intelligently, and knowingly entered. (R.p.26, line 17-p.27, line 11).

Prior to sentencing, the victim's father spoke briefly about the impact losing his son had on his family, telling the plea judge his son was taken by "a selfish act of greed" and his loss left a void "that will never be filled." (R.pp.28, line 12-p.29, line 2).

Next, several people spoke on petitioner's behalf, in an effort to give the judge a better understanding of petitioner's social history and personality. Defense counsel first noted he had a sentencing memorandum to make an exhibit which provided the basis for petitioner's argument for the minimum statutory sentence of thirty years. (R.p.29, lines 8-11; p.42, lines 4-16). Counsel told the plea judge everyone they interviewed had only good things to say about petitioner, he was well-liked and trusted, and the murder was out of character for him. (R.p.29, line 24-p.30, line 13). Counsel read a brief statement from petitioner's mother, then stated those who were there to speak in mitigation would present a profile of a man who scored low on neuropsychological testing, wanted to be liked and could be easily misled, and his co-defendant lied to and took advantage of him. (R.p.30, line 14-p.32, line 16).

Petitioner's brother spoke first, stating the person who committed murder was not the individual he grew up with. (R.p.33, lines 3-10). Kermit Johnson (Kermit) admitted petitioner

made "some not-so-great choices" in life, but stated petitioner was always willing "to help those around him" and had a "knack for fixing things," especially vehicles. (R.p.33, line 11-p.35, line 4). Petitioner did not do well in school and his brother thought he dropped out in the tenth grade, and Kermit tried to encourage him to return by taking him to college with him occasionally. (R.p.35, lines 5-18). Petitioner's sister-in-law told the plea judge she had always known petitioner to be "a kind, caring, hard-working, and fun guy." (R.p.38, lines 5-12). She believed "things went downhill" for petitioner after he was shot in the leg and it became overwhelming for him to keep up with his affairs, and he was not able to work as much. (R.p.39, line 11-p.40, line 12).

A former employer told the plea judge petitioner was always a good employee, there when he needed him, and dependable. (R.p.40, line 20-p.41, line 13). Petitioner's ex-girlfriend and mother of his eight-year-old son also spoke. (R.p.36, lines 20-23; p.37, lines 6-10). Ashley Ramey stated petitioner was a "truly great person" who made a mistake, and she asked the judge to "have some mercy" and give petitioner "a sentence of something other than life." (R.p.37, line 21-p.38, line 1).

Finally, petitioner spoke. He expressed remorse for the murder, and apologized to the victim's family. (R.p.43, lines 5-8).

Defense counsel emphasized again "everybody is at a complete loss as to how somebody could convince this man to do this." (R.p.41, lines 19-21). Counsel told the plea judge the school records and neuropsychological testing, along with the statements about petitioner's character, made by those who knew him, provided a starting point to better understand "how he could be duped, be gullible." (R.p.41, line 21-p.42, line 3). Counsel asked for the minimum sentence and asserted, upon consultation with appellate attorneys at South Carolina Commission

of Indigent Defense, he had a duty and obligation to object to any sentence exceeding the minimum "based on a very strong [intellectual disability] claim,[2] [petitioner's] level of culpability, the neuropsychological data, and statistics from the Department of Corrections" regarding life expectancy of inmates. (R.p.42, line 4-p.43, line 2).

Defense counsel relied on information contained in the sentencing memorandum to make his objection. It appears from school records attached to the memorandum petitioner repeated first and third grades, and left school in the tenth grade. (R.pp.69-74). Neuropsychological testing completed by Tora Brawley, Ph.D., indicated petitioner self-reported he was an average student who was in regular classes, not special education or self-contained classes. (R.p.54; pp.87-89). Petitioner received a full scale IQ score of 75 on the Wechsler Adult Intelligence Scale-IV (WAIS-IV) test, preliminarily placing him in the borderline range of intellectual functioning. (R.p.54; pp.88-89). Further, some of petitioner's reported cognitive issues began in 2012 after he was shot in the leg and fell from his truck, well after the developmental age of eighteen.[3] (R.p.89). The memorandum also contained statistics obtained from the South Carolina Department of Corrections (SCDC), and indicated the average age of death by natural causes of male inmates in correctional institutions. (R.p.55; pp.93-97). In addition, the document contained a social history obtained through interviews conducted by the defense which defense counsel maintained lessened petitioner's level of culpability.[4] (R.pp.56-62).

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[2] Respondent notes there has never been a finding that petitioner is intellectually disabled as no such claim has ever been litigated.

[3] South Carolina law defines an intellectual disability as "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period," which is before the age of eighteen. S.C. Code Ann. § 44-20-30.

[4] Respondent notes the majority of the social history is hearsay and affidavits of those

The State noted for the plea judge the plea negotiations with petitioner and defense counsel were not the result of the evidence contained in the sentencing memorandum. (R.p.43, lines 12-19). The State maintained it was not conceding to any assessment that indicated petitioner was intellectually disabled. (R.p.43, line 20-p.44, line 6). Defense counsel agreed, stating the memorandum "provided sort of the underpinning of an [intellectual disability] claim," but because the parties reached a plea agreement, the issue had not been fully litigated. (R.p.44, lines 7-16).

The State briefly gave petitioner's criminal history, which included pleas to assault and battery of a high and aggravated nature and two counts of assault and battery, and reiterated its request for a life sentence. (R.p.17, lines 15-19; p.44, line 23-p.45, line 7). The State asked the plea judge to consider several factors when determining petitioner's sentence, including: (1) evidence of petitioner's malice, such as his continuous attempts over two months to contact a friend about buying a gun; (2) petitioner was instrumental in carrying out the murder as the person who shot the victim; (3) ambushing the victim as he came out of his bedroom; (4) killing the victim in order to get money from the life insurance policy; (5) petitioner's co-defendant previously pled guilty and was sentenced to life without parole; and, (6) petitioner had multiple opportunities to walk away from the plan and failed to do so. (R.p.16, line 8-p.17, line 14; p.45, lines 8-24).

The plea judge accepted petitioner's guilty pleas. (R.p.46, line 11). Then, contrary to

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interviewed were not attached to the memorandum or otherwise presented to the plea judge, nor did all of them speak at sentencing. However, as discussed below, the judge noted he considered the document prior to determining petitioner's sentence. (R.p.46, lines 11-17); *see also State v. Gulledge*, 326 S.C. 220, 220, 487 S.E.2d 590, 594 (1997) (citing *United States v. Silverman*, 976 F.2d 1502, 1509 (6th Cir. 1992)) (explaining the admissibility of evidence at sentencing is limited by constitutional provisions which require the evidence be relevant and reliable, but hearsay evidence which is inadmissible at trial may be considered at sentencing).

petitioner's assertion that the judge sentenced petitioner without any explanation, the judge made clear he relied on everything before him to exercise his discretion in determining petitioner's sentence. Prior to sentencing, the judge stated, "[c]onsidering everything that has been presented to me," which included the opportunity to review "the sentencing memorandum with all attachments" and statements made during the hearing. (R.p.46, lines 12-20). The judge then sentenced petitioner to life imprisonment for murder, and concurrent terms of five years each for the weapons charge and conspiracy. (R.p.46, line 25-p.47, line 9).

Petitioner timely appealed and the Court of Appeals affirmed his guilty pleas and sentences. (App.p.1). In doing so, the Court of Appeals found:

> PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) ("A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed."); *id.* at 324, 659 S.E.2d at 500 ("On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law."); *Garrett v. State*, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995) ("A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against [the defendant]."); S.C. Code Ann. § 16-3-20(A) (2015) ("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."); *State v. Harrison*, 402 S.C. 288, 299-300, 741 S.E.2d 727, 733 (2013) ("[I]n analyzing proportionality under the Eight[h] Amendment outside the capital context, South Carolina courts shall first determine whether a comparison between the sentence and the crime committed gives rise to an inference of gross disproportionality."); *State v. Pittman*, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) ("To establish that evolving standards of decency preclude his punishment, [Appellant] bears the 'heavy burden[]' of showing that our culture and laws emphatically and well nigh universally reject it." (first alteration by court) (quoting *Harris v. Wright*, 93 F.3d 581, 583 (9th Cir. 1996))).

(App.p.2); *see also State v. Johnson*, Op. No. 2018-UP-437 (S.C. Ct. App. filed Dec. 5, 2018).

Analysis

Standard of Review

It is well settled that an appellate court has no jurisdiction to disturb, because of alleged excessiveness, a sentence within the statutory limits unless the statute itself violates the prohibition against cruel and unusual punishment or the sentence is the result of prejudice or partiality. *Wood v. State*, 257 S.C. 179, 182, 184 S.E.2d 702, 703 (1971). A trial court has broad discretion in sentencing within statutory limits. *Brooks v. State*, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997). A sentence is not excessive if it is within the statutory limits and there are no facts supporting an allegation of prejudice. *Garrett v. State*, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995).

The Plea Judge Did Not Abuse His Discretion in Sentencing Petitioner

The plea judge was well within his discretion to sentence petitioner to life after he freely, voluntarily, and intelligently chose to plead guilty to avoid the death penalty. The sentence petitioner received was within the statutory range for murder and properly determined after the judge considered all the relevant information presented to him at the plea hearing.

"A person who is convicted of or pleads guilty to murder must be punished by death, or a mandatory minimum term of imprisonment for thirty years to life." S.C. Code Ann. § 16-3-20(A). If sentenced to life, it means without the possibility of parole. *Id.* The severity of a sentence designated for a particular offense remains a matter of legislative prerogative. *State v. Burdette*, 335 S.C. 34, 41, 515 S.E.2d 525, 529 (1999). When exercising discretion to determine a sentence within a given designated statutory range, a judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant.

State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (citing *Wasman v. United States*, 468 U.S. 559 (1984)); *see also State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (holding, in exercising his discretion, a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come") (citations omitted).

The plea judge did not abuse his discretion when the record reveals he considered all the information before him, including the sentencing memorandum prepared by defense counsel and statements made at the hearing. The memorandum contained hearsay from interviews conducted by the defense team, results of neuropsychological testing, and statistics from SCDC, all of which petitioner argued at the plea hearing, and continues to argue on appeal, demonstrates a diminished level of culpability. (R.p.29; p.42). Defense counsel made clear his argument for the minimum statutory sentence rested on the basis provided in the memorandum and counsel believed that information, along with the people who spoke on petitioner's behalf, provided a starting point for the judge to better understand "how [petitioner] could be duped, be gullible." (R.pp.41-43). There is no indication in the record the judge ignored the information or did not give it any weight. Prior to sentencing, the plea judge noted for the record he considered everything that had been presented to him, indicating he took into account the very information petitioner wished him to examine. (R.p.46); *see also Hicks*, 377 S.C. at 325, 659 S.E.2d at 500 (noting a sentencing judge's discretion includes consideration of any and all information that reasonably might bear on the proper statutory sentence of a particular defendant).

However, the judge also weighed and considered information from the State. The judge listened to the statement from the victim's father, as well as the facts of the case as presented by the solicitor. The State argued a life sentence was appropriate given the facts of the case,

including evidence of malice such as petitioner's continuous attempts to purchase a gun, lying in wait and ambushing the victim as he walked out to get firewood, and committing murder to get money from an insurance policy, and that petitioner's co-defendant pled guilty and was sentenced to life. (R.pp.16-17; p.45). While petitioner hoped his guilty plea to murder and two other charges would result in a minimum sentence of thirty years' imprisonment, the only agreement between the parties was to remove the possibility of a death sentence, and both defense counsel and petitioner told the judge during the hearing they understood the negotiations. (R.pp.18-19); *see also Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (finding admissions made during a guilty plea should be considered conclusive unless a defendant presents valid reasons why he should be allowed to depart from the truth of his statements) (citing *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975), *overruled on other grounds by United States v. Whitley*, 759 F.2d 327 (4th Cir. 1985)). Petitioner cannot now complain about his sentence when he voluntarily chose to plead guilty to avoid the risk of going to trial and agreed sentencing was in the plea judge's discretion. (R.pp.5-8; pp.18-20; pp.25-27); *see also State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993) (holding a defendant's knowing and voluntary waiver of rights must be established by a complete record, and may be accomplished by the colloquy between the plea judge and the defendant, the judge and defense counsel, or both).

Accordingly, the record demonstrates the judge did not abuse his discretion in sentencing petitioner to a term within the statutorily permitted range for murder.

Petitioner's Sentence Not Excessive, Cruel and Unusual, or Disproportionate

The sentence petitioner received for the murder-for-hire conspiracy that left the father of a young son dead did not violate the Eighth Amendment. It was not excessive, cruel and

unusual, or disproportionate to the crime petitioner committed. Petitioner's argument during his direct appeal attempts to expand guilty plea jurisprudence in our jurisdiction. The Eighth Amendment prohibits cruel and unusual punishment.[5] U.S. Const. amend. VIII. However, the Eighth Amendment only forbids extreme sentences that are grossly disproportionate to the crime. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991). What constitutes cruel and unusual punishment is an evolving standard and involves looking at how society presently views a particular punishment. *State v. Wilson*, 306 S.C. 498, 509-10, 413 S.E.2d 19, 26 (1992). The clearest and most reliable expression of a society's contemporary values is derived from laws enacted by this country's legislatures. *State v. Pittman*, 373 S.C. 527, 563, 647 S.E.2d 144, 162 (2007). To establish evolving standards of decency preclude a particular punishment, the petitioner bears the heavy burden of showing our culture and laws have emphatically and virtually universally rejected a particular sentencing practice. *Id.* at 565, 647 S.E.2d at 164. "It is not the burden of the state to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of the defendant to establish a national consensus against it." *State v. Williams*, 380 S.C. 336, 347, 669 S.E.2d 640, 646 (Ct. App. 2008).

Following the decision of the Court of Appeals in petitioner's case, this Court revisited its Eighth Amendment jurisprudence and held:

> [P]recedent dictates that only the [United States] Supreme Court may extend and enlarge the protections guaranteed by the United States Constitution. Once the Supreme Court has drawn a line in the sand, the authority to redraw that line and broaden federal constitutional protections is limited to our nation's highest court.

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[5] South Carolina's constitution provides the same protection. S.C. Const. Art. I, § 15. This Court has previously explained "the analysis we employ is the same under both constitutions" and held where a determination that no violation under the Eighth Amendment occurred, there is also no violation of the South Carolina Constitution. *State v. Wilson*, 306 S.C. 498, 512, 413 S.E.2d 19, 27 (1992).

State v. Slocumb, Op. No. 27877, at *25-26 (S.C. Sup. Ct. filed Apr. 3, 2019) (Shearouse Adv. Sh. No. 14). While *Slocumb* involved a non-homicide juvenile offender and the question of whether his aggregate 130-year sentence violated the Eighth Amendment, this Court's opinion is instructive for its reluctance to extend Supreme Court precedent beyond their "explicit holding[s]." *Id.* at *32. The Court chose not to extend protections to juveniles serving any sentence other than life without parole, such as a *de facto* life sentence. *Id.* at *40. This Court should follow its recent decision in *Slocumb* and decline to extend Eighth Amendment protection to a competent adult homicide offender who voluntarily pleads guilty.

As discussed, both defense counsel and petitioner acknowledged at the plea hearing the only agreement during negotiations was to remove the possibility of a death sentence. (R.pp.18-19). Sentencing was to be in the plea judge's discretion. Petitioner cannot on appeal assert a lower level of responsibility for the murder based on a claim of diminished intellectual functioning that has never been challenged and where no court has ever made a finding of Intellectual Disability. As correctly pointed out during the plea hearing and conceded by defense counsel, any issue of Intellectual Disability was never fully litigated because petitioner chose to plead guilty. (R.pp.43-44). Petitioner continually maintains in his petition he is intellectually disabled, the nature of his disability makes him less culpable than others convicted of the same offense, and an imposition of a life sentence is cruel, unusual, and excessive. Again, there has never been a finding by any court that petitioner is intellectually disabled. *See* S.C. Code Ann. § 44-20-30 (defining intellectual disability as "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period"); *see also Atkins v. Virginia*, 536 U.S. 304, 317-18 (2002) (cautioning "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range

of mentally retarded offenders about whom there is a national consensus," and relying on a clinical definition of intellectual disability that required sub-average intellectual functioning and significant limitations in adaptive skills such as communication, self-care, and self-direction that manifested before age eighteen, the developmental age). Further, while those with Intellectual Disability are categorically excluded from execution, which was not at issue here as petitioner chose to plead guilty and the State declined to seek the sentence, the *Atkins* Court cautioned mental "deficiencies do not warrant an exemption from criminal sanctions." *See Atkins*, 536 U.S. at 318. The Court explained further, the deficiencies "do diminish their personal culpability" as it related to the most extreme sanction available to a state—i.e. the death penalty. *See Atkins*, 536 U.S. at 319-20. By petitioner's own admission of guilt at his plea hearing, his level of culpability was the same as his co-defendant, not less. Moreover, as previously demonstrated, the plea judge considered the results of neuropsychological testing as part of his overall inquiry at the hearing and the sentence was a proper exercise of his discretion.

Likewise, petitioner is not entitled to an individualized sentencing hearing despite his discussion of cases holding mandatory life without parole sentences for juveniles violated the Eighth Amendment. First, those cases involved a categorical challenge to a sentence and the analysis does not apply here. Second, there is no requirement for individualized sentencing in a guilty plea hearing for an *adult offender* outside a capital context. Petitioner presented mitigation evidence at the discretion of the plea judge who considered it prior to sentencing, but it was not required. *See Franklin*, 267 S.C. at 246, 226 S.E.2d at 898 (holding, in exercising discretion in sentencing, a judge may conduct a broad inquiry, largely unlimited, as to the kind of information considered or the source from which it may come). The United States Supreme Court has expressly rejected the concept of "required mitigation" in any context other than its

death penalty jurisprudence, and has only recently expanded that to include proceedings involving juveniles facing life without parole sentences for homicide. *See Harmelin*, 501 U.S. at 995-96 (holding a claim that it is cruel and unusual to impose a sentence without consideration of mitigating factors has some support in the "individualized capital-sentencing doctrine," but it may not be extended outside the capital context because of the qualitative differences between death and all other penalties); *see also Miller v. Alabama*, 567 U.S. 460, 479-80 (2012) (holding the Eighth Amendment prohibits sentencing juvenile homicide offenders to life without parole without first considering the hallmark features of youth). Similarly, the requirement for individualized sentencing is codified only in the capital trial context. *See generally* S.C. Code Ann. §§ 16-3-20(B)-(C) (providing for the sentencing proceeding in a death penalty eligible trial or plea). This Court also provides for such sentencing proceedings for juveniles. *See Aiken v. Byars*, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014) (applying *Miller* to juvenile homicide cases in South Carolina). However, because petitioner was an adult offender not subject to the death penalty, he was not entitled to an individualized sentencing hearing.[6] The plea judge followed the proper procedure and used his discretion to allow family members, friends, and former employers to speak on petitioner's behalf prior to sentencing.

Accordingly, the sentence was not disproportionate to the crime committed, fit the offender given the information available and reviewed by the plea judge, and certiorari review should be denied by this Court.

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[6] In addition, neither *Miller* nor *Aiken* foreclosed a court's ability to impose a life without parole sentence on a juvenile. *Miller*, 567 U.S. at 479-80; *Aiken*, 410 S.C. at 545, 765 S.E.2d at 577-78. Neither opinion supports the argument the plea judge in petitioner's case was prohibited from sentencing him to life imprisonment, as neither opinion references the applicability of life without parole for an adult offender who voluntarily chose to plead guilty to avoid the risk of going to trial.

CONCLUSION

For the foregoing reasons, respondent submits petitioner has failed to show the question presented warrants certiorari review. The Court should deny the petition for writ of certiorari and let stand the decision of the Court of Appeals.

Respectfully submitted,

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April 22, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
APR 22 2019
S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Pickens County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2018-UP-437 (S.C. Ct. App. filed Dec. 5, 2018)

THE STATE,

RESPONDENT,

V.

MARCUS CHANNING JOHNSON,

PETITIONER.

PROOF OF SERVICE

I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Susan B. Hackett, South Carolina Commission on Indigent Defense, 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 22nd day of April, 2019.

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