

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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DEC 31 2019  
S.C. SUPREME COURT

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas  
William H. Seals, Jr., Circuit Court Judge

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Appellate Case No. 2019-000610

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Stephen Corey Bryant, ..... Petitioner-Respondent,

v.

State of South Carolina, ..... Respondent-Petitioner.

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**Petition for Writ of *Certiorari***

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## QUESTIONS PRESENTED

### *Question I*

Was it an abuse of discretion for the current PCR judge to deny Stephen Cory Bryant's<sup>1</sup> motion to amend his PCR application to allege he suffers from Fetal Alcohol Spectrum Disorder, which is evidence of material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice, pursuant to S.C. Code Ann. § 17-27-20(A)(4), and when, under the unique circumstances of this case, this Court took the unusual step of limiting the prior PCR judge's discretion to continue the evidentiary hearing for "good cause" as provided for by S.C. Code Ann. § 17-27-160(C)?

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Was it an abuse of discretion for the current PCR judge to deny Stephen Cory Bryant's motion to amend his PCR application to allege a categorical bar to capital punishment for someone suffering from Fetal Alcohol Spectrum Disorder, which is evidence of material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice, pursuant to S.C. Code Ann. § 17-27-20(A)(4), and when, under the unique circumstances of this case, this Court took the unusual step of limiting the prior PCR judge's discretion to continue the evidentiary hearing for "good cause" as provided for by S.C. Code Ann. § 17-27-160(C)?

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### *Question IV*

Should this Court require post-conviction relief judges to draft the final orders in PCR cases in order to ensure the findings of fact and conclusions of law, required by S.C. Code Ann. §17-27-80, are those of the court, rather than an advocate, and to preserve the separation of powers between the judicial branch and executive branch as required by S.C. Const. Art. I, §8?

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<sup>1</sup> Mr. Bryant's middle name is spelled "Corey" in court filings. The correct spelling is "Cory," which will be used in the body of this pleading.

## STATEMENT OF THE CASE

### A. Pre-Trial Proceedings.

The Richland County Grand Jury indicted Stephen Cory Bryant for assault and battery with intent to kill for an incident occurring on October 8, 2014. *See* Appendix (hereinafter “A.”) 2675-76.

The Sumter County Grand Jury indicted Mr. Bryant for charges occurring on five different days in October 2004: second-degree burglary occurring on October 5, 2004 (A. 2650-51); first-degree burglary occurring on October 8, 2004 (A. 2653-54); first-degree burglary, second-degree arson, possession of a stolen handgun, and the murder of Clifton Dale Gainey occurring in October 9, 2004 (A. 2656-57); armed robbery, possession of a stolen handgun, and the murder of Willard Tietjen occurring on October 11, 2004 (A. 2661-62); and possession of a stolen handgun and the murder of Clarence Burgess occurring on October 13, 2004 (A. 2666-67). The Sumter County Grand Jury also indicted Mr. Bryant for assault and battery with intent to kill and threatening the life of a public official for incidents occurring on March 6, 2005 and October 26, 2005 while he was incarcerated at the detention center in Sumter. A. 2669-70, 2672-73. Sumter County Public Defender, Jack Howle, Jr., represented Mr. Bryant from the beginning of the case. *See e.g.*, A. 1055.

The State sought the death penalty for the murder of Willard Tietjen. A. 1089. This Court assigned the Honorable Thomas Russo to preside over Mr. Bryant’s cases. A. 1112. Judge Russo convened a hearing on May 24, 2007 and appointed James Babb as second counsel to represent Mr. Bryant. A. 1108-1123. On July 18, 2008, Judge Russo

convened a hearing, relieved Mr. Babb, and appointed John D. Clark to represent Mr. Bryant. A. 1309-22.

**B. Interlocutory Petition for Writ of *Certiorari*.**

On April 14, 2008, Mr. Bryant filed a petition for a writ of *certiorari* in the original jurisdiction of this Court to determine whether S.C. Code Ann. § 16-3-20, requiring judge sentencing after a guilty plea, violates the Sixth Amendment as interpreted by the Supreme Court of the United States in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 542 U.S. 296 (2004). Supplemental A. 5-62. On April 21, 2008, Mr. Bryant moved to stay the lower court proceedings until this Court ruled on his petition. *Id.* at 63-67. By written order dated April 23, 2008, this Court granted the motion to stay. *Id.* at 1-2. On May 5, 2008, the State filed its return. *Id.* 68-83. On May 8, 2008, Mr. Bryant replied. *Id.* at 84-89. On May 30, 2008, this Court denied Mr. Bryant's petition for a writ of *certiorari*. *Id.* 3-4.

**C. Guilty Plea & Sentencing.**

On August 18, 2008, Mr. Bryant pled guilty to three counts of murder, armed robbery, two counts of first-degree burglary, second-degree burglary, second-degree arson, two counts of assault and battery with intent to kill, possession of a stolen handgun, and threatening the life of a public official.<sup>2</sup> A. 1323-86. On September 11, 2008, Judge Russo found the murder of Willard Tietjen was committed during the "commission of a robbery while armed with a deadly weapon" and sentenced Mr. Bryant to death. A. 1049-51, 1387-88. Judge Russo imposed additional sentences, including

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<sup>2</sup> Mr. Bryant's guilty plea included a guilty plea to the Richland County charge.

several concurrent life sentences without the possibility of parole. A. 1047-49, 2652, 2655, 2658-60, 2663-65, 2668, 2671, 2674, 2677.

#### **D. Direct Appeal.**

Mr. Bryant appealed his sentences. Robert M. Dudek and Joseph L. Savitz, III, both of the South Carolina Commission on Indigent Defense, represented Mr. Bryant. A. 1393-1408. Donald J. Zelenka represented the State. A. 1409-51. This Court affirmed the convictions and sentences on January 7, 2011. *State v. Bryant*, 390 S.C. 638, 704 S.E.2d 344 (2011). A. 1452-60. Mr. Bryant did not appeal to the Supreme Court of the United States. On March 3, 2011, this Court granted Mr. Bryant a stay of execution to pursue post-conviction relief (“PCR”), assigned the Honorable R. Ferrell Cothran, Jr. to preside over Mr. Bryant’s PCR case, and ordered, “[A]bsent an extension of time by this Court, a final hearing shall be held and a final order issued in this matter within one year of this order.” A. 1475-76 (emphasis added).

#### **E. Initial PCR Case.**

On April 1, 2011, Judge Cothran convened a hearing and appointed Lisa K. Armstrong and Heath Taylor to represent Mr. Bryant. A. 1477-82. Mr. Bryant filed his PCR application on April 1, 2011. A. 1483-86. He amended his PCR application on May 10, 2011 and June 11, 2012. A. 1532-36, 1632-39. The State filed its return on June 13, 2011. A. 1486-1527.

On May 3, 2012, Mr. Bryant moved to continue the evidentiary hearing scheduled for June 11, 2012 because Dr. Donna Schwartz Maddox,<sup>3</sup> a forensic psychiatrist, opined

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<sup>3</sup> Dr. Maddox is board certified in general psychiatry and forensic psychiatry. She has been a professor of clinical psychiatry and director of forensic services at the University of South Carolina School of Medicine. A. 806-08. The trial judge qualified

Mr. Bryant was not competent, was not “able to assist his counsel,” but his competence could be restored with mediation and therapy. A. 1528-31. On June 11, 2012, Judge Cothran convened a hearing regarding Mr. Bryant’s competency to proceed with his PCR hearing. A. 1537-1631. By written order dated August 29, 2012, this Court granted the motion to continue. Supplemental A. 90-91.

From October 1-3, 2012, Judge Cothran convened an evidentiary hearing. A. 1639-2170. Ms. Armstrong and Mr. Taylor represented Mr. Bryant. Donald J. Zelenka and Melody J. Borwn represented the State. On December 3, 2012, Judge Cothran dismissed Mr. Bryant’s PCR application. A. 2572-2625. On February 20, 2012, Mr. Bryant filed a Rule 59(e), SCRPC motion. A. 2626-33. On February 19, 2013, Judge Cothran denied the Rule 59(e) motion. A. 2634-49.

Mr. Bryant appealed the denial of his PCR application to this Court. Susan B. Hackett of the South Carolina Commission on Indigent Defense and Miles Edward Coleman of Nelson Mullins Riley & Scarborough, LLP represented Mr. Bryant. Melody J. Brown represented the State. On March 4, 2015, Mr. Bryant filed his petition for a writ of *certiorari*. On July 28, 2014, the State filed its response. On March 4, 2015, this Court denied the petition. On May 6, 2015, this Court denied Mr. Bryant’s petition for rehearing. *Bryant v. State*, Appellate Case No. 2013-00518. The Supreme Court of the United States subsequently denied Bryant’s petition for a writ of *certiorari* on November 30, 2015. *Bryant v. South Carolina*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 545 (2015).

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her as an expert in psychiatry and forensic psychiatry. A. 808. In the prior PCR proceeding, the State stipulated she is an expert in forensic psychiatry. A. 2049. Dr. Maddox’s name appears as Dr. Donna Schwartz-Watts in transcripts of prior proceedings. She has remarried. A. 4061-62.

#### **F. Federal Habeas Corpus Case.**

On June 24, 2015, the Honorable David C. Norton, United States District Court Judge for the District of South Carolina, issued an order staying Mr. Bryant's execution so that he could file a petition for writ of *habeas corpus*.<sup>4</sup> On September 18, 2015, Judge Norton extended the stay. Pursuant to Judge Norton's order dated January 13, 2016, Mr. Bryant filed his "place holder" petition for writ of *habeas corpus* on January 14, 2016. Also on January 14, 2016, Judge Norton extended the stay of execution until Mr. Bryant's *habeas* petition is resolved. Mr. Bryant amended his *habeas* petition on April 28, 2016. By written order dated July 26, 2016, the Honorable Bristow Marchant, United States Magistrate Judge, stayed the federal *habeas* case to allow Mr. Bryant to pursue "unexhausted claims" in state court. By written order dated April 15, 2019, Judge Norton denied the State's motion to lift the stay. *Bryant v. Stirling*, C/A No. 9:16-cv-01423-DCN-BM.

#### **G. Current PCR Case.**

Contemporaneously with filing the amended *habeas* petition with the District Court, Mr. Bryant filed two successor applications for post-conviction relief in the Court of Common Pleas for Sumter County. The first PCR application—which is the subject of this appeal—alleged Mr. Bryant is ineligible for the death penalty because he suffers from an intellectual disability pursuant to *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604

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<sup>4</sup> The District Court appointed Charles Grose and Jon Sheldon (*pro hoc vice*) of Fairfax, Virginia to represent Mr. Bryant.

(2003) (“*Atkins* claim”).<sup>5</sup> A. 3423-29. The affidavit of Dr. Donna Schwartz Maddox supported this application. A. 3430-31. The second application raised four other grounds for relief. The State moved to dismiss both PCR applications. A. 3432-45.

By written order dated May 31, 2016, this Court assigned the Honorable Thomas W. Cooper, Jr. jurisdiction to adjudicate the State’s motions to dismiss. A. 3345. On June 21, 2016, Judge Copper convened a hearing on the State’s motions. A. 3718-60. By written order July 16, 2016, Judge Cooper denied the State’s motion to dismiss Mr. Bryant’s first PCR application—the *Atkins* claim. A. 3347-53.<sup>6</sup>

By written order dated August 1, 2016, this Court assigned the Honorable William H. Seals, Jr. jurisdiction to adjudicate Mr. Brant’s *Atkins* claim. A. 3354-55.

On January 9, 2017, pursuant to S.C. Code § 17-27-45(B), Mr. Bryant filed an amended PCR application alleging *Hurst v. Florida*, 577 U.S. \_\_\_, 136 S.Ct. 616 (2016) is a new substantive standard of constitutional law, binding on state court criminal procedures, that applies retroactively (“*Hurst* claim”). A. 3460-67. The State moved to dismiss the amended application. A. 3468-76. On February 22, 2017, Judge Seals

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<sup>5</sup> In *Atkins*, the Supreme Court held executing someone with “mental retardation” violates the Eighth Amendment. The Supreme Court recognized, “Previous opinions of this Court have employed the term ‘mental retardation,’” but *Hall* began using “the term ‘intellectual disability’ to describe the identical phenomenon. 572 U.S. at 704; *see also* 2011 Act No. 47, § 14(B) (“The Code Commissioner shall substitute the term ‘intellectual disability’ for ‘mental retardation’ and ‘person with intellectual disability’ for ‘mentally retarded’ in the 1976 Code of Laws at such times as regulations and statutes containing these terms are amended, revised, or republished.”); *State v. Blackwell*, 420 S.C. 127, fn. 2, 135, 801 S.E.2d 713, 717, fn. 2 (2017) (recognizing amendment to S.C. Code of Laws). Whenever possible, Mr. Bryant will use the term “intellectual disability.”

<sup>6</sup> By written order dated July 7, 2016, Judge Cooper granted the State’s motion to dismiss Mr. Bryant’s second PCR application. *Bryant v. State*, Case No. 2016-CP-43-00829.

convened a hearing on the State's motion. A. 3782-3800. By written order dated March 13, 2017, Judge Seals granted the State's motion to dismiss Mr. Bryant's *Hurst* claim. A. 3361-63. By written order dated May 12, 2017, Judge Seals denied Mr. Bryant's Rule 59(e), SCRCF motion. 3367-68, 3477-81.

On August 15, 2017, the State moved for summary judgment on the *Atkins* claim. A. 3484-3529. Mr. Bryant opposed the State's motion, asserting he needed additional time for investigation. A. 3530-78. On October 25, 2017, Judge Seals convened a hearing on the State's motion. A. 3815-38. By written order dated October 31, 2017, Judge Seals denied the State's motion for summary judgment. A. 3370-71.

Mr. Bryant disclosed the written report of Dr. George Woods dated May 8, 2018.

Dr. Woods opined:

Although Mr. Bryant's IQ scores are marginally above those required to meet the criteria for intellectual disability, his adaptive functioning scores obtained by Dr. Everington's testing are consistent with someone suffering from mild intellectual disability. Mr. Bryant has the stigmata of Fetal Alcohol Spectrum Disorder (FASD).

A. 3589-99. Based on Dr. Wood's report, Mr. Bryant moved to amend his PCR application to allege:

10(c) Mr. Bryant's sentence of death violates the Eighth Amendment of the United States Constitution because he suffers from Fetal Alcohol Spectrum Disorder ("FASD"). FASD is present during the developmental period, and people suffering from FASD suffer from impairments to an equal or greater extent as people suffering from Intellectual Disabilities. In fact, the information concerning FASD was developed during the natural course of investigation of Intellectual Disabilities because the two disorders involve significant overlaps. A categorical ban on imposing the death penalty on people suffering from FASD is a natural extension of *Hall* and *Atkins, supra*.

10(d) In the alternative to 10(c), Mr. Bryant's FASD is evidence of material facts not previously presented to a sentencing authority that should be considered before imposing sentence.

A. 3579-99. On May 18, 2018, the State filed its brief in opposition to this motion. Supplemental A. 92-100. Also based on the written report of Dr. Woods, the State filed its second motion for summary judgment. A. 3600-14. On June 12, 2018, Judge Seals convened a hearing on these motions. A. 3839-62. By written orders dated July 22, 2018, Judge Seals denied both motions. A. 3373-75.

On October 1, 2018, Judge Seals convened an evidentiary hearing regarding Mr. Bryant's PCR application. Charles Grose and Diana Holt represented Mr. Bryant. Melody J. Brown and Sherrie Butterbaugh represented the State. At the beginning of the hearing, Mr. Bryant renewed his motions to amend his PCR application. A. 3866. Mr. Bryant presented the testimony of Dr. George Woods (A. 3866-4000), Dr. Caroline Everington (A. 4001-4059), and Dr. Donna Schwartz Maddox (A. 4061-70). The State did not call any witnesses. A. 4070. At the conclusion of the hearing, Mr. Bryant "move[d] to conform the pleadings to the evidence for the amendment we previously offered," citing Rule 15, SCRPC and *Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017). A. 4071.

On October 19, 2018, at the request of the PCR court, the State submitted its proposed order. Mr. Bryant filed objections to the State's proposed order. A. 3615. On December 21, 2018, the PCR court convened and hearing on Mr. Bryant's objections. A. 4075-89. During this hearing, Mr. Bryant pointed out this Court departed from the "established procedures" that are "ordinarily followed" when it issued an order limiting the timeframe to complete the prior PCR case, meaning "the first PCR lawyers didn't have an opportunity" to investigate the evidence discovered and developed in subsequent proceedings. A. 4077-78; *see also* A. 1475-76.

On January 3, 2019, the PCR court issued an order overruling Mr. Bryant's objections to the State's proposed order and signed the State's proposed order. A. 3381-3420. Mr. Bryant filed a Rule 59(e), SCRCP motion. A. 3648-70. On January 28, 2019, Mr. Bryant provided a supplemental citation to *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019). A. 3671-3700. On February 1, 2019, the State responded to Mr. Bryant's Rule 59(e) motion. A. 3701-13. On February 8, 2019, Mr. Bryant replied. A. 3714-16. On March 5, 2019, the PCR court denied the Rule 59(e) motion. A. 3421-22. This petition for a writ of *certiorari* follows.

### STANDARD OF REVIEW

The "standard of review in PCR cases depends on the specific issue before" this Court. *Mangal*, 421 S.C. at 91, 805 S.E.2d at 571. This Court will "defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Id.* This Court does "not defer to a PCR court's rulings on questions of law. Questions of law are reviewed de novo, and [this Court] will reverse the PCR court's decision when it is controlled by an error of law." *Id.* "On review of a PCR court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, [this Court applies] an abuse of discretion standard." *Id.* 421 S.C. at 92, 805 S.E.2d at 571. *See Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019) (denial of motion to amend application for post-conviction relief was abuse of discretion); *Winkler v. State*, 418 S.C. 643, 663, 795 S.E.2d 686, 697 (2016) (Circuit Court abused its discretion in denying defendant's second motion for additional time).

All of the issuers in this petition involve procedural questions arising under the Uniform Post Conviction Procedure Act and the South Carolina Rules of Civil Procedure.

## ARGUMENTS

### *Question I*

**Was it an abuse of discretion for the current PCR judge to deny Stephen Cory Bryant’s motion to amend his PCR application to allege he suffers from Fetal Alcohol Spectrum Disorder, which is evidence of material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice, pursuant to S.C. Code Ann. § 17-27-20(A)(4), and when, under the unique circumstances of this case, this Court took the unusual step of limiting the prior PCR judge’s discretion to continue the evidentiary hearing for “good cause” as provided for by S.C. Code Ann. § 17-27-160(C)?**

During Stephen Cory Bryant’s sentencing hearing, Dr. Donna Schwartz Maddox testified Mr. Bryant does not have an Intellectual Disability (A. 837) and she had seen “a specific picture” of Mr. Bryant “consistent with . . . expos[ure] to alcohol in utero” (A. 814), suggesting it should be investigated whether Mr. Bryant has Fetal Alcohol Spectrum Disorder.<sup>7</sup> Mr. Bryant’s federal *habeas* counsel provided Dr. Maddox “with information that [she] did not know before either the sentencing hearing or the post-conviction relief hearing.” This information included evidence Mr. Bryant’s mother “drank alcohol and smoked marijuana” while she was pregnant. Also, Mr. Bryant was “late meeting most of his developmental milestones,” “had difficulty in school,” “failed the first grade,” obtained “only a fifth grade education [but] was passed on from grade to grade.” Based on the additional information, Dr. Maddox opined in an affidavit that “Mr. Bryant should receive a comprehensive evaluation to determine whether he suffers from

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<sup>7</sup> During the evidentiary hearing on October 1, 2018, Dr. Maddox testified Applicant’s Exhibit No. 5 is the picture she previously observed. A. 814, 4133.

Intellectual Disabilities” and “a full assessment to determine whether he meets the criteria for Fetal Alcohol Syndrome.” A. 3430-31.

In a written report dated May 8, 2018, Dr. George Woods opined:

Although Mr. Bryant’s IQ scores are marginally above those required to meet the criteria for intellectual disability, his adaptive functioning scores obtained by Dr. Everington’s testing are consistent with someone suffering from mild intellectual disability. Mr. Bryant has the stigmata of Fetal Alcohol Spectrum Disorder (FASD).

A. 3589-99. Based on Dr. Wood’s report, Mr. Bryant moved to amend his PCR application to allege his FASD is “evidence of material facts, not previously presented and heard, that requires vacation of the . . . sentence in the interest of justice,” pursuant to S.C. Code Ann. § 17-27-20(A)(4). A. 3579-99. The State opposed this motion by arguing “there is no procedure in the PCR statute which would allow [Mr. Bryant] to amend his application to assert this untimely claim.” Supplemental A. 95.

On June 12, 2018, the current PCR judge convened a hearing on Mr. Bryant’s motion to amend. Counsel acknowledged Mr. Bryant’s “IQ scores are marginally above those required to meet the criteria for intellectual disability,” noted “[a]n intellectual disability is just one type of a developmental disability,” pointed out S.C. Code Ann. § 44-20-30(15) defines a “related disability,”<sup>8</sup> and observed Mr. Bryant’s FASD meets the

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<sup>8</sup> S.C. Code Ann. § 44-20-30(15) defines:

“Related disability” is a severe, chronic condition found to be closely related to intellectual disability or to require treatment similar to that required for persons with intellectual disability and must meet the following conditions:

- (a) It is attributable to cerebral palsy, epilepsy, autism, or any other condition other than mental illness found to be closely related to intellectual disability because this condition results in impairment of general intellectual

statutory criteria for a “related disability.” A. 3841-44. Counsel cited *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016) and argued the “discovery rule” and “fundamental fairness” allows the PCR court to consider Mr. Bryant’s FASD claim. A. 3849, 3856-57. The court below denied this motion, believing “Judge Cooper’s previous ruling [] expressly restricted the action solely to the allegation of intellectual disability,” and, therefore, it did not have the discretion to enlarge the scope of the current PCR case.<sup>9</sup> A. 3377.

On October 1, 2018, the court below convened an evidentiary hearing. Dr. George Woods, Jr.,<sup>10</sup> a physician specializing in neuropsychiatry,<sup>11</sup> reviewed Mr.

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functioning or adaptive behavior similar to that of persons with intellectual disability and requires treatment or services similar to those required for these persons.

(b) It is manifested before twenty-two years of age.

(c) It is likely to continue indefinitely.

(d) It results in substantial functional limitations in three or more of the following areas of major life activity: self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living.

<sup>9</sup> The PCR court abused its discretion to the extent the court believed it lacked discretion under the Uniform Post Conviction Procedure Act and the Rules of Civil Procedure. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (“A failure to exercise discretion amounts to an abuse of that discretion.”).

<sup>10</sup> Dr. Woods graduated from Westminster College in Salt Lake City, Utah in 1969 and the University of Utah Medical Center in 1977. He completed a medical internship at Alameda County General Hospital in Oakland, California, a psychiatric residence at Pacific Medical Center in San Francisco, California, and a fellowship with the National Institute of Mental Health and the American Psychiatric Association in geriatric psychopharmacology. He has been in private practice since 1983, specializing in developmental disorders and geriatric psychiatry. The PCR judge qualified Dr. Woods as “an expert in clinical and forensic neuropsychiatry with a specialty in developmental disorders.” A. 3866-71; *see also* Applicant’s Exhibit No. 1, A. 4090-4111.

Bryant's school records, medical records, work history, social history, prior evaluations, and court transcripts. Dr. Woods conducted a clinical interview of Mr. Bryant, performed a "neuropsychiatric examination," and "administered a Montreal Cognitive Assessment, which is a screening instrument for cognitive disorders." Dr. Woods opined Mr. Bryant has dysmorphology, which occurs when facial bones do not develop properly as a result of the mother drinking alcohol, "typically between the 17<sup>th</sup> and 20<sup>th</sup> day of pregnancy." The right side of Mr. Bryant's head is "shaped differently" than the left side. Mr. Bryant's "eyes are smaller," making it appear "they are wider apart." Mr. Bryant has "impairment of his corpus callosum," which is the part of the brain that "provides information between the right side of the brain and the left side of the brain." A. 3871-79.

Dr. Woods reviewed "neurological testing performed by Dr. Paul Moburg," who is "a neuropsychologist and professor of dysmorphology and neurology at the University of Pennsylvania," and consulted Dr. Julian Davies, "who is a pediatric neurologist at the University of Washington who specializes in developmental disabilities, and Fetal Alcohol specifically." Both Dr. Moburg and Dr. Davies performed tests and confirmed Mr. Bryant has a "palpebral fissure," which is small eyes making them appear wider apart than normal. Both "Dr. Davies and Dr. Moburg described Mr. Bryant as having what is called a statistic encephalopathy alcohol related. Encephalopathy is an impairment of the brain. 'Statistic' means that it won't go away." Dr. Woods also reviewed the evaluation performed by Dr. Caroline Everington, which showed "Mr. Bryant's adaptive deficits,

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<sup>11</sup> "Neuropsychiatry is the study of the brain and how it impacts behavior. It is really more focused toward the medical and neurological aspects of brain behavior rather than the psychological aspects." A. 3867.

functional academics, [and] poor academic function, particularly in math.” A. 3872, 3882-90.

Dr. Woods opined Mr. Bryant “meets the criteria for developmental disability as well as intellectual disability in his adaptive functioning.” A. 3886. Dr. Woods explained a

developmental disorder is a disorder that occurs during the period of birth, gestation. It is not something that occurs after a child is born. It is not an acquired disorder. It has to occur sometime between the period that the child is actually developing.

A. 3891. Dr. Woods diagnosed, “Mr. Bryant has a statistic encephalopathy secondary to alcohol, alcohol related neuro-developmental disorder,” which is a Fetal Alcohol Spectrum Disorder. Dr. Woods explained the damage to Mr. Bryant’s brain includes impairment to his executive functioning, which “allows us to effectively weigh and deliberate, effectively sequence our thinking and our behavior to effectively understand social cues, understand context.” A. 3891-93. Dr. Woods further opined that Mr. Bryant has a “related disability” as defined by S.C. Code Ann. § 44-20-30. Dr. Woods opined that, prior to his incarceration, Mr. Bryant functioned in society similar to someone with an intellectual disability. If Mr. Bryant was a patient in Dr. Woods’ clinical practice, then treatment would consist of occupational therapy to “help him in his daily functioning” and cognitive remediation to improve his math skills. A. 3899-3906; *see also* Applicant’s Exhibit No. 2, A. 4112-17.

Dr. Caroline Everington,<sup>12</sup> a professor of special education, reviewed Mr. Bryant’s school, Department of Juvenile Justice, Department of Corrections, and

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<sup>12</sup> Dr. Everington has bachelor’s and master’s degrees in special education from Peabody College at Vanderbilt University and a doctorate in special education from the

probation records. She reviewed declarations of Mr. Bryant's former teachers. She interviewed Mr. Bryant about his "adaptive skills." She administered the Test of Adolescent and Adult Language, the Independent Living Skills Test, and the Wide Range Achievement Test. Dr. Everington interviewed Mr. Bryant's mother, Kathryn Bryant, his grandmother, Shirley Freeman, and his aunt, Terri Lee Bryant Caulder, using the Adaptive Behavioral Assessment Scale, Version 3, which is a standardized assessment of adaptive behavior. Dr. Everington opined Mr. Bryant's "adaptive behavior pattern is completely consistent with someone with intellectual disability." Mr. Bryant's pattern of adaptive functioning deficits is consistent with someone with FASD. Dr. Everington opined Mr. Bryant meets the criteria for having a "related disability" as defined by S.C. Code Ann. § 44-20-30. A. 4004-29.

Dr. Donna Schwartz Maddox testified Mr. Bryant's FASD should have been investigated prior to his sentencing hearing. She reviewed her prior testimony, at A. 837-38, stating Mr. Bryant did not have an intellectual disability or organic brain damage. After reviewing Dr. Woods' report and Dr. Everington's affidavit, Dr. Maddox changed her opinion regarding Mr. Bryant having brain damage. She explained:

What has changed my opinion is that he finally had neuropsychological testing. I had been trying to do that since 2006, and so as Dr. Woods said, not bolstering, but I also agreed with that. The way to tell brain function is to test it. A picture of the brain, MRI of the brain, just assesses brain structure, it doesn't test how it functions. The most sensitive way to test brain function is through neuropsychological testing.

A. 4061-70.

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University of New Mexico. Both of her advanced degrees "specialized in intellectual disabilities." Since 1987, she has been a professor of special education. She has numerous publications. The PCR judge qualified her an expert in intellectual disabilities. A. 4001-04; *see also* Applicant's Exhibit No. 4, A. 4120.

In South Carolina, the Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10, *et. seq.*, is the first opportunity for a person convicted of a crime to investigate, develop, and present allegations of ineffective assistance of trial counsel. In all PCR cases involving “questions of law or fact which will require a hearing,” an indigent person is entitled to appointed counsel. Rule 71.1(d), SCRPC; *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999). After appointment, “[c]ounsel shall be given a reasonable time to confer with the” client and “shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.” Rule 71.1(d), SCRPC; *see also* S.C. Code Ann. § 17-27-90 (expressly contemplating supplemental or amended PCR application). In a capital PCR case, two attorneys must be appointed to represent a person who is indigent. S.C. Code Ann. § 17-27-160(B).

As this Court has reminded, “the Sixth Amendment guarantee of effective assistance of counsel is a ‘bedrock principle in our justice system.’” *Mangal*, 421 S.C. at 99, 805 S.E.2d at 575 (citing *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016)). “[T]he interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure.” *Id.* (emphasis supplied by court). This Court ordinarily “encourage[s] trial courts in PCR cases to use the discretion [it] grant[s] them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.” *Id.* 421 S.C. at 100, 805 S.E.2d at 576. In *Love*, this Court further explained the opinion in *Mangal*. “The South Carolina Rules of Civil Procedure apply in a PCR action to the extent the rules do not conflict with the PCR

Act,” which includes Rule 15, SCRPC. 428 S.C. at \_\_\_, 834 S.E.2d at 199. This Court explained:

[A trial] court is to freely grant leave to amend when justice requires and there is no prejudice to any other party. The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. Essentially, [a] trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion.

*Id.*, 428 S.C. at \_\_\_, 834 S.E.2d at 200 (internal quotations and citations omitted). The dissent observed when a “proposed amendment is complicated (factually or legally) and would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.” *Id.*, 428 S.C. at \_\_\_, 834 S.E.2d at 203 (Kittredge, J. dissenting).

In capital PCR cases, a showing of “good cause” ordinarily requires continuing the evidentiary hearing to provide appointed counsel sufficient time and resources to investigate all available grounds for relief and amend the PCR application. S.C. Code Ann. § 17-27-160(C); *see also Winkler*, 418 S.C. at 659, 795 S.E.2d at 695 (“PCR court abused its discretion in not granting Winkler additional time” to investigate evidence of brain damage as mitigation evidence).

Despite Dr. Maddox’s observation of “a specific picture” of Mr. Bryant “consistent with . . . expos[ure] to alcohol in utero” (A. 814), Mr. Bryant’s trial counsel did not investigate and present evidence of FASD as mitigation. In Mr. Bryant’s initial PCR case, this Court departed from the ordinary procedures when it ordered, “[A]bsent an extension of time by this Court, a final hearing shall be held and a final order issued in this matter within one year of this order.” A. 1475-76 (emphasis added). This Court thus limited the discretion of the initial PCR judge, contrary to S.C. Code Ann. § 17-27-

160(C) and the longstanding discretion afforded to PCR courts. *See Love, Mangal, and Winkler supra*. Although this Court ultimately granted Mr. Bryant's extension requests (Supplemental A. 90-91), his evidentiary hearing convened on October 1, 2012 (A. 1639), which was within nineteen months of this Court's order March 3, 2011 assigning Judge Cothran (A. 1475-76).

As pointed out in his Rule 59(e) motion, Mr. Bryant has been able to identified only two other cases where this Court has issued orders requiring capital PCR cases to be resolved within one year—*Starnes v. State*, Case No. 2011-CP-32-00830 and *Torres v. State*, Case No. 2011-CP-42-01851. A. 3648-70. According to the Public Index, at the time of preparing this petition, *Starnes* is still pending in the circuit court pre-evidentiary hearing,<sup>13</sup> and *Torres* is still pending in the circuit court on a Rule 59(e), SCRCP motion.<sup>14</sup> For reasons unknow to Mr. Bryant, his prior PCR case is the only one of these three capital PCR cases enforcing this Court's order limiting the PCR judge's customary discretion to continue the case based on a showing of "good cause." S.C. Code Ann. § 17-27-160(C), *Mangal*, and *Winkler*.

Had this Court not limited the discretion of prior PCR judge, then prior PCR counsel would have had sufficient time to discover, investigate, and present Mr. Bryant's FASD claim. The need to investigate whether Mr. Bryant suffers from FASD is readily

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<sup>13</sup><https://publicindex.sccourts.org/Lexington/PublicIndex/CaseDetails.aspx?County=32&CourtAgency=32002&Casenum=2011CP3200830&CaseType=V&HKey=107667952849011947559811099716886110905555861228990118104486876103698351681224869501167274497881> (last viewed Dec. 23, 2019).

<sup>14</sup><https://publicindex.sccourts.org/Spartanburg/PublicIndex/CaseDetails.aspx?County=42&CourtAgency=42002&Casenum=2011CP4201851&CaseType=V&HKey=6847122881161214766112759012182471135011811710287122487947826999725787519811382106105105107839810211377> (last viewed Dec. 23, 2019).

apparent from the sentencing hearing testimony of Dr. Maddox about “a specific picture” of Mr. Bryant “consistent with . . . expos[ure] to alcohol in utero” (A. 814), thereby establishing the deficient performance of trial counsel under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984). The failure to discover and present evidence of FASD as mitigation has been held to be prejudicial, ineffective assistance of counsel, under both prongs of *Strickland*, requiring a new sentencing hearing. *E.g. Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019) (petitioner was prejudiced by counsel’s failure to collect any evidence that defendant suffered from FASD). The court below recognized the possibility that Mr. Bryant “may suffer from some form of FASD” and “may have an impaired brain.” A. 3410. Investigating FASD is a lengthy time consuming process. Prior PCR counsel did not have sufficient time to investigate FASD. Indeed, current federal habeas counsel and state PCR counsel have been investigating the possibility Mr. Bryant might have FASD since 2015. More investigation is needed. *See e.g., Winkler*.

This Court consistently holds a successive PCR application is permissible because of extraordinary circumstances. *See e.g., Robertson*, 418 S.C. at 516, 795 S.E.2d at 35 (allowing a successive PCR application where PCR counsel was not statutorily qualified to represent the applicant); *Washington v. State*, 324 S.C. 232, 236, 478 S.E.2d 833, 835 (1996) (permitting a successive PCR application where multiple procedural irregularities, including the denial of a direct appeal, denied applicant the benefit of due process); *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989) (allowing a successive PCR application where the applicant unknowingly withdrew his first PCR application with prejudice); *Carter v. State*, 293 S.C. 528, 530, 362 S.E.2d 20, 21-22 (1987) (authorizing a successive PCR application where the applicant did not have PCR counsel

that differed from his trial counsel); *Case v. State*, 277 S.C. 474, 475, 289 S.E.2d 413, 414 (1982) (allowing a successive PCR application where the applicant's first PCR application was dismissed without the assistance of legal counsel and without a hearing).

Additionally, this Court recognizes the discovery rule as an exception to the PCR statute of limitations. *See e.g., McCoy v. State*, 401 S.C. 363, 369-70, 737 S.E.2d 623, 626-27 (2013) (“[T]he PCR judge apparently overlooked the discovery rule in section 17-27-45(C), which allows one year after the discovery of ‘material facts not previously presented and heard that require[] vacation of the conviction or sentence’ to file a PCR application.”).

The Uniform Post Conviction Procedure Act, Rule 15, SCRCP, and the cases cited above, granted the court below the legal authority to expand the scope of Mr. Bryant's successive PCR to present evidence of FASD as mitigation. *And see Love, Mangal, and Winkler*. Under the unique facts and circumstances of this case, the unusual scheduling restraints imposed by this Court constitute an extraordinary circumstance justifying this proposed amendment to the PCR application. This Court, therefore, should reverse the PCR court, allow Mr. Bryant to amend his PCR application, and remand this case for a new evidentiary hearing to commence after Mr. Bryant receives sufficient time to complete his FASD investigation.

## *Question II*

**Was it an abuse of discretion for the current PCR judge to deny Stephen Cory Bryant’s motion to amend his PCR application to allege a categorical bar to capital punishment for someone suffering from Fetal Alcohol Spectrum Disorder, which is evidence of material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice, pursuant to S.C. Code Ann. § 17-27-20(A)(4), and when, under the unique circumstances of this case, this Court took the unusual step of limiting the prior PCR judge’s discretion to continue the evidentiary hearing for “good cause” as provided for by S.C. Code Ann. § 17-27-160(C)?**

Based on the Affidavit of Dr. Woods, Mr. Bryant additionally moved to amended his PCR application to allege:

Mr. Bryant’s sentence of death violates the Eighth Amendment of the United States Constitution because he suffers from Fetal Alcohol Spectrum Disorder (“FASD”). FASD is present during the developmental period, and people suffering from FASD suffer from impairments to an equal or greater extend as people suffering from Intellectual Disabilities. In fact, the information concerning FASD was developed during the natural course of investigation of Intellectual Disabilities because the two disorders involve significant overlaps. A categorical ban on imposing the death penalty on people suffering from FASD is a natural extension of *Hall* and *Atkins*, *supra*.

A. 3579-99. The State opposed this motion by arguing “there is no procedure in the PCR statute which would allow [Mr. Bryant] to amend his application to assert this untimely claim.” Supplemental A. 95.

On June 12, 2018, the PCR judge convened a hearing on this motion. Counsel for Mr. Bryant argued FASD, a related disability as defined by S.C. Code Ann. § 44-20-30(15), is a condition “consistent with the *Atkins* line of case, consistent with the *Roper*<sup>15</sup> line of cases that would make it unconstitutional to impose the death penalty on someone

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<sup>15</sup> *Roper v. Simmons*, 543 U.S. 551 (2005); *see also Miller v. Alabama*, 132 S.Ct. 2455 (2012), *Graham v. Florida*, 130 S.Ct. 2011 (2010), and *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

with” FASD. A. 3843-48. By written order dated July 22, 2018, the court below denied this motion, noting an *Atkins* extension claim is a “new claim” and believing “Judge Cooper’s previous ruling [] expressly restricted the action solely to the allegation of intellectual disability,” and, therefore, it did not have the discretion to enlarge the scope of the current PCR case.<sup>16</sup> A. 3376-80.

The Uniform Post Conviction Procedure Act, Rule 15, SCRPC, and the cases cited in Question II above, granted the current PCR judge the legal authority to expand the scope of Mr. Bryant’s successive PCR to present evidence of FASD. *And see Love, Mangal, and Winkler*. Under the unique circumstances of this case, this Court should reverse the court below, remand for a new evidentiary hearing, and allow Mr. Bryant a full opportunity to brief and argue why FASD should be a categorical bar to the death penalty.

### *Question III*

**Was it an abuse of discretion for the current PCR judge to deny Stephen Cory Bryant’s motion to amend his PCR application to allege that *Hurst v. Florida*, \_\_\_, U.S. \_\_\_, 136 S. Ct. 616 (2016) is a constitutionally binding decision from the Supreme Court of the United States that can be raised in the current PCR application pursuant to S.C. Code § 17-27-45(B)?**

Prior to his guilty plea, Stephen Cory Bryant requested to be sentenced by a jury. He asked this Court to intervene by filing an interlocutory petition for writ of *certiorari*, based on *Blakely v. Washington*, 542 U.S. 296 (2004), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Supplemental A. 1-89. After this Court declined to intervene (*id.* at 2-3), Mr. Bryant renewed his objection prior to

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<sup>16</sup> The PCR court abused its discretion to the extent the court believed it lacked discretion under the Uniform Post Conviction Procedure Act and the Rules of Civil Procedure. *Hawes*, 411 S.C. at 191, 767 S.E.2d at 708 (“A failure to exercise discretion amounts to an abuse of that discretion.”).

sentencing (A. 9-12), but appellate counsel did not present this issue to this Court during the direct appeal (A. 1393-1407).

On January 9, 2017, Mr. Bryant sought to amend the current PCR application to allege:

S.C. Code Ann. § 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution, which is applicable to the states through the Fourteenth Amendment, because a judge rather than a jury finds facts required for imposition of a death sentence. *Hurst v. Florida*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 616 (2016).

A. 3461. Mr. Bryant further alleged S.C. Code Ann. § 16-3-20 denied him “his right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed.” A. 3462. Mr. Bryant argued *Hurst* “is a constitutionally binding decision from the Supreme Court of the United States that can be raised in this PCR application pursuant to S.C. Code § 17-27-45(B).” A. 3463. The State opposed this amendment by arguing “the new claim is not permitted under Rule 15,” SCRE and current PCR action was limited by Judge Cooper’s order. A. 3468-76. The PCR court agreed with the State by ruling, “Judge Cooper’s Order allowing additional proceedings on one claim limited the scope of authorized litigation.”<sup>17</sup> A. 3361-64.

A review of *Apprendi* and *Ring* reveals *Hurst* established a new constitutional rule requiring jurors to make all findings of fact necessary for *imposition* of the death penalty.

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<sup>17</sup> The PCR court abused its discretion to the extent the court believed it lacked discretion under the Uniform Post Conviction Procedure Act and the Rules of Civil Procedure. *Hawes*, 411 S.C. at 191, 767 S.E.2d at 708 (“A failure to exercise discretion amounts to an abuse of that discretion.”).

*Ring* considered the application of *Apprendi* to Arizona’s capital sentencing scheme.

*Apprendi* held that the Sixth Amendment does not permit a defendant to be

expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. . . . even if the State characterizes the additional findings made by the judge as sentencing factor[s].

*Ring* 536 U.S. at 588-89 (internal citations and quotations omitted; emphasis supplied by Court). *Ring*, however, was expressly limited to whether “the Sixth Amendment required jury findings on the aggravating circumstances.” *Id.* at 597 (fn. 4). *Ring* did not address whether a jury must consider mitigation and “make the ultimate determination whether to *impose* the death penalty.” *Id.* (emphasis added). *Ring*, accordingly, was limited to a jury determination regarding *eligibility* for the death penalty. *Hurst*, however, involved a challenge to Florida’s capital sentencing procedure where the jurors render an “advisory sentence” but “the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death.” 136 S.Ct. at 620. *Hurst* held the Sixth Amendment requires jurors make the “critical findings necessary to *impose* the death penalty.” *Id.* at 622 (emphasis added). *Ring*, accordingly, addressed only *eligibility* for the death penalty. *Hurst* addressed *imposition* of the death penalty. *Hurst*, therefore, decided constitutional issues not considered in *Ring*. This Court must determine whether *Hurst* is a substantive constitutional rule that applies retroactively. The Supreme Court’s precedent in *Montgomery v. Louisiana* militates in favor of *Hurst* applying retroactively. \_\_\_ U.S. \_\_\_, 136 S. Ct. 718 (2016) (*Miller v. Alabama*, 567 U.S. 460 (2012) prohibiting under Eighth Amendment mandatory life sentences without parole for juvenile offenders, announced a new substantive constitutional rule that was retroactive on state collateral review).

Because Mr. Bryant pleaded guilty to murder, S.C. Code Ann. § 16-3-20(B) mandated his “sentencing proceeding must be conducted before the judge.” The guilty plea to murder, standing alone, did not make him eligible for the death penalty. Under South Carolina’s capital sentencing scheme, a “statutory aggravating circumstance [must be] found beyond a reasonable doubt” before someone convicted of murder is eligible for the death penalty. S.C. Code Ann. § 16-3-20(A)-(C). The statutory aggravating circumstances are set forth in § 16-3-20(C). Although Mr. Bryant also pleaded guilty to armed robbery in connection with Willard Tietjen’s murder, the prosecution still had the burden of proving beyond a reasonable doubt that the murder of Willard Tietjen was committed during the “commission of a robbery while armed with a deadly weapon.” S.C. Code Ann. § 16-3-20(C)(e). Although the prosecution had a “head start,” based on Mr. Bryant’s guilty plea, towards persuading the judge to find these statutory aggravating circumstances, the statute still required the additional findings of fact.

In South Carolina, a finding that a statutory aggravating circumstance exists beyond a reasonable doubt does not require imposition of the death penalty. The sentencing authority must consider statutory mitigating circumstances, S.C. Code Ann. § 16-3-20(C)(b), and non-statutory mitigating circumstances, *see, e.g., State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000) *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). The sentencing authority is “authorized to impose a life sentence even if it did not find any mitigating circumstances.” *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). The sentencing authority must consider “the specific circumstances of the crime and the characteristics of the person who committed the crime.” *State v. Green*, 301 S.C. 347, 358, 392 S.E.2d 157, 162 (1990). Pursuant to

*Payne v. Tennessee*, 501 U.S. 808, (1991), South Carolina allows consideration of victim impact evidence. See, e.g., *State v. Bixby*, 388 S.C. 528, 555, 698 S.E.2d 572, 586 (2010). Even after all of these considerations, a life sentence may be imposed “for any reason or no reason at all, including as an act of mercy.” *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10.

Mr. Bryant’s guilty plea does not preclude application of *Hurst*. The Supreme Court applied *Apprendi* “to instances involving plea bargains” in *Blakely v. Washington*, 542 U.S. 296 (2004). *Hurst*, 136 S. Ct. at 621. Blakely “was sentenced to more than three years above the 53-month statutory maximum of the standard range because the sentencing judge subjectively found that Blakely had acted with ‘deliberate cruelty.’ The facts supporting that finding were neither admitted by [Blakeley] nor found by a jury.” *Id.* The Court held, “[T]he State’s sentencing procedure did not comply with the Sixth Amendment” and Blakeley’s “sentence [was] invalid.” *Id.* at 305.

This Court, therefore, should consider whether the trial court judge found any fact to support imposing the death sentence beyond Mr. Bryant’s admissions during his guilty plea. When announcing the sentence, the trial judge expressly found:

Now although Mr. Bryant pled guilty to that charge of armed robbery the Court is of the opinion and wants the record to reflect that independent of that guilty plea the Court is of the opinion that the State did provide substantial evidence, both direct and circumstantial, that prove Mr. Bryant guilty of that charge beyond a reasonable doubt. Now in addition to the evidence that was presented to establish that statutory aggravating circumstance of armed robbery the Court spent many hours reviewing all of the other evidence submitted by both the State and the Defense in establishing any nonstatutory aggravating circumstances as well as statutory and nonstatutory mitigating circumstances. And after completely reviewing and examining all of the evidence presented the Court has reached the following verdict.

A. 1050. After providing Mr. Bryant a final opportunity to address the trial court, the trial judge imposed the death sentence. A. 1050-51; *see also* A. 1387-88.

Because the sentencing court considered facts beyond those admitted by Mr. Bryant during his guilty plea, Mr. Bryant should be allowed to amend his PCR application and have an opportunity to fully brief this issue. *Love and Mangal*. This Court should reverse the PCR court and remand this case for further briefing on this issue.

#### *Question IV*

**Should this Court require post-conviction relief judges to draft the final orders in PCR cases in order to ensure the findings of fact and conclusions of law, required by S.C. Code Ann. §17-27-80, are those of the court, rather than an advocate, and to preserve the separation of powers between the judicial branch and executive branch as required by S.C. Const. Art. I, §8?**

In the prior PCR, Stephen Cory Bryant objected the PCR “Court’s almost complete reliance on the respondent’s proposed Order denying relief, which, after a few minor cosmetic changes, was proclaimed the ruling of [the PCR] Court.” A. 2626. In his objections to the State’s proposed order of dismissal in the current PCR case, Mr. Bryant objected to the PCR court allowing the State to draft its order:

As a threshold matter, the procedure followed by this Court risks denying Mr. Bryant an opportunity to have his PCR application adjudicated by a judicial officer. “S.C. Code Ann. §17-27-80 (1976), requires the PCR court to ‘make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.’” *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). This Court did not do that, but rather delegated the responsibility of drafting the order to the Attorney General’s Office. The reasoning in the proposed order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, §8. In capital cases, our Supreme Court “strongly encourage[s] PCR judges to draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). The admonition in *Hall* is consistent with this Court’s

responsibility to “safeguard the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012).

A. 3615 (fn. 1). The court below overruled Mr. Bryant’s objections to the State’s proposed order. The PCR court subsequently signed the State’s proposed order as drafted. A. 3383-3420. Mr. Bryant renewed this objection in his Rule 59(e), SCRCP motion. A. 3651-52.

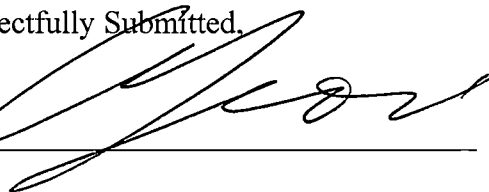
This Court’s admonition in *Hall* has not stopped the practice of the judges adopting the State’s proposed order. This practice poses two problems. First, it deprives a PCR applicant of the judicial findings of fact and conclusions of law. Second, it violates the separation of powers guaranteed by Article I, Section 8 of the South Carolina Constitution. This Court should require PCR judges draft the orders, particularly in capital cases.

### CONCLUSION

For the foregoing reasons, this Court should grant the writ and consider the issues.

Respectfully Submitted,

By



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December 27, 2019  
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas  
William H. Seals, Jr., Circuit Court Judge

**RECEIVED**  
DEC 31 2019  
S.C. SUPREME COURT

Appellate Case No. 2019-000610

Stephen Corey Bryant, .....Petitioner-Respondent,

v.

State of South Carolina, .....Respondent-Petitioner.

**Certificate of Service**

I certify that I have served this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed to:

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