THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2019-000610

Stephen Corey Bryant, ... Petitioner-Respondent,

v.

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

Supplemental Appendix

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The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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April 23, 2008

James H. Babb, Esquire
Jack D. Howle, Jr., Esquire
Seven East Hapmton Ave
P. O. Box 2685
Sumter, SC 29151-2685

Re: State of SC v. Bryant, Stephen Corey

Dear Counsel:

Enclosed is a copy of an Order issued on your Motion for Stay of Proceedings in the Lower Court in the above entitled matter.

By copy of this letter and Order, we are advising all Mr. Jackson of this Order.

Very truly yours,

CLERK

DES/bfs

cc: Cecil Kelly Jackson, Esquire

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The Supreme Court of South Carolina

The State, Respondent,

v.

Stephen Corey Bryant, Petitioner.

ORDER

Petitioner has filed a petition for a writ of certiorari pursuant to Rule 229, SCACR. The time for filing a return has not expired. Petitioner has now filed a motion to stay his trial, which is scheduled to begin on April 28, 2008, until a decision is rendered on his petition for a writ of certiorari. The motion to stay is granted pending a decision by this Court on petitioner's petition for a writ of certiorari.

IT IS SO ORDERED.

C.J.

FOR THE COURT

Columbia, South Carolina

April 23, 2008

(25)

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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May 30, 2008

James H. Babb, Esquire
Jack D. Howle, Jr., Esquire
Seven East Hapmton Ave
P. O. Box 2685
Sumter, SC 29151-2685

Re: State of SC v. Bryant, Stephen Corey

Dear Counsel:

The following Order has been endorsed on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari in the Original Jurisdiction is denied.

s/ Jean H. Toal C.J.
For the Court

Justice John H. Waller, Jr., not participating.

May 30, 2008."

Very truly yours,

Daniel E. Shearouse
SS

CLERK

DES/bfs

cc: Cecil Kelly Jackson, Esquire
Donald J. Zelenka, Esquire

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April 11, 2008

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211-1330

RE: Petition for Writ of Certiorari
In re: State v. Bryant
Docket No.: 2006-GS-43-699

Dear Mr. Shearouse:

Please find enclosed for filing an original and six copies each of a Petition for a Writ of Certiorari in the original jurisdiction of the South Carolina Supreme Court, and of our Proof of Service in the foregoing matter. This being a criminal matter in which the appellant has been determined to be indigent, no filing fee is being remitted. .

Should you or your office have any questions or require additional information, please contact me at your earliest convenience. With kindest regards,

Sincerely,

James H. Babb
Jack D. Howle, Jr.
ATTORNEYS FOR PETITIONER

JHB/jb

Enclosures
– Petition for Writ
– Proof of Service

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APR 14 2008
S.C. SUPREME COURT

Original 20080887509

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APR 14 2008
S.C. SUPREME COURT

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The State of South Carolina
In the Supreme Court

Case No. 2006-GS-43-699

In the matter of the State of South Carolina
- vs-
Stephen Corey Brant, Petitioner.

PETITION FOR A WRIT OF CERTIORARI
{PREMISED UPON ORIGINAL JURISDICTION}

Petitioner, Stephen Corey Bryant, hereby invokes, requests, and moves this Honorable Court to act upon and exercise its original jurisdiction[1] for purposes of ruling upon the questions, issues and matters herein raised, as follows:

I. Whether the State of South Carolina may, pursuant to statute or otherwise, impose as a condition precedent to acceptance of a plea of guilty to a capital murder charge, a requirement that a defendant unequivocally waive all rights to have a jury determine the existence or absence of any statutory aggravating or mitigating factors, and/or the right to decide whether such a defendant should be sentenced to death, life without any hope of parole, or otherwise;

[1] "The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs." **S.C. Const. Art. V, § 5.** "[T]his Court retains the ability to entertain writs of habeas corpus in our original jurisdiction and grant relief in those unusual instances where 'there has been a violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice.'" **Butler v. State**, 302 S.C. 466, 397 S.E.2d 87,(1990); *see also* **Simmons v. State**, 322 S.C.49, 471 S.E.2d 455 (1992); **Key v. Currie**, *supra* (this Court will exercise its original jurisdiction where there is an extraordinary reason such as a question of significant public interest or an emergency).

II. Whether, State v. Truesdale,[2] 278 S.C. 368, 369; 296 S.E. 2d 528 (1982); has been implicitly overruled by the Apprendi line of cases,[3] and/or subsequent decisions of the South Carolina Supreme Court;[4]

III. Given the quantitative and qualitative research available clearly establishing a statistically significant juror bias in favor of death against defendants who maintain innocence during the guilt phase of a capital trial, whether it would be fundamentally unfair and therefore a violation of the Petitioner's Due Process rights to deny him the opportunity to plead guilty and have a jury determine his sentence on the capital murder charge; and/or,

IV. Whether the Apprendi line of cases,[3] now requires that any and all aggravating factors set forth in a notice of intent to seek the death penalty be first submitted to a grand jury, charged in an indictment, and proved to a jury of a defendant's peers beyond a reasonable doubt.

Pursuant to and in fulfillment of Rue 229, SCACR, the Petitioner herein asserts that having moved (copy of motion and supplement attached)before the Court of General Sessions[5] and having tendered a plea of guilty (copy attached) to the pending indictment against him, while reserving the right to have a jury

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[2] Holding § 16-3-20(B), Code of Laws of South Carolina, 1976 (Cum. Supp. 1981), requires sentencing by the trial judge, not a jury, when jury trial has been waived or the defendant has entered a guilty plea. *See also,* State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982).

[3] The so-called "Apprendi line of Cases,"began with the dissent in Almendarez-Torres v. U.S., 523 U.S. 224 (1998); includes Jones v. U.S., 526 US 227 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000); Harris v. U.S., 536 U.S. 545 (2002); Ring v. Arizona, 536 U.S. 584 (2002); Blakely v. Washington, 542 U.S. 296 (2004); U.S. v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 549 US, ____ (2007); and arguably culminating, even if only for the moment with, with Rita v. U.S., 551 U.S. ___ (2007).

[4] State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004); and State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005)

[5] Hearing held on April 3, 2008, the Honorable Thomas A. Russo presiding.

determine his sentence, represents and raises facts constituting an instance of a denial of fundamental fairness shocking to the universal sense of justice, and raising questions of significant public interest, or an emergency for one or more, if not all, of the following reasons:

a.) It involves the most fundamental of Constitutional rights – i.e. the Sixth Amendment right of an accused to trial by jury; the Eighth Amendment prohibition against cruel and unusual punishment; the right to Due Process, including, but not limited to, the right to present a complete defense;

b.) The questions raised have implications for each, every and all capital case currently pending within the jurisdiction of the State of South Carolina – one or more of which has already raised identical or closely related issues;

c.) The issues are sufficiently clear that an appropriate ruling can and will reduce the otherwise unnecessary costs of appeals, the retrial of pending cases, and the concomitant expenditure of scarce judicial resources; and,

d.) A definitive ruling by this Court will provide guidance to any and all defendants who, wishing to plead guilty but desiring to have a jury determine the additional factors necessary to sentencing find themselves in a veritable "no man's land" where informing the jury of their admission as to guilt will most likely render as "harmless error" any and all transgressions of the prosecution and/or any erroneous rulings of the trial court as to matters of law in the guilt phase of the trial; all to the detriment of the defendant in the sentencing phase; and, more likely than not serving as the basis for Post Conviction Relief and further retrials.

SOUTH CAROLINA PRE-APPRENDI CASES.

In State v. Patterson,[6] following the impaneling of a jury, the defendant offered to plead guilty to murder and armed robbery, provided that he be

[6] 278 S.C. 319, 295 S.E.2d 264 (1982).

sentenced by the jury. The trial court accepted the plea, and upon recommendation of the jury, the defendant was sentenced to death. The Defendant thereafter appealed the sentence.

At the trial stage, "The solicitor argued vigorously there is no constitutional right to jury determination of sentence and the statute does not offer a defendant that option." Noting that S.C. Code § 16-3-20(B) is "imprecisely drafted," the Court nevertheless determined it "governs sentencing after a plea of guilty to murder." *Id.* at 321. Further and more critically important from a Constitutional point of view is the fact that the holding in Patterson was expressly premised upon the reasoning that:

> A plea of guilty is more than an admission of conduct; it is a conviction which leaves only the punishment to be determined. A defendant who pleads guilty simultaneously waives several constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront his accusers.[7] *Id.* at 322.

In State v. Truesdale,[8] the South Carolina Supreme Court reaffirmed Patterson, and also took the opportunity to "address several questions by way of guidance to the trial court."[9] It specifically ruled:

> Pleas of guilty are unconditional, and if an accused attempts to attach any condition or qualification thereto, the trial court should direct a plea of not guilty. The basis for this rule is, of course, the settled doctrine that a guilty plea constitutes ***waiver of all prior***

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[7] What the Court did not then recognize, but which appears apparent from both the Apprendi Line of Cases as well as subsequent South Carolina decisions, is that a defendant has a right to and can waive or can reserve the right to have a jury determine factual issues relative to punishment.

[8] 278 S.C. 368, 296 S.E.2d 528 (1982).

[9] *Id.* at 529

claims of constitutional rights or deprivations thereof. *Id.* at 370 (internal citations omitted)(***emphasis added***).

Thus, it appears to the defense that the holding of Patterson and Truesdale is that should a defendant plead guilty, (s)he thereby must waive and inherently is required to waive all other of attendant constitutional rights. In other words, the Patterson and Truesdale holdings, if constitutional, would not only permit, but would require that a defendant be subjected to judicial fact finding on matters which could increase the penalty that otherwise could have been absent such findings – a matter squarely addressed by both Blakely and Cunningham.

CONSTITUTIONAL STANDARDS UNDER THE APPRENDI LINE.

It is the position of the defense that the Apprendi Line of Cases has "reshaped the landscape" insofar as the holdings of Patterson and Truesdale are concerned. It is also the position of the defense that:

a.) A defendant may plead guilty to the underlying charge(s), while reserving the right to have a jury determine any additional facts which may enhance the sentence to be imposed;

b.) A defendant may plead guilty to the underlying charge(s), while reserving the right to have a jury determine any additional facts (mitigating factors) which may reduce the sentence to be imposed;

c.) The state may not coerce or require a defendant to waive the right to have a jury determine "aggravating" or "mitigating" facts or factors as a condition of pleading guilty to the underlying charge(s); and,

d.) Even were the defense position incorrect in a non-death penalty case, it is unequivocally correct in a capital trial where the proceedings are bifurcated – one being held to determine guilt as to the underlying charge(s); and, upon a conviction, the other being held to determine not only

> aggravating and mitigating circumstances, but the sentence to be imposed.

The Sixth Amendment to the Constitution of the United States (which has been made applicable to the states via the Fourteenth Amendment) guarantees that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U.S. Constitution, 6th Amendment.

Apprendi -vs- New Jersey, 530 U.S. 466 (2000), raised the issue of whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence be made by a jury on the basis of proof beyond a reasonable doubt. The holding of Apprendi, most simply put is that:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Id.* at 490.

Apprendi also, however, expressed and gave meaning to the Constitutional requirement that:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached. *Id.* at 484.

As noted in the defendant's original motion on this subject, Ring -vs- Arizona, 536 U.S. 584 (2002), addressed the ability of a state to impose upon a capital defendant the requirement that a finding of aggravating circumstances be made by way of judicial finding (i.e. a judge sitting alone), as the determinate means for increasing the maximum penalty which may be imposed in a capital case. Accordingly the Ring Court held that because Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury at trial. *Id.* at 609.

With regard to the case of Blakely v. Washington, 542 U.S. 296 (2004) the fundamental holding was that:

> [E]very defendant has a [Sixth Amendment] right to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Any sentencing enhancement contingent on determination of a fact neither admitted by a Defendant, nor found by a jury beyond a reasonable doubt is prohibited by the Sixth Amendment guarantee of trial by jury. The maximum sentence a judge may impose is not the maximum sentence (s)he may impose after finding additional facts, but the maximum that may be imposed without any additional findings. The maximum sentence a judge may impose is that which may be imposed solely on the basis of the facts reflected in the jury verdict (in a trial) or admitted by the defendant (in a plea).[10]

Blakely specifically contemplated and addressed the appropriateness of a defendant's right to exercise the right to trial by jury on "sentencing elements" after a guilty plea. In Blakely, the Court held that the Sixth

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[10] It was in this case that Justice Scalia penned his now oft quoted opinion that, "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours.'"*314 4 Blackstone, supra, at 343, rather than a lone employee of the State. Id. at 313-314.

Amendment entitles a defendant to jury fact-finding on all facts essential to the punishment at sentencing even when he pleads guilty.[11] In rejecting a sentencing scheme whereby the defendant's sentence was enhanced on the basis of a judicial finding of fact, the United States Supreme Court in Blakely stated:

> Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in Apprendi), one of several specified facts (as in Ring), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. *Id.* at 305.
>
> Every new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest at trial and make the prosecutor prove beyond a reasonable doubt. *Id.* at 311.

As Apprendi held, "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 313.

Perhaps most apropos to the matter at hand is that in discussing the application of a defendant's right to a jury trial after having plead guilty, the U.S. Supreme Court made the following observation:

> [N]othing prevents a defendant from waiving his Apprendi rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements **so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding.** *See* Apprendi, 530 U.S., at 488 (emphasis added); Duncan v. Louisiana, 391 U.S. 145, 158 (1968).
>
> If appropriate waivers are procured, States may continue to offer judicial fact finding as a matter of course to all defendants who plead guilty. **Even a defendant who stands trial may consent to judicial fact finding as to sentence enhancements, which**

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[11] 542 U.S. at 313-14, 124 S.Ct. 2531.

> **may well be in his interest if relevant evidence would prejudice him at trial.**
>
> We do not understand how Apprendi can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable. *Id.* at 310 (emphasis added); accord Cunningham, 127 S.Ct. 856, 865 (2007)(recognizing Blakely's rejection of the State's argument that the Apprendi rule did not apply because the guilty plea in Blakely provided the court with discretion to impose an exceptional sentence).

Thus, under the Apprendi Line of Cases, a defendant certainly can, but is not and can not be required to waive his Sixth Amendment right to have any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum to be submitted to a jury, and proved beyond a reasonable doubt. In South Carolina, this "new era" has been presumptively, if not officially, ushered in by two South Carolina Supreme Court Cases which the defense maintains recognizes the flawed doctrine of the Patterson and Truesdale holdings, implicitly overruling them and also, albeit begrudgingly, the requirement of S.C. Code § 16-3-20(B) that conditions a defendant's right to have a jury determine the sentence should (s)he plead guilty to the charge of murder.

SOUTH CAROLINA POST-APPRENDI CASES.

Since the landmark decision in Blakely, the South Carolina Supreme Court has on two occasions addressed the issue of a defendant's decision to enter a plea of guilty and the consequences thereof. In each instance, the language of the Court in upholding the resultant sentences is markedly distinguishable from that previously employed in the Pre-Apprendi decision of Patterson and Truesdale.

In State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004), the issues presented were characterized by the Court as:

> I. Whether Appellant's guilty plea was an invalid conditional plea;
>
> II. Whether Appellant had a right to a jury trial on sentencing of which he was deprived; and,
>
> III. Whether the circuit court lacked subject matter jurisdiction to sentence Appellant to death because the indictment did not allege aggravating circumstances.

As to the matter of whether the defendant entered a conditional plea, the Court ruled he did not. It contrarily held he had only reserved the right to present evidence of mental illness, and a plea of guilty but mentally ill is still a plea of guilty. In so holding the Court noted the difference between a plea of guilty and a plea of guilty but mentally ill pertains only to post-sentencing medical treatment.

With regard to issue II, which is at the heart of the controversy raised by way of the defense motion, it should be noted that the Supreme Court went out-of-its way to explain that:

> Appellant was informed that by pleading guilty he waived his right to a jury trial on both guilt and sentencing. He does not argue his waiver was made involuntarily, unknowingly, or unintelligently. *Id.* at 147.

The existence of such language itself undermines the viability of Truesdale and Patterson. In other words, were those cases still considered controlling, the analysis would simply begin and end with the question of whether or not the defendant plead guilty. That it does not speaks volumes. And as to the last matter questioning subject matter jurisdiction for failure to allege aggravating circumstances in the indictment, the S.C. Supreme Court

ruled the court of general sessions had jurisdiction to sentence the defendant to death because:

a.) The Court expressly noted in both Apprendi and Ring that the cases did not involve challenges to state indictments;

b.) The Fourteenth Amendment has not been construed to incorporate the Fifth Amendment's Presentment or Indictment Clause;

c.) Under South Carolina law, aggravating circumstances need not be alleged in an indictment for murder, as the aggravating circumstances listed in S.C. Code § 16-3-20(C)(a) are "sentencing factors,"[12] not elements of murder; and,

d.) The circuit court had subject matter jurisdiction to sentence Appellant to death.

In State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005), the relevant issues with regard to the matters before this Court were formulated as follows:

II. In light of the United States Supreme Court's decision in Ring v. Arizona, is the statutory provision allowing a judge, sitting alone, to sentence to death a defendant who pleads guilty a violation of a defendant's Sixth Amendment right to a jury trial?

III. Did the trial judge lack subject matter jurisdiction to sentence Appellant to death because the murder indictment did not identify any statutory circumstances of aggravation necessary to expose Appellant to a punishment greater than life in prison?

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[12] So-called "sentencing factors" being a term or art or statutory construction the Petitioner maintains was implicitly, if not expressly, abandoned or otherwise rejected by Blakely, and all subsequent U.S. Supreme Court Cases in the Apprendi line.

In Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005) the South Carolina Supreme Court upheld the procedure and sentence imposed on the grounds that:

> At the June 2001 plea hearing, the trial judge questioned Appellant at length about the various constitutional rights he would waive by pleading guilty. The trial judge specifically and repeatedly informed Appellant that he would waive the right to a jury trial in not only the guilt phase, but also in the sentencing phase; that the jury's verdict recommending death would have to be unanimous, and the refusal of one juror to agree to the death penalty would result in a sentence of life imprisonment.
>
> . . ..
>
> Appellant was informed that by pleading guilty he waived his right to a jury trial on both guilt and sentencing. He does not argue his waiver was made involuntarily, unknowingly, or unintelligently. . .. Appellant was not deprived of his right to a jury trial. *Id.* at 417-18.

Of particular interest is the rather emphatic observations of the South Carolina Supreme Court that:

> The constitutionality of Section 16-3-20(B) does not rest on a defendant's desire for a particular outcome, his sense of remorse, or his rationale for committing a particular crime. Instead, it rests, *inter alia*, on whether the statute comports with the right to a jury trial as established by this Court and the United States Supreme Court in interpreting the state and federal constitutions. *See* U.S. Const. amend VI; S.C. Const. art. I, § 14. Accordingly, we adhere to our opinion in Downs and reject Appellant's arguments for the reasons expressed in that case. Section 16-3-20(B) is not unconstitutional in light of Ring, *supra*, and a capital defendant may be sentenced only by a judge pursuant to that statute ***after knowingly and voluntarily waiving his right to a jury trial.*** Id. at 418-19 (***emphasis added***).

The distinction between the Patterson and Truesdale cases, and the Downs and Crisp cases are stark and monumental. In the former the sole

emphasis was on whether the respective defendants had entered a "conditional plea." In Truesdale, the Court clarified that a "conditional plea" was one in which a defendant attempted to reserve and not waive all and any attendant constitutional rights.

In contrast, both in Downs as well as in Crisp, the focus of the Court's inquiry and ruling were that each of those defendants had, in-fact, knowingly and intelligently waived their rights to have a jury determine their sentence, and could only be sentenced by a judge after having done so. [13] Here, in the case presented by Petitioner we have quite a different situation. Here in the case presented by Petitioner we have a situation where the recent opining of the Colorado Supreme Court rings very true:

> The People argue that this Court should follow other state courts that have held that a defendant who pleads guilty forfeits his right to jury fact-finding during sentencing, citing Leone v. State, 797 N.E.2d 743 (Ind. 2003); People v. Altom, 338 Ill. App. 3d 355, 788 N.E.2d 55, 272 Ill. Dec. 751 (Ill. App. 2003); Colwell v. State, 118 Nev. 807, 59 P.3d 463 (Nev. 2002); State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (S.C. 2005); and State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (S.C. 2004).
>
> We are not persuaded as the majority of these cases are distinguishable because they were decided before Blakely and thus fail to recognize an independent right to jury fact-finding during sentencing. ***The Supreme Court of South Carolina is the only court to hold post-Blakely that a defendant waives his right to jury fact-finding during sentencing by pleading guilty, but its failure to cite Blakely suggests those decisions to be in error.*** State v. Montour, 157 P.3d 489, 495-496 (Colo. 2007). ***(emphasis added).***

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[13] "Appellant was informed that by pleading guilty he waived his right to a jury trial on both guilt and sentencing. He does not argue his waiver was made involuntarily, unknowingly, or unintelligently." Downs at 147; "Appellant was informed that by pleading guilty he waived his right to a jury trial on both guilt and sentencing. He does not argue his waiver was made involuntarily, unknowingly, or unintelligently. . .. " Crisp at 417-18

In further support of his position that the Supreme Court should exercise it original jurisdiction in this matter, Mr. Bryant would show that he has attempted to admit his guilt to the charges for which he has been indicted. In doing so he in fact tendered a plea of guilty waiving, his right to have a jury trial for purposes of determining the necessary facts constituting those charges set forth in the indictment against him. On the other hand, however, he retained and was unwilling to forfeit his right to have a jury determine those additional and separate facts or factors impacting on the penalty which may be imposed by the jury as a consequence of his guilty plea.

The trial court denied his right to plead guilty and to have a jury determine those additional facts necessary to the imposition of a sentence greater than that which could be imposed on the basis of a guilty plea alone. Mr. Bryant accordingly maintains he has suffered a basic denial of his Constitutional right to trial by jury and to due process as a result of the the State of South Carolina attempting to condition his waiver or decision to plead guilty to the charges for which he has been indicted upon a waiver of his Constitutional rights to present evidence in mitigation to a jury of his peers, or to have such a jury determine his sentence.

RIGHT TO TENDER GUILTY PLEA AS EVIDENCE IN MITIGATION.

A defendant on trial for his life in a capital case has a 14th and a 6th Amendment right to present a full and complete defense. As part and parcel of a full and complete defense, a Defendant has an 8th Amendment right to present any and all evidence in mitigation during a capital sentencing proceeding.

Studies relying on extensive interviews of more than 150 South Carolinians who had served as capital jurors establish that, when choosing

between a death sentence and life in prison, many capital jurors place significant weight on a defendant's remorse and acceptance of responsibility for his crimes. Theodore Eisenberg et al., How the Death Penalty Works: Empirical Studies of the Modern Capital Sentencing System, 83 CORNELL L. REV. 1599 (1998); Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 COLUM. L. REV. 1538 (1998); Scott E. Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty, 83 CORNELL L. REV. 1557 (1998). "In short, if jurors believed that the defendant was sorry for what he had done, they tended to sentence him to life imprisonment, not death." Eisenberg, 83 CORNELL L. REV. 1599, 1633 (1998). Similarly, interviewed jurors were 39.8% "... more likely to vote for death if the defendant expressed no remorse for his offense." Garvey, 98 COLUM. L. REV. 1538, 1560 (1998).

The most effective way in which a capital defendant can demonstrate his remorse (i.e., his acceptance of responsibility for the crimes he committed) is to plead guilty and not deny his moral and legal culpability for the crimes. Alternatively, by pleading not guilty, the defendant sends a strong signal to the jury that he denies responsibility for the crimes and will attempt to show the court and jury that he is innocent. A strategy of denial is extraordinarily dangerous for a capital defendant, as ". . . juries in denial defense cases imposed death sentences twice as often as they imposed life sentences, while juries in admission defense cases chose a life verdict over a death sentence by a three-to-two ratio." Sundby, 83 CORNELL L. REV. 1557, 1575 (1998). The studies clearly show that remorse and acceptance of guilt are viewed as powerful mitigation evidence by capital jurors.

Because "[t]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest of capital cases, not be precluded from

considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant offers as a basis for a sentence less than death," Lockett v. Ohio, 438 U.S. 586, 604-605 (1978)(footnote omitted, emphasis in the original), a capital defendant should be permitted to enter a guilty plea that also serves as mitigating evidence of his acceptance of responsibility.

Similarly, the Sixth Amendment's right to trial by jury has been one of this nation's most revered legal guarantees. ". . . [T]he accused shall enjoy the right to a . . . trial, by an impartial jury . . ." U.S. CONST. amend. VI. "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). In Witherspoon v. Illinois, 391 U.S. 510, 519 (1968), the Supreme Court recognized that juries play a particularly important role in capital cases, "a jury that must choose between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life or death." (footnote omitted).

Though a defendant may knowingly waive his Sixth Amendment right to a jury trial, no defendant should be forced to do so only to preserve his constitutional right to present mitigating evidence of acceptance of responsibility. In Simmons v. U.S., 390 U.S. 377, 394 (1968), the Supreme Court protected the defendant's Fourth Amendment right to challenge an unlawful search while simultaneously protecting his Fifth Amendment right against self-incrimination despite an admission of possession of the item discovered in the search, an admission necessary to establish an interest in the seized property. The Supreme Court stated, ". . . we find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* It is no less intolerable to force a capital defendant to surrender his right

to a jury trial in order that he preserve his right to present mitigation evidence through a guilty plea demonstrating his acceptance of responsibility.

Through judicial sentencing of capital defendants that plead guilty, the South Carolina statute compels a capital defendant to elect either to offer persuasive evidence that may convince a jury to save his life or to have a jury of his peers determine if he lives or dies. This statute may only survive Constitutional challenge if the policies underlying the two constitutional rights involved are not appreciably impaired. McGautha v. California, 402 U.S. 183, 213 (1971) (forcing a choice between constitutional rights is impermissible if ". . . compelling the election impairs to an appreciable extent any of the policies behind the rights involved.")

Lockett's right to offer mitigation evidence is grounded in the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process of law. The Lockett rule, which has repeatedly been reaffirmed by the Supreme Court, see, e.g., Skipper v. South Carolina, 476 U.S. 1 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), is vital to our judicial system and serves to prevent a defendant from being sentenced to death by a jury that was not permitted to consider the full range of mitigating evidence. These important constitutional values are clearly impaired when a capital defendant is prevented from offering supporting evidence if he wishes to exercise his Sixth Amendment right to a trial by jury.

The right to a jury trial is founded on the premise that a jury of one's peers is a better representation of the will and wisdom of the community than is a single arbiter. "If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Forcing a defendant fighting for his life to give up the wisdom and will of the

jury, the "conscience of the community," so that he may offer evidence making a death sentence less likely directly impairs the policies underlying the rights to due process of law and to a jury trial. "The Framers [of our Constitution] would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State." Blakely at 131-314 (internal citations omitted).

A jury may presume a defendant is unwilling to take responsibility for his actions when that defendant pleads not guilty. *See* Eisenberg, 83 Cornell L. Rev. 1599 (1998). This presumption is materially inaccurate when the defendant is statutorily forced to plead not-guilty to retain his right to a jury trial. The Supreme Court has stated that a jury cannot sentence a defendant to death based on materially inaccurate evidence. Johnson v. Mississippi, 486 U.S. 578, 590 (1988)(a capital jury's consideration of inaccurate information violates the Eighth Amendment and constitutes error which "extends[s] beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise inadmissible," implicating instead the reliability concerns articulated in the Court's capital sentencing jurisprudence). Thus, a death sentence premised on the materially inaccurate evidence that the defendant refused to accept responsibility for his actions is a violation of the Eighth Amendment.

Additionally, there is no legitimate state interest in refusing to allow a capital defendant to both plead guilty and have a jury determine the appropriate sentence. A guilty plea does not prevent the prosecution from offering evidence regarding the defendant's role in the crime at sentencing, but it does allow the defendant to accept moral and legal responsibility for his actions. No

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defendant should be forced to choose between two Constitutional rights when he feels each independently may make it more likely that his life is spared, particularly when the forced choice offers so little to gain and so much to lose.

WHEREFORE, your Petitioner respectfully submits his situation and the posture of his case squarely and appropriately presents "a question of significant public interest" which should be expediently considered and judiciously addressed by this Honorable Court without further delay or unnecessary expenditure of scarce judicial resources at the trial level.

Respectfully Submitted By: James H Babb

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SUMTER, SOUTH CAROLINA

DATED: APRIL 11, 2008

Petition for Certiorari in the Original Jurisdiction is denied.

C.J.

For the Court

Justice John H. Waller, Jr., not participating.

May 30, 2008

STATE OF SOUTH CAROLINA **COUNTY OF SUMTER**	**COURT OF GENERAL SESSIONS** **THIRD JUDICIAL CIRCUIT** **DOCKET No.: 2006-GS-43-699**
The STATE OF SOUTH CAROLINA - vs - Stephen Corey **BRYANT**, Defendant.	**MOTION FOR ORDER TO DETERMINE MODE OF TRIAL** {Together with Incorporated Memorandum of Law}

The Defendant, Stephen Corey Bryant, through undersigned counsel, hereby respectfully moves this Court to determine the mode of trial in this capital prosecution.

THE ISSUE PRESENTED.

Pursuant to the Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution; and Article I, Sections 3, 14, and 15 of the South Carolina Constitution; as well as all other applicable law and interpretative judicial decisions of the Courts of the United States, and of the State of South Carolina, the Defendant seeks to:

a.) Be permitted to plead guilty to the capital offense of murder; while,

b.) Simultaneously preserving, reserving, and insisting upon his right(s) to present mitigation evidence to a jury; and,

c.) To have a jury (and not a judge) make the factual predicate determination(s) regarding the question of the ultimate sentence to be imposed.

In other words, the Defendant wishes to plead guilty to a capital murder charge, and to do so without being required to waive, forfeit, or otherwise elect between competing Constitutional guarantees – more specifically his Sixth Amendment, Eight Amendment, Due Process

Clause, and/or any other related Constitutional rights to have a jury, and a jury alone, determine the appropriate sentence.

These not being mutually exclusive rights, that this is an issue at all, presents and raises the inescapable, concomitant, and fundamental questions of whether the South Carolina Death Penalty Statute, as written and applicable in this case, is Constitutionally defective. The Defendant submits that it is not only unquestionably deficient from a Constitutional point of view, but that it is unnecessarily and irretrievably so.

RELEVANT HISTORICAL & FACTUAL BACKGROUND.

1. Stephen Corey Bryant stands accused, *inter alia*, of Murder, Armed Robbery, and Possession of a Stolen Handgun.

2. The relevant murder warrant (H-782551) charges Mr. Bryant with the October 11, 2004 murder of Willard Tietjen. It was served upon Mr. Bryant on October 14, 2004. As probable cause for the warrant, Sumter County Senior Investigator David E. Florence executed an affidavit alleging Mr. Bryant admitted "he shot and killed the . . . victim. Law enforcement also recovered the 40 caliber Smith and Wesson handgun in the Defendants (sic) truck that he stated he used to kill the victim."

3. The relevant armed robbery warrant (H-782558) charges Mr. Bryant with the October 11, 2004 armed robbery of Willard Tietjen. It was served upon Mr. Bryant on October 14, 2004. As probable cause for the warrant, Sumter County Senior Investigator David E. Florence executed an affidavit alleging Mr. Bryant admitted "he killed the victim at the victims (sic) residence . . .. Property belonging to the victim was

recovered by law enforcement officers from the Defendants (sic) vehicle."

4. No warrant was served upon the Defendant relating to the charge that he was in possession of a stolen handgun.

5. Mr. Bryant was also on October 14, 2004, served with a warrant for possession of a weapon during the commission of a violent crime. As probable cause for that warrant, Sumter County Senior Investigator David E. Florence executed an affidavit alleging Mr. Bryant admitted "he did shoot and kill the victim with the use of a 40 caliber handgun. This Affiant and other officers recovered cash and other property from the Defendants (sic) house believed to have been taken by the Defendant during the murder and robbery."

6. On July 20, 2006, the Sumter County Grand Jury returned the instant, pending indictment against Mr. Bryant a true bill.

7. On April 27, 2007, solicitor Jackson served Mr. Howle and Mr. Bryant with a Notice of Intent to seek imposition of the death penalty against Mr. Bryant for the murder of Willard Tietjen.

OVERVIEW OF SOUTH CAROLINA'S DEATH PENALTY SCHEME.

8. The statutory scheme established by the General Assembly for application of the death penalty in South Carolina is set forth in S.C. Code §§ 16-3-20 *et. seq.*

9. Section 16-3-20(A) of the South Carolina Code sets forth the potential penalties as follows:

"A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years."[1]

10. There are, however, at least five (5) statutory prerequisites which must first be satisfied before any defendant may be considered eligible for imposition of a sentence of death. Those are:

a.) The state must formally notice the Defendant that it is seeking a sentence of death;[2]

b.) Assuming the Defendant is convicted of or pleads guilty to murder, at least one (1) statutory aggravating circumstance must be proven beyond a reasonable doubt in a separate proceeding, the so-called "sentencing phase";[3]

c.) In this so-called "sentencing phase" the fact finder (judge or jury, as the case may be) must consider additional evidence in extenuation, mitigation or aggravation of the punishment to be imposed;[4]

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[1] Furman v. Georgia, 408 U.S. 238 (1972) (*per curiam*) of course declares and makes unconstitutional any statute that imposes or provides for an "automatic" or "across the board" imposition of the death penalty.

[2] "Whenever the Solicitor seeks the death penalty he shall notify the defense attorney of his intention to seek such penalty." S.C. Code § 16-3-26(A).

[3] When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. S.C. Code § 16-3-20(B).

[4] "In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment." S.C. Code § 16-3-20(B).

d.) Any statutory aggravating circumstance found to exist must be found to exist beyond a reasonable doubt;[5] and,

e.) Before the recommendation of a penalty of death may become the sentence of the Court, the trial judge must make a factual finding that the death penalty recommendation is "warranted."[6]

11. The proverbial "fly in the ointment," insofar as the South Carolina statutory scheme is concerned is that under and pursuant to S.C. Code § 16-3-20 (B), requiring that should "trial by jury "be waived by the defendant and the State," **or if the defendant pleaded guilty**, the sentencing proceeding **must be conducted before the judge**." (**emphasis added**).

12. In other words, the foregoing statutory language expressly forbids and precludes the right of a defendant to have a jury determine the additional facts required prior to imposition of the sentence following any decision on his or her part to enter a plea of guilty to a capital murder charge.

13. Further, the South Carolina Supreme Court has on more than one occasion unequivocally stated this arguably "constitutionally flawed"

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[5] "In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. S.C. Code § 16-3-20(B).

[6] The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. S.C. Code § 16-3-20(C).

statute to be absolutely controlling in this state.[7] But for the latter substitution of the word "must" for the then used term "shall" the wording of the relevant portion of the statute[8] today applicable remains unchanged.

14. As such, and as accordingly presented by this motion, this Court must:

a.) Either declare the statutory South Carolina death penalty scheme[9] unconstitutional, *ab extensio*; **or else,**

b.) Substantially reinterpret and some how reconcile it with the clear, unequivocal, and absolutely controlling mandates of the relevant decisions of the United States Supreme Court establishing and emphasizing that a defendant has an inviolate Sixth Amendment right to have a jury determine any factual predicate necessary to the imposition of an enhanced sentence;[10] **and,**

c.) Constitutionally legitimize the South Carolina requirement that a defendant elect between his or her

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[7] State v. Truesdale, 278 S.C. 368, 369 ;296 S.E. 2d 528 (1982) (Holding § 16-3-20(B), Code of Laws of South Carolina, 1976 (Cum. Supp.1981), requires sentencing by the trial judge, not a jury, when jury trial has been waived or the defendant has entered a guilty plea). *Accord,* State v. Patterson, 278 S.C., 295 S.E. (2d) 264 (1982).

[8] If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must [shall] be conducted before the judge.

[9] Which specifically prohibits and denies the right of a defendant to have a jury determine the sentence to be imposed in the event of a guilty plea.

[10] See the so-called "Apprendi line of Cases," which begins with the dissent in Almendarez-Torres v. U.S., 523 U.S. 224 (1998); includes Jones v. U.S., 526 US 227 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000); Harris v. U.S., 536 U.S. 545 (2002); Ring v. Arizona, 536 U.S. 584 (2002); Blakely v. Washington, 542 U.S. 296 (2004); U.S. v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 549 US, _____ (2007); and arguably culminating, even if only for the moment with, with Rita v. U.S., 551 U.S. ___ (2007).

> respective Sixth Amendment right to trial by jury and his or her Eighth Amendment right to have a jury hear and consider evidence in mitigation – which inherently includes having a sentencing jury hear the fact that a defendant has entered a plea of guilty to the capital murder charge upon which they are being asked/required to render judgement in the form of the sentence to be imposed.

15. The South Carolina death sentence scheme requires that a defendant make an expressly prohibited choice (i.e. the unnecessary, non-mutually exclusive, election between the exercise of one or more fundamental constitutional rights). Here the prohibited juxtaposition is the requirement to elect between one's Sixth Amendment right to jury trial, and one's Eight Amendment right to present evidence in mitigation. It is a choice, it is an election, which is neither legally, logically, nor constitutionally required.[11]

16. Because it is not a mutually exclusive decision, and because of the rulings of the United States Supreme Court in the Apprendi line of cases,[10] it is a choice the State of South Carolina can neither Constitutionally compel, nor Constitutionally enforce.[12]

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[11] As opposed to say an impossibly exclusionary and inconsistent decision to remain silent but yet testify, or to enter a guilty plea and simultaneously insist on a trial as to guilt or innocence.

[12] *See, e.g.*, Simmons v. United States, 390 U.S. 377 (1968)(when a defendant must testify in suppression hearing in order to assert his rights under the Fourth Amendment, his Fifth Amendment rights prohibit the government from thereafter using the testimony against him at trial); State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985)(where the defendant charged with capital murder was entitled pursuant to statute to testify and to personally present a closing argument in sentencing phase of trial, the trial court's ruling requiring him to choose between testifying or making closing argument was reversible error); United States v. Jackson, 390 U.S. 570 (1968)(federal kidnaping statute unconstitutional because it, in effect, penalized

17. Because the Defendant does not believe the prohibition and inconsistences complained of to be reconcilable, he is of the opinion, believes; and respectfully submits the trial Court must either deny his request, in absolute violation and contravention of his herein above recited Constitutional rights and protections, or else declare the South Carolina Death Penalty Statute and Sentencing Scheme to be unequivocally and outright unconstitutional; and/or, thereby permit him to proceed as requested.

DEFENDANT'S SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

18. If it makes nothing else clear, the Apprendi line of cases,[10] establishes that the determination of any factual predicate or element which is necessary or required to enhance a sentence, must be charged in an indictment, presented to a grand jury, and found by the trial jury to exist beyond a reasonable doubt.

19. In the oft and now famously so quoted words penned by Justice Scalia in Blakely, "The framers would not have thought it too much to demand that, before depriving a man of [his life], the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the state."

20. Further and that Apprendi and its progeny are fully and directly applicable to cases in which the state seeks to impose a sentence of death was resolved, and resolved unequivocally by Ring v. Arizona, 536 U.S. 584 (2002) (Holding a mere judicial finding alone of aggravating

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defendants that chose to plead not guilty by exposing them to a death sentence while a defendant that waived his right to trial would be assured a life sentence).

circumstances increasing the maximum penalty violates the Sixth Amendment).

21. In Ring, the Court expressly and concisely noted, "The question presented is whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury."[13]

22. Overruling Walton v. Arizona, 497 U.S. 639 (1990), even though "recognizing that the Arizona [Supreme] court's construction of the State's own law is authoritative," the Ring Court nevertheless noted, "we are persuaded that Walton, in relevant part, cannot survive the reasoning of Apprendi."[14]

23. Accordingly, the Court struck down the Arizona statute permitting a trial judge, sitting alone, to determine the presence or absence of an aggravating factor necessary for the imposition of the death penalty.[15]

24. In short, the Ring Court expressly and specifically struck down what the South Carolina statute at issue purports to require.

A Defendant's Right To Plead Guilty.

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[13] Id., at 597 (footnote omitted).

[14] Id.' at 603 (internal citations omitted).

[15] ". . . [W]e hold that Walton and Apprendi are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule Walton to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. Id. at 609.

25. Assuming arguendo that it is Constitutionally impermissible for the trial judge to alone make the rulings apparently required by the South Carolina Statutory Death Penalty Scheme upon entry of a plea of guilty, the question then becomes whether and under what terms may a defendant plead guilty and in such fashion so as to trigger the Sixth Amendment Rights guaranteed under the United States Constitution and the Apprendi line of cases in interpretation thereof.

26. The South Carolina Supreme Court has not, in the humble opinion of your defendant, to date squarely addressed the issue(s) presented by way of this motion.

27. In the case of State v. Laney, 367 S.C. 639, 627 S.E.2d 726, (2006), the South Carolina Supreme Court formulated two (2) of the several issues to therein to be determined as:

> II. Do the cases of Atkins v. Virginia and Ring v. Arizona, decided by the United States Supreme Court after Appellant's trial, require Appellant's case to be remanded for a new sentencing proceeding before a jury; and,
>
> III. Did the trial court lack subject matter jurisdiction to sentence Appellant to death because the murder indictments did not identify any statutory aggravating circumstances necessary to expose Appellant to a punishment of death?

28. With regard to Issue Two (II), the Court noted:

> Appellant has confused the issues of eligibility for the death penalty and a fact on which the legislature conditions an increase in a defendant's maximum punishment. The General Assembly has not conditioned an increase in a defendant's maximum punishment on the fact the defendant is not mentally retarded. The fact a defendant is not mentally retarded is not an aggravating circumstance that increases a defendant's punishment; rather, the issue is one of eligibility for the sentence imposed by a jury.

29. In other words, the trial court was not sitting alone making a determination as to whether a particular defendant was guilty of an aggravating circumstance or otherwise subject to an enhanced penalty, but rather, being called upon to determine whether the defendant's mental condition precluded a jury from even considering such as a possible, potential penalty.

30. With regard to issue three (III), the question revolved around whether the Notice of Intent to Seek the Death Penalty required by South Carolina law is the functional equivalent or otherwise satisfies the holding and requirement of Apprendi that:

> "[E]very defendant has a [Sixth Amendment] right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." Any sentencing enhancement contingent on determination of a fact neither admitted by a Defendant, nor found by a jury beyond a reasonable doubt is prohibited by the Sixth Amendment guarantee of trial by jury.

31. In short, neither of the foregoing are holdings that are of particular import, or helpful as regards resolution of the issues at hand.

32. Contrarily however, the statutory language of S.C. Code § 16-3-20 clearly envisions a jury sentencing procedure:

> (A) A person who is convicted of **or pleads guilty to murder** must be punished . . .. [T]he judge **must charge the jury** in his instructions that life imprisonment means until the death of the defendant without the possibility of parole . . ..
>
> (B) The proceeding **must be conducted** by the trial judge **before the trial jury** as soon as practicable after the lapse of twenty-four hours . . ..

(C) The statutory instructions as to statutory aggravating and mitigating circumstances **must be given in charge and in writing to the jury for its deliberation**. **The jury**, if its verdict is a recommendation of death, shall designate in writing, and signed **by all members of the jury**, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. **The jury**, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and **signed by all members of the jury**, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt.

Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation.

33. Clearly, the General Assembly overwhelmingly envisioned a "perhaps more traditional form of proceeding" whereby one accused of a capital murder would first stand trial for purposes of determining guilt; and, if found guilty, then stand trial in a separate proceeding for purposes of determining the appropriate punishment.

34. That vision does not, however apply to the current case; nor does it apply to the vision of the Sixth Amendment as interpreted by Apprendi and its progeny. And lastly, it may not be superimposed upon a Defendant who wishes to tender a plea a guilty to the underlying charges, while reserving the right to have a jury determine aggravating circumstances, mitigating circumstances, and the proper penalty to be imposes.

RIGHT TO TENDER GUILTY PLEA AS EVIDENCE IN MITIGATION.

35. A defendant on trial for his life in a capital case has a 14th and a 6th Amendment right to present a full and complete defense. As part and parcel of a full and complete defense, a Defendant has an 8th Amendment right to present any and all evidence in mitigation during a capital sentencing proceeding.

36. It is undisputable that the definition of "mitigation" necessarily includes the tender of a plea of guilty plea. It is a time honored, valid, and very reasonable sentencing defense strategy.

37. As has been recently noted, "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes v. South Carolina, 547 U.S. 319, 330 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

38. This right is abridged by "rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'" Holmes, 547 U.S. at 330 (quoting U.S. v. Scheffer, 523 U.S. 303, 308 (1998)).

39. What rights are, or can fairly claimed to be more fundament or "weighty" in American jurisprudence than a defendant's right to trial by jury and to due process under law? Accordingly, the State bears a heavy burden indeed – one in-fact, which the defense maintains it can not sustain, and certainly not to justify the denial of rights legislatively incorporated into its death penalty scheme for little or no apparent reason.

40. Moreover, South Carolina has long recognized a plea of guilty as a mitigating factor in meting out criminal sentences. "For those that plead guilty, that fact itself is a constitutionally permissible consideration in sentencing, a consideration that is not present when one is found guilty by a jury." State v. Brouwer, 346 S.C. 375, 391, 550 S.E.2d 915, 924 (Ct. App. 2001). Further, the Brouwer Court went on to expound upon the reasons why a guilty plea is proper mitigation:

> Guilty pleas are recognized as a significant step toward rehabilitation. Hooten v. State, 212 Ga.App. 770, 442 S.E.2d 836 (1994). A genuine admission of guilt may properly result in a lighter sentence than would be appropriate for an intransigent and unrepentant malefactor. United States v. Stockwell, 472 F.2d 1186 (9th Cir.1973). *See also* Hooten, 442 S.E.2d at 840 (plea of guilty can be, and frequently is, considered in sentencing). *Id.* at 391, at 925.

WHEREFORE, your Defendant respectfully requests, moves and prays this Court issues its Orders Determining the Mode of Trial in the Capital Proceeding, permitting your Defendant to exercise all and his full rights to enter a plea of guilty and to have a jury of his peers determine the ultimate sentence to be imposed.

Respectfully Submitted By: James H. Babb

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Jack D. Howle, Jr.
Counsel For Defendant

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STATE OF SOUTH CAROLINA	**COURT OF GENERAL SESSIONS**
COUNTY OF SUMTER	**THIRD JUDICIAL CIRCUIT**
RECORDED 2008 APR -3 AM 10:43 JAMES C. CAMPBELL CLERK OF COURT SUMTER COUNTY, S.C.	**DOCKET No.: 2006-GS-43-699**
The STATE OF SOUTH CAROLINA - vs - Stephen Corey **BRYANT**, Defendant.	**SUPPLEMENT TO MOTION FOR ORDER TO DETERMINE MODE OF TRIAL**

Supplementing and in addition to the facts, circumstances and arguments set forth in the previous motion herein dated February 11, and filed for record March 3, 2008, your Defendant, Stephen Corey Bryant, through undersigned counsel, would show as follows:

I. State v. Truesdale,[1] 278 S.C. 368, 369; 296 S.E. 2d 528 (1982); has been implicitly overruled by both the Apprendi line of cases,[2] as well as subsequent decisions of the South Carolina Supreme Court;[3] and,

II. Given the quantitative and qualitative research available clearly establishing a statistically significant juror bias in favor of death against defendants who maintain innocence during the guilt phase of a capital trial, it would be fundamentally unfair and therefore a violation of your

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[1] Holding § 16-3-20(B), Code of Laws of South Carolina, 1976 (Cum. Supp. 1981), requires sentencing by the trial judge, not a jury, when jury trial has been waived or the defendant has entered a guilty plea. *See also,* State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982).

[2] The so-called "Apprendi line of Cases,"began with the dissent in Almendarez-Torres v. U.S., 523 U.S. 224 (1998); includes Jones v. U.S., 526 US 227 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000); Harris v. U.S., 536 U.S. 545 (2002); Ring v. Arizona, 536 U.S. 584 (2002); Blakely v. Washington, 542 U.S. 296 (2004); U.S. v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 549 US, (2007); and arguably culminating, even if only for the moment with, with Rita v. U.S., 551 U.S. ___ (2007).

[3] State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004); and State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005)

> Defendant's due process rights to deny him the opportunity to plead guilty and have a jury determine his sentence on the capital murder charge.

SOUTH CAROLINA PRE-APPRENDI CASES.

In State v. Patterson,[4] following the impaneling of a jury, the defendant offered to plead guilty to murder and armed robbery, provided that he be sentenced by the jury. The trial court accepted the plea, and upon recommendation of the jury, the defendant was sentenced to death. The Defendant thereafter appealed the sentence.

At the trial stage, "The solicitor argued vigorously there is no constitutional right to jury determination of sentence and the statute does not offer a defendant that option." Noting that S.C. Code § 16-3-20(B) is "imprecisely drafted," the Court nevertheless determined it "governs sentencing after a plea of guilty to murder." *Id.* at 321. Further and more critically important from a Constitutional point of view is the fact that the holding in Patterson was expressly premised upon the reasoning that:

> A plea of guilty is more than an admission of conduct; it is a conviction which leaves only the punishment to be determined. A defendant who pleads guilty simultaneously waives several constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront his accusers.[5] *Id.* at 322.

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[4] 278 S.C. 319, 295 S.E.2d 264 (1982).

[5] What the Court did not then recognize, but which appears apparent from both the Apprendi Line of Cases as well as subsequent South Carolina decisions, is that a defendant has a right to and can waive or can reserve the right to have a jury determine factual issues relative to punishment.

In State v. Truesdale,[6] the South Carolina Supreme Court reaffirmed Patterson, and also took the opportunity to "address several questions by way of guidance to the trial court."[7] It specifically ruled:

> Pleas of guilty are unconditional, and if an accused attempts to attach any condition or qualification thereto, the trial court should direct a plea of not guilty. The basis for this rule is, of course, the settled doctrine that a guilty plea constitutes ***waiver of all prior claims of constitutional rights or deprivations thereof.*** *Id.* at 370 (internal citations omitted)(***emphasis added***).

Thus, it appears to the defense that the holding of Patterson and Truesdale is that should a defendant plead guilty, (s)he thereby inherently forfeits, and must forfeit, all other of attendant constitutional rights. In other words, the Patterson and Truesdale holdings, if constitutional, would not only permit, but would require that a defendant be subjected to judicial fact finding on matters which could increase the penalty that could have otherwise have been absent such findings – a matter squarely addressed by Blakely.

CONSTITUTIONAL STANDARDS UNDER THE APPRENDI LINE.

It is the position of the defense that the Apprendi Line of Cases has "reshaped the landscape" insofar as the holdings of Patterson and Truesdale are concerned. It is also the position of the defense that:

a.) A defendant may plead guilty to the underlying charge(s), while reserving the right to have a jury determine any additional facts which may enhance the sentence to be imposed;

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[6] 278 S.C. 368, 296 S.E.2d 528 (1982).

[7] *Id.* at 529

b.) A defendant may plead guilty to the underlying charge(s), while reserving the right to have a jury determine any additional facts (mitigating factors) which may reduce the sentence to be imposed;

c.) The state may not coerce or require a defendant to waive the right to have a jury determine "aggravating" or "mitigating" facts or factors as a condition of pleading guilty to the underlying charge(s); and,

d.) Even were the defense position incorrect in a non-death penalty case, it is unequivocally correct in a capital trial where the proceedings are bifurcated – one being held to determine guilt as to the underlying charge(s); and, upon a conviction, the other being held to determine not only aggravating and mitigating circumstances, but the sentence to be imposed.

The Sixth Amendment to the Constitution of the United States (which has been made applicable to the states via the Fourteenth Amendment) guarantees that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Apprendi -vs- New Jersey, 530 U.S. 466 (2000), raised the issue of whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence be made by a jury on the basis of proof beyond a reasonable doubt. The holding of Apprendi, most simply put is that:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Id.* at 490.

Apprendi also, however, expressed and gave meaning to the Constitutional requirement that:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached. *Id.* at 484.

As noted in the defendant's original motion on this subject, Ring -vs- Arizona, 536 U.S. 584 (2002), addressed the ability of a state to impose upon a capital defendant the requirement that a finding of aggravating circumstances be made by way of judicial finding (i.e. a judge sitting alone), as the determinate means for increasing the maximum penalty which may be imposed in a capital case. Accordingly the Ring Court held that because Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury at trial. *Id.* at 609.

With regard to the case of Blakely v. Washington, 542 U.S. 296 (2004) the fundamental holding was that:

> [E]very defendant has a [Sixth Amendment] right to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Any sentencing enhancement contingent on determination of a fact neither admitted by a Defendant,

> nor found by a jury beyond a reasonable doubt is prohibited by the Sixth Amendment guarantee of trial by jury. The maximum sentence a judge may impose is not the maximum sentence (s)he may impose after finding additional facts, but the maximum that may be imposed without any additional findings. The maximum sentence a judge may impose is that which may be imposed solely on the basis of the facts reflected in the jury verdict (in a trial) or admitted by the defendant (in a plea).[8]

Blakely specifically contemplated and addressed the appropriateness of a defendant's right to exercise the right to trial by jury on sentencing elements after a guilty plea. In rejecting a sentencing scheme whereby the defendant's sentence was enhanced on the basis of a judicial finding of fact, the United States Supreme Court in Blakely stated:

> Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in Apprendi), one of several specified facts (as in Ring), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. *Id.* at 305.
>
> Every new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest at trial and make the prosecutor prove beyond a reasonable doubt. *Id.* at 311.

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[8] It was in this case that Justice Scalia penned his now oft quoted opinion that, "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours.'"*314 4 Blackstone, supra, at 343, rather than a lone employee of the State. Id. at 313-314.

As Apprendi held, "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 313.

Perhaps most apropos to the matter at hand is that in discussing the application of a defendant's right to a jury trial after having plead guilty, the Supreme Court made the following observation:

> [N]othing prevents a defendant from waiving his Apprendi rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements **so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding.** *See* Apprendi, 530 U.S., at 488 (emphasis added); Duncan v. Louisiana, 391 U.S. 145, 158 (1968).
>
> If appropriate waivers are procured, States may continue to offer judicial fact finding as a matter of course to all defendants who plead guilty. **Even a defendant who stands trial may consent to judicial fact finding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.**
>
> We do not understand how Apprendi can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable. *Id.* at 310 (emphasis added); accord Cunningham, 127 S.Ct. 856, 865 (2007)(recognizing Blakely's rejection of the State's argument that the Apprendi rule did not apply because the guilty plea in Blakely provided the court with discretion to impose an exceptional sentence).

Under the Apprendi Line of Cases, a defendant certainly can, but is not and can not be required to waive his Sixth Amendment right to have any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum to be submitted to a jury, and proved beyond a reasonable doubt. In South

Carolina, this "new era" has been ushered in by two South Carolina Supreme Court Cases the defense maintains recognizes the flawed doctrine of the Patterson and Truesdale holdings, implicitly overruling them, and albeit begrudgingly, the requirement of S.C. Code § 16-3-20(B) that conditions a defendant's right to have a jury determine the sentence should (s)he plead guilty to the charge of murder

SOUTH CAROLINA POST-APPRENDI CASES.

Since the landmark decision in Blakely, the South Carolina Supreme Court has on two occasions addressed the issue of a defendant's decision to enter a plea of guilty and the consequences thereof. In each instance, the language of the Court in upholding the resultant sentences is markedly distinguishable from that previously employed in the Pre-Apprendi decision of Patterson and Truesdale.

In State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004), the issues presented were characterized by the Court as:

I. Whether Appellant's guilty plea was an invalid conditional plea;

II. Whether Appellant had a right to a jury trial on sentencing of which he was deprived; and,

III. Whether the circuit court lacked subject matter jurisdiction to sentence Appellant to death because the indictment did not allege aggravating circumstances.

As to the matter of whether the defendant entered a conditional plea, the Court ruled he did not. It contrarily held he had only reserved the right to present evidence of mental illness, and a plea of guilty but mentally ill is still a plea of guilty. In so holding the Court noted the

difference between a plea of guilty and a plea of guilty but mentally ill pertains only to post-sentencing medical treatment.

With regard to issue II, which is at the heart of the controversy raised by way of the defense motion, it should be noted that the Supreme Court went out-of-its way to explain that:

> Appellant was informed that by pleading guilty he waived his right to a jury trial on both guilt and sentencing. He does not argue his waiver was made involuntarily, unknowingly, or unintelligently. *Id.* at 147.

And as to the last matter questioning subject matter jurisdiction for failure to allege aggravating circumstances in the indictment, the S.C. Supreme Court ruled the court of general session had jurisdiction to sentence the defendant to death because:

a.) The Court expressly noted in both Apprendi and Ring that the cases did not involve challenges to state indictments;

b.) The Fourteenth Amendment has not been construed to incorporate the Fifth Amendment's Presentment or Indictment Clause;

c.) Under South Carolina law, aggravating circumstances need not be alleged in an indictment for murder, as the aggravating circumstances listed in S.C. Code § 16-3-20(C)(a) are "sentencing factors," not elements of murder; and,

d.) The circuit court had subject matter jurisdiction to sentence Appellant to death.

In State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005), the relevant issues with regard to the matters before this Court were formulated as follows:

II. In light of the United States Supreme Court's decision in Ring v. Arizona, is the statutory provision allowing

a judge, sitting alone, to sentence to death a defendant who pleads guilty a violation of a defendant's Sixth Amendment right to a jury trial?

III. Did the trial judge lack subject matter jurisdiction to sentence Appellant to death because the murder indictment did not identify any statutory circumstances of aggravation necessary to expose Appellant to a punishment greater than life in prison?

In Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005) the South Carolina Supreme Court upheld the procedure and sentence imposed on the grounds that:

> At the June 2001 plea hearing, the trial judge questioned Appellant at length about the various constitutional rights he would waive by pleading guilty. The trial judge specifically and repeatedly informed Appellant that he would waive the right to a jury trial in not only the guilt phase, but also in the sentencing phase; that the jury's verdict recommending death would have to be unanimous, and the refusal of one juror to agree to the death penalty would result in a sentence of life imprisonment.
>
> . . ..
>
> Appellant was informed that by pleading guilty he waived his right to a jury trial on both guilt and sentencing. He does not argue his waiver was made involuntarily, unknowingly, or unintelligently. . .. Appellant was not deprived of his right to a jury trial. *Id.* at 417-18.

Of particular interest is the rather emphatic observations of the South Carolina Supreme Court that:

> The constitutionality of Section 16-3-20(B) does not rest on a defendant's desire for a particular outcome, his sense of remorse, or his rationale for committing a particular crime. Instead, it rests, *inter alia*, on whether the statute comports with the right to a jury trial as established by this Court and the United States Supreme Court in interpreting the state

> and federal constitutions. *See* U.S. Const. amend VI; S.C. Const. art. I, § 14. Accordingly, we adhere to our opinion in Downs and reject Appellant's arguments for the reasons expressed in that case. Section 16-3-20(B) is not unconstitutional in light of Ring, *supra*, and a capital defendant may be sentenced only by a judge pursuant to that statute ***after knowingly and voluntarily waiving his right to a jury trial.*** Id. at 418-19 (***emphasis added***).

The distinction between the Patterson and Truesdale cases, and the Downs and Crisp cases are stark and monumental. In the former the sole emphasis was on whether the respective defendants had entered a "conditional plea." In Truesdale, the Court clarified that a "conditional plea" was one in which a defendant attempted to reserve and not waive all and any attendant constitutional rights.

In contrast, both in Downs as well as in Crisp, the focus of the Court's inquiry and ruling were that each of those defendants had, in-fact, knowingly and intelligently waived their rights to have a jury determine their sentence, and could only be sentenced by a judge after having done so. [9] Here, we have quite a different situation.

Mr. Bryant wishes to admit his guilt to the charges for which he has been indicted. In doing so, he is prepared and will waive his right to have a jury trial for purposes of determining the necessary facts constituting those charges. On the other hand, however, he is unwilling to forfeit his right to have a jury determine those additional and separate

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[9] "Appellant was informed that by pleading guilty he waived his right to a jury trial on both guilt and sentencing. He does not argue his waiver was made involuntarily, unknowingly, or unintelligently." Downs at 147; "Appellant was informed that by pleading guilty he waived his right to a jury trial on both guilt and sentencing. He does not argue his waiver was made involuntarily, unknowingly, or unintelligently. . .. " Crisp at 417-18

facts or factors impacting on the penalty which may be imposed by the trial court or by the jurors themselves as the case may be as a consequence of his guilty plea.

Further, Mr. Bryant maintains it a denial of his Constitutional rights to trial by jury and to due process for the State of South Carolina to condition his waiver or decision to plead guilty to the charges for which he has been indicted upon a waiver of his Constitutional rights to present evidence in mitigation to a jury of his peers or to have such a jury determine his sentence.

RIGHT TO TENDER GUILTY PLEA AS EVIDENCE IN MITIGATION.

A defendant on trial for his life in a capital case has a 14th and a 6th Amendment right to present a full and complete defense. As part and parcel of a full and complete defense, a Defendant has an 8th Amendment right to present any and all evidence in mitigation during a capital sentencing proceeding.

Recent studies relying on extensive interviews of more than 150 South Carolinians who had served as capital jurors establish that, when choosing between a death sentence and life in prison, many capital jurors place significant weight on a defendant's remorse and acceptance of responsibility for his crimes. Theodore Eisenberg et al., How the Death Penalty Works: Empirical Studies of the Modern Capital Sentencing System, 83 CORNELL L. REV. 1599 (1998); Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 COLUM. L. REV. 1538 (1998); Scott E. Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty, 83 CORNELL L. REV. 1557 (1998). "In short, if jurors believed that

the defendant was sorry for what he had done, they tended to sentence him to life imprisonment, not death." Eisenberg, 83 CORNELL L. REV. 1599, 1633 (1998). Similarly, interviewed jurors were 39.8% "... more likely to vote for death if the defendant expressed no remorse for his offense." Garvey, 98 COLUM. L. REV. 1538, 1560 (1998).

The most effective way in which a capital defendant can demonstrate his remorse (i.e., his acceptance of responsibility for the crimes he committed) is to plead guilty and not deny his moral and legal culpability for the crimes. Alternatively, by pleading not guilty, the defendant sends a strong signal to the jury that he denies responsibility for the crimes and will attempt to show the court and jury that he is innocent. A strategy of denial is extraordinarily dangerous for a capital defendant, as ". . . juries in denial defense cases imposed death sentences twice as often as they imposed life sentences, while juries in admission defense cases chose a life verdict over a death sentence by a three-to-two ratio." Sundby, 83 CORNELL L. REV. 1557, 1575 (1998). The studies clearly show that remorse and acceptance of guilt are viewed as powerful mitigation evidence by capital jurors.

Because "[t]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest of capital cases, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant offers as a basis for a sentence less than death," Lockett v. Ohio, 438 U.S. 586, 604-605 (1978)(footnote omitted, emphasis in the original), a capital defendant should be permitted to enter a guilty plea that also serves as mitigating evidence of his acceptance of responsibility.

Similarly, the Sixth Amendment's right to trial by jury has been one of this nation's most revered legal guarantees. ". . . [T]he accused shall enjoy the right to a . . . trial, by an impartial jury . . ." U.S. CONST. amend. VI. "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). In Witherspoon v. Illinois, 391 U.S. 510, 519 (1968), the Supreme Court recognized that juries play a particularly important role in capital cases, "a jury that must choose between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life or death." (footnote omitted).

Though a defendant may knowingly waive his Sixth Amendment right to a jury trial, no defendant should be forced to do so only to preserve his constitutional right to present mitigating evidence of acceptance of responsibility. In Simmons v. U.S., 390 U.S. 377, 394 (1968), the Supreme Court protected the defendant's Fourth Amendment right to challenge an unlawful search while simultaneously protecting his Fifth Amendment right against self-incrimination despite an admission of possession of the item discovered in the search, an admission necessary to establish an interest in the seized property. The Supreme Court stated, ". . . we find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* It is no less intolerable to force a capital defendant to surrender his right to a jury trial in order that he preserve his right to present mitigation evidence through a guilty plea demonstrating his acceptance of responsibility.

Through judicial sentencing of capital defendants that plead guilty, the South Carolina statute compels a capital defendant to elect either to offer persuasive evidence that may convince a jury to save his life or to have a jury of his peers determine if he lives or dies. This statute may only survive Constitutional challenge if the policies underlying the two constitutional rights involved are not appreciably impaired. McGautha v. California, 402 U.S. 183, 213 (1971) (forcing a choice between constitutional rights is impermissible if ". . . compelling the election impairs to an appreciable extent any of the policies behind the rights involved.")

Lockett's right to offer mitigation evidence is grounded in the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process of law. The Lockett rule, which has repeatedly been reaffirmed by the Supreme Court, see, e.g., Skipper v. South Carolina, 476 U.S. 1 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), is vital to our judicial system and serves to prevent a defendant from being sentenced to death by a jury that was not permitted to consider the full range of mitigating evidence. These important constitutional values are clearly impaired when a capital defendant is prevented from offering supporting evidence if he wishes to exercise his Sixth Amendment right to a trial by jury.

The right to a jury trial is founded on the premise that a jury of one's peers is a better representation of the will and wisdom of the community than is a single arbiter. "If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Forcing a defendant fighting for his

life to give up the wisdom and will of the jury, the "conscience of the community," so that he may offer evidence making a death sentence less likely directly impairs the policies underlying the rights to due process of law and to a jury trial. "The Framers [of our Constitution] would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State. Blakely at 131-314 (internal citations omitted).

A jury may presume a defendant is unwilling to take responsibility for his actions when that defendant pleads not guilty. See Eisenberg, 83 Cornell L. Rev. 1599 (1998). This presumption is materially inaccurate when the defendant is statutorily forced to plead not-guilty to retain his right to a jury trial. The Supreme Court has stated that a jury cannot sentence a defendant to death based on materially inaccurate evidence. Johnson v. Mississippi, 486 U.S. 578, 590 (1988)(a capital jury's consideration of inaccurate information violates the Eighth Amendment and constitutes error which "extends[s] beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise inadmissible," implicating instead the reliability concerns articulated in the Court's capital sentencing jurisprudence). Thus, a death sentence premised on the materially inaccurate evidence that the defendant refused to accept responsibility for his actions is a violation of the Eighth Amendment.

Additionally, there is no legitimate state interest in refusing to allow a capital defendant to both plead guilty and have a jury determine the appropriate sentence. A guilty plea does not prevent the

prosecution from offering evidence regarding the defendant's role in the crime at sentencing, but it does allow the defendant to accept moral and legal responsibility for his actions. No defendant should be forced to choose between two Constitutional rights when he feels each independently may make it more likely that his life is spared, particularly when the forced choice offers so little to gain and so much to lose.

WHEREFORE, your Defendant respectfully requests, moves and prays this Court issues its Orders Determining the Mode of Trial in the Capital Proceeding, permitting your Defendant to exercise all and his full rights to enter a plea of guilty and to have a jury of his peers determine the ultimate sentence to be imposed.

Respectfully Submitted By: James H. Babb

James H. Babb
Jack D. Howle, Jr.
Counsel For Defendant

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SUMTER, SOUTH CAROLINA

DATED: APRIL 3, 2008

(108)

STATE OF SOUTH CAROLINA	**COURT OF GENERAL SESSIONS**
COUNTY OF SUMTER	**THIRD JUDICIAL CIRCUIT**
	DOCKET No.: 2006-GS-43-699
The STATE OF SOUTH CAROLINA **- vs -** Stephen Corey **BRYANT**, Defendant.	**TENDER OF GUILTY PLEA** {Reserving Right to Jury Determination of Sentence}

I, Stephen Corey Bryant, have not taken any medication not prescribed by my doctor, nor have I consumed any alcohol, or illegal drugs within the last 96 hours. I am not sick, nor under duress or any other mental infirmity.

I speak, read, write, and understand the English language; and, have read this document in its entirety. I have also discussed my decision to tender a plea of guilty and have a jury determine my sentence with my lawyer(s) in detail and at length. All of my questions have been satisfactorily answered.

I have received a written copy of the charges against me in this case. I have been made aware of and am fully cognizant of the nature of the charges pending against me, and do hereby declare that I fully understand I have a right to trial by jury on each, every, and all of the specific allegations and counts of the foregoing indictment against me, which are as follows:

COUNT ONE - MURDER.

That STEPHEN COREY BRYANT did in Sumter County on or about October 11, 2004, feloniously, wilfully and with malice aforethought, either expressed or implied, kill one Willard Tietjen by means of shooting him with a .40 caliber handgun, and that the said Willard Tietjen did die as a proximate result thereof.

COUNT TWO - ARMED ROBBERY.

That STEPHEN COREY BRYANT did in Sumter County on or about October 11, 2004, violate Section 16-11-330(A) of the Code of Laws of South Carolina (1976), as amended, while armed with a deadly weapon, to-wit: a.40 caliber handgun, did feloniously take from Willard Tietjen in the presence of Willard Tietjen, by means of force or intimidation goods or monies of the said Willie Tietjen, such goods or monies being described: currency, change, camera, knife, jewelry, tools, cell phone and other personal belongings.

COUNT THREE - POSSESSION OF A STOLEN HANDGUN.

That STEPHEN COREY BRYANT in Sumter County on or about October 11, 2004, was in possession of a stolen handgun, to-wit: a Smith and Wesson Model 4046 semi-automatic .40 caliber pistol stolen from James Allen Ammons on or about October 8,2004, in violation of Section 16-23-30(c), Code of Laws of South Carolina (1976), as amended.

These charges have been explained to me by my lawyer(s), and I understand what it is the state would be required to prove beyond a reasonable doubt in order to obtain a conviction against me as to each charge should I elect to have a trial by jury. More specifically, I understand and acknowledge that in order to obtain and sustain a conviction on the foregoing charges/counts against me, the state would have to present evidence sufficient to convince a jury that I did, beyond a reasonable doubt, commit the offenses of which I am accused, to wit:

a.) MURDER being defined as the unlawful killing of any person with malice aforethought, either express or implied;

b.) ARMED ROBBERY being defined as a robbery committed while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, or either by action or words, alleging to be

armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon; and,

c.) POSSESSION OF A STOLEN HANDGUN being defined as knowingly buying, selling, transporting, pawning, receiving, or possessing any stolen handgun or one from which the original serial number has been removed or obliterated.

My lawyers have also explained to me the possible punishments that may result as a consequence of my guilty plea. More specifically, I have been advised and understand that:

MURDER: A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. I understand and acknowledge that the terms "life imprisonment" and "imprisonment for life" means until my death, with no hope or possibility of parole.

If, however the State seeks the death penalty, as it does in my case, then and in the event and a statutory aggravating circumstance is found beyond a reasonable doubt and a recommendation of death is not made by the jury, the trial judge must impose a sentence of life imprisonment.

Because the State has elected to seek the death penalty, I am entitled to have a separate a separate sentencing proceeding. In that sentencing proceeding, if a statutory aggravating circumstance is found by the jury, I must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found by the jury, then I must be sentenced to either life imprisonment or else a mandatory minimum term of imprisonment for thirty (30)years.

I understand that "robbery while armed with a deadly weapon" (more commonly referred to as "armed robbery) is a statutory aggravating circumstance. Therefore and because I am tendering a plea of guilty to that offense as well as to murder, it could serve as a statutory aggravating circumstance and result in the jury deciding I should be sentenced to death.

ARMED ROBBERY: A person who is convicted of or pleads guilty to armed robbery in violation of S.C. Code § 16-11-330(A), must be imprisoned for a mandatory minimum term of not less than ten (10) years or more than thirty (30) years, no part of which may be suspended or probation granted. A person pleading guilty to this offense is not eligible for parole until the person has served at least seven years of the sentence.

POSSESSION OF STOLEN HANDGUN: A person who is convicted of or pleads guilty to knowingly possessing a stolen handgun in violation of S.C. Code § 16-23-30(c), is guilty of a "Class F" felony and may be sentenced to a period of incarceration of not more than five (5) years.

CALCULATION OF TOTAL SENTENCE: My lawyers have advised me and I understand there is no requirement that any of my sentences run concurrently - that is, that time be counted all together on each sentence just as if it were one total sentence. My lawyers have advised me and I understand that the Court could and likely will require that my sentences run consecutively – that is one after the other ,and without any credit being given to any one sentence for time served on any other sentence.

I have received a copy and have an opportunity to review the discovery the State has provided to my lawyers to date. I have explained and have had opportunity to explain my side of the story to my lawyers, including possible defenses I may have. I have explained to my lawyers all the facts I know or can call recall about the case.

I understand the state is seeking a penalty of death in my case; and, that should my request to plead guilty and be sentence by a jury be granted, a jury could in-fact sentence me to death. I also understand that should I plead guilty and leave my sentencing to a judge, I could be sentenced to death. Furthermore, I understand that should I plead innocent, and be found guilty by a jury, I could be sentenced to death.

Upon the basis of the empirical and statistical research which exists I understand that should I plead innocent, but then be found guilty by a jury, there exists an increased chance (i.e. a statistically significant correlation) that I would more likely be subjected to a sentence of death by that jury than I would if my request to plead guilty and have my sentence determined by the jury be granted.

I know I have the right to plead not guilty and to have a speedy and public trial by jury; and, that under the laws of South Carolina that I have the right to plead guilty and be sentenced by the Court. Nevertheless and upon advice of counsel, I maintain that the State of South Carolina can not require that I forfeit my right to be sentenced by a jury, should I desire, as I do, to enter a plea of guilty while maintaining and insisting upon exercising my right to have a jury determine all and such additional facts as may affect, impact, or determine my ultimate sentence in this case.

Furthermore; I have had explained to me and understand that I have:

d.) The right to plead not guilty, or having already so pleaded, to persist in that plea;

e.) The right to a jury trial;

f.) The right to be represented by counsel - and if necessary to have the court appoint counsel to assist me at trial and at every other stage of the proceedings;

g.) The right at trial to confront and cross-examine adverse witnesses;

h.) The right at trial to be protected from compelled self-incrimination;

i.) The right at trial to testify and present evidence; and,

j.) The right at trial to compel the attendance of witnesses on my behalf; and,

I understand that by tendering a plea of guilty as charged, the acceptance of that plea of guilty would constitute a my waiver of those trial rights and any defenses I may have, or could have alleged at trial, subject, however, to my herein made reservation of my right to have a jury determine my sentence.

I further understand and also acknowledge that before the court accepts my plea of guilty, it can and may require that I be placed under oath, personally and in open court, and that I address, determine, and acknowledge that I understand each and every of the foregoing rights, in addition to each and all of the following:

1.) That should I be placed under oath and questioned by the Court, the government may use any false statements I knowingly make against me in a prosecution for perjury or false statement;

2.) That before accepting a plea of guilty, the court must address me personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises made pursuant to a negotiated plea agreement); and,

3.) That before accepting a plea of guilty, the court must determine that a substantial factual basis exists for the plea, which is a matter I hereby declare and admit as true.

I, Stephen Corey Bryant do hereby declare under penalty of perjury that the foregoing is true and correct.

STEPHEN COREY BRYANT

(114)

RECEIVED
APR 16 2008
S.C. SUPREME COURT

The State of South Carolina
In the Supreme Court

Case No. 2006-GS-43-699

In the matter of the State of South Carolina
- vs-
Stephen Corey Brant, Petitioner.

PROOF OF SERVICE

I certify that I have served the Petition for a Writ of Certiorari on C. Kelly Jackson, Third Circuit Solicitor, by delivering a true copy thereof to the office of The Third Circuit Solicitor, located at:

Sumter County Courthouse
Room 201
141 North Main Street
Sumter, South Carolina 29150

and leaving the same:

(X) With the clerk or other person in charge thereof.

SO CERTIFIED BY: CS Spivey
CARLEY S. SPIVEY

SUMTER, SOUTH CAROLINA

DATED: APRIL 11, 2008

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2007-084-197

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April 21, 2008

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211-1330

RE: Motion for Stay of Proceedings
in Lower Court
In re: State v. Bryant
Docket No.: 2006-GS-43-699

Dear Mr. Shearouse:

Please find enclosed for filing an original and six (6) copies each of our Petition for a Stay of Proceedings in the Lower Court, together with Proof of Service in the foregoing matter. This being a criminal matter in which the Petitioner has been determined to be indigent, no filing fee is being remitted.

I believe you will find these documents self-explanatory. Should you or your office have any questions or require additional information, however, please contact me at your earliest convenience. With kindest regards,

Sincerely,

James H. Babb

James H. Babb
Jack D. Howle, Jr.
ATTORNEYS FOR PETITIONER

JHB/jb

Enclosures
– Motion for Stay
– Proof of Service

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The State of South Carolina
In the Supreme Court

Case No. 2006-GS-43-699

In the matter of the State of South Carolina
- vs-
Stephen Corey Brant, Petitioner.

MOTION FOR STAY
{Of Proceedings in Lower Court}

Petitioner herein previously filed and served a proper Petition (currently pending) requesting that this Honorable Court act upon and exercise its original jurisdiction for purposes of ruling upon various Constitutional issues of significant import in this capital case. Since filing and service of that Petition, Petitioner has received notification from the Court that the prosecution (i.e. opposing counsel) shall have until the 28th day of April, to respond to the Petition; after which, a decision on the Petition will be rendered.

Trial counsel received written notification on February 19th, 2008 that trial of this matter had been set to commence April 28, 2008. The relevant motion of Petitioner[1] was filed for record and served on March 3, 2008. Being opposed by the prosecution, it was considered, ruled upon and verbally denied by the trial court on April 3, 2008. The pending Petition followed.

Petitioner now moves this Honorable Court for a stay of proceedings in the lower Court for the following reasons:

[1] Styled as a "Motion for Order to Determine Mode of Trial," was attached to and incorporated by reference in the Petition currently pending before this Court.

1. The established trial date (i.e. 4/28/08) effectively precludes and renders moot any fair, reasoned, or rationale consideration of the very substantial Constitutional issues raised by way of the pending Petition, prior to commencement of trial itself;

2. Trial counsel simply can not now effectively represent, nor should they be expected to somehow effectively represent and formulate a trial strategy which simultaneously preserves the defendant's various and full Constitutional rights as defined by the United States Supreme Court (e.g. the defendant's Sixth and Eight Amendment rights at issue herein);

3. At this late juncture, irrespective of how this Court Rules, trial counsel simply can not now, and certainly could not during trial, prepare for or create a proper strategy of representation, nor provide the defendant with effective representation of counsel as required under the United States Constitution;

4. Until such time as the South Carolina Supreme Court, or alternatively the United States Supreme Court, has definitively ruled respecting the right of South Carolina capital defendant to enter a plea of guilty while reserving his unequivocal Sixth Amendment right to have a jury determine any and all additional facts serving as a condition precedent to imposition of a greater penalty than that authorized by reason of the indictment alone, as is consistent with the previously cited controlling United States Supreme Court decisions at issue herein,[2] trial of this matter should be stayed; and,

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[2] More specifically, the so-called "Apprendi line of Cases," which began with the dissent in Almendarez-Torres v. U.S., 523 U.S. 224 (1998); includes Jones v. U.S., 526 US 227 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000); Harris v. U.S., 536 U.S. 545 (2002); Ring v. Arizona, 536 U.S. 584 (2002); Blakely v. Washington, 542 U.S. 296 (2004); U.S. v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 549 US, ____ (2007); and arguably culminating, even if only for the moment with, with Rita v. U.S., 551 U.S. ___ (2007).

5. It is in the interest of judicial economy and of preservation of this State's scare judicial resources that this Court clarify it's post Apprendi, rulings; and, squarely now address the issue of whether or not the South Carolina Death Penalty Scheme can or should survive Constitutional scrutinity in light of the "Apprendi line of cases," particularly, Blakely v. Washington, 542 U.S. 296 (2004); and, Cunningham v. California, 549 US, ____ (2007). For if not, as Petitioner maintains, all expenses associated with this trial and all expenses associated with all subsequent and potentially multiple appeals in this and related cases will have been incurred for naught.

WHEREFORE, your Petitioner once again respectfully submits "a question of significant public interest" exists which should be expediently considered and judiciously addressed by this Honorable Court; without further delay or the otherwise unnecessary expenditure of scarce judicial resources at the trial level; and, in consideration thereof, respectfully requests that all and any further proceedings at the trial level be stayed and held in abeyance pending a full and fair consideration of the important and complex Constitutional issues herein raised and joined .

Respectfully Submitted By: James H. Babb

James H. Babb
Jack D. Howle, Jr.
Counsel For Defendant

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SUMTER, SOUTH CAROLINA

DATED: APRIL 21, 2008

The State of South Carolina
In the Supreme Court

Case No. 2006-GS-43-699

In the matter of the State of South Carolina
- vs-
Stephen Corey Brant, Petitioner.

PROOF OF SERVICE

I certify that I have served the Motion for a Stay of Proceedings in the Lower Court on C. Kelly Jackson, Third Circuit Solicitor, by this day depositing a true copy thereof into the United States Mail, postage prepaid, and addressed as follows:

C. Kelly Jackson, Solicitor
Sumter County Courthouse
Room 201
141 North Main Street
Sumter, South Carolina 29150

SO CERTIFIED BY: CS Spivey
CARLEY S. SPIVEY

SUMTER, SOUTH CAROLINA

DATED: APRIL 21, 2008

SEVEN EAST HAMPTON AVENUE
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TELEPHONE: (803) 775-3060

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HENRY MCMASTER
ATTORNEY GENERAL

RECEIVED
MAY 5 2008
S.C. SUPREME COURT

May 1, 2008

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: The State v. Stephen Corey Bryant

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Respondent's ***Return to Petition for Writ of Certiorari in its Original Jurisdiction*** in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: James H. Babb, Esquire
Jack D. Howle, Jr., Esquire

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RECEIVED

MAY 5 2008

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN ITS ORIGINAL JURISDICTION
2006-GS-43-699

In the Matter of:
STATE OF SOUTH CAROLINA
v.
STEPHEN COREY BRYANT

RETURN TO PETITION FOR WRIT OF CERTIORARI IN ITS ORIGINAL JURISDICTION

The Respondent, State of South Carolina, through the Attorney General of South Carolina and Solicitor of the Third Judicial Circuit, pursuant to SCACR Rule 229 makes a Return to the Petition for Writ of Certiorari received by the Solicitor and by the Court on April 11, 2008.[1] In the Petitioner, Bryant, through counsel James H. Babb and Jack D. Howle, Jr., relies upon South Carolina Constitution, Article V, § 5 ("The Supreme Court shall have the power to issue writs or orders of injunction, mandamus, quo warrants, prohibition, certiorari, habeas corpus, and other original and remedial writs."), to request this Court to issue a "writ of certiorari." In particular, Bryant asks this Court in its original jurisdiction, not appellate jurisdiction, [no notice of appeal has been filed] to consider the following stated issues:

I. Whether the State of South Carolina may, pursuant to statute or otherwise, impose as a condition precedent to

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[1] This Return, made with the understanding that Rule 229 applied to the response giving Respondent twenty (20) days from the date of service to make its Return. Below-signed counsel was not aware of an intervening letter dated April 14, 2008 directing a response be made within ten (10) days. Respondent's counsel has been advised by the Solicitor that defense counsel contacted him and advised him that they had no objection to an extension request to file the Return.

acceptance of a plea of guilty to a capital murder charge, a requirement that a defendant unequivocally waive all rights to have a jury determine the existence or absence of any statutory aggravating or mitigating factors, and/or the right to decide whether such a defendant should be sentenced to death, life without any hope of parole, or otherwise;

II. Whether, State v. Truesdale, 278 S.C. 368, 369, 296 S.E.2d 528 (1982); has been implicitly overruled by the Apprendi line of cases, and/or subsequent decisions of the South Carolina Supreme Court;

III. Given the quantitative and qualitative research available clearly establishing a statistically significant juror bias in favor of death against defendants who maintain innocence during the guilt phase of a capital trial, whether it would be fundamentally unfair and therefore a violation of the Petitioner's Due Process rights to deny him the opportunity to plead guilty and have a jury determine his sentence on the capital murder charge; and/or,

IV. Whether the Apprendi line of cases now requires that any and all aggravating factors set forth in a notice of intent to seek the death penalty be first submitted to a grand jury, charged in an indictment, and proved to a jury of a defendant's peers beyond a reasonable doubt.

I.

A Right to Certiorari Has Not Been Established

The common law writ of certiorari in the Court's original jurisdiction has been held proper for two limited purposes: (A) ascertaining that a lower court or body performing judicial functions has acted within jurisdictional limitations; or (B) correcting unlawful procedure in the lower court. 14 Am.Jur.2d Certiorari § 2. Stated another way, a writ of certiorari is to keep an inferior tribunal within the scope of its powers, and one of the most important functions of the

writ is to determine whether the inferior court has acted without jurisdiction. City of Columbia v. S.C. Public Service Commission, 242 S.C. 528, 131 S.E.2d 705 (S.C. 1963). Further and importantly, common law certiorari is not a substitute for an appeal. Feldman v. S.C. Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943). The writ issues primarily are to test jurisdiction and is not a means to correct abuses of discretion. City of Columbia, supra.

It has been stated that although the Supreme Court will not accept matters on a writ that can be entertained at trial or on appeal, a writ of certiorari may be issued when exceptional circumstances exist. In Re: Breast Implant Product Liability Litigation, 331 S.C. 540, 503 S.E.2d 445 (1998), the Court pointed to its conclusion that there were "novel questions of law concerning issues of significant public interest" contained in the litigation and that "a decision by this Court would serve the interests of judicial economy by eliminating numerous inevitable appeals raising those issues." Id.

However, this Court has held that the constitutionality of a statute cannot be determined on a petition for writ of certiorari. Floyd v . Thornton, 220 S.C. 414, 68 S.E.2d 334 (1951). Certiorari does not lie where the remedy by appeal is available. State v. Moore, 54 S.C. 556, 32 S.E. 700 (1899). Further, the Court has stated that it will not issue a writ of certiorari to relieve a circuit court's burden of deciding difficult issues in high profile cases. In Re Breast Implant Product Liability, supra.

It has been stated that if the Respondent can show that the Petitioner has an alternative remedy, the extraordinary writ will not issue. S.C. Board of Examiners of Optometry v. Cohen, 256 S.C. 13, 180 S.E.2d 650 (1971); Feldman, supra. For the common law writ, South Carolina requires the absence of a right of appeal. South Carolina Appellate Practice Handbook, S.C. Bar

(1985), p. VII-23, citing Cohen, supra, Wagner v. Ezell, 249 S.C. 421, 154 S.E.2d 731 (1967), Feldman, supra, Ex Parte Childs, 12 S.C. 111 (1978).

1. There is no Right to Plead Guilty in South Carolina

Underlying his perceived constitutional claim is that the mere proffer of a guilty plea is sufficient to establish his claim. Contrary to the suggestion, there is no "right" to enter a guilty plea in South Carolina. Plainly then, there is no enforceable right to plead guilty. South Carolina Rule of Criminal Procedure, Rule 14(b) concerning a trial by jury states:

> (b) Waiver. A defendant may waive his right to a trial by jury only with the approval of the solicitor and the trial judge.

There has been no consent to the waiver or entry of any guilty plea by either the solicitor or the trial judge in Mr. Bryant's case. Thusly, there is no guilty plea by Mr. Bryant.

In State v. Burgin, 255 S.C. 237, 178 S.E.2d 325 (1970), the Court concluded that the Federal Constitution does not encompass any right to waive a jury trial, relying upon U.S. v. Jackson, 390 U.S. 570 (1968) and Singer v. U.S., 380 U.S. 24 (1965). Citing Singer, the Court stated:

> A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury - the very thing the Constitution guarantees him. 380 U.S. 24, 36, 85 S.Ct. 783, 790, 13 L.Ed.2d 630 (1965).

State v. Burgin, supra. ("The defendant was given an impartial trial by jury as guaranteed by the Constitution and was not in any way prejudicial by refusal of the trial judge to try the case

without the jury.").

In State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (1999), the Court of Appeals held that the trial court was not required to accept an alleged plea agreement between a defendant and the State. As stated therein

> It is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced. State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct.App. 1996)("Easler I"), aff'd as modified, State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997)("Easler II"). However, an appellant has no constitutional right to plea. Id. *An accused has the right to trial by an impartial jury. Conditioning a waiver of this right on the consent of the prosecutor and the trial judge would create no constitutional impediment since the result of their refusal to consent is that the accused is subject to trial by an impartial jury, that to which he is constitutional impediment exists in a trial judge's refusal to accept a defendant's guilty plea since the result of his refusal is that the accused is subject to a trial by an impartial jury, which is a constitutional guarantee).* We find no error.

State v. Kerr, supra.

The lessons of Rule 14, Burgin and Kerr are consistent - there is no right in S.C. to enter a guilty plea. Absent any right, the existence of a controversy falls. Certiorari is not authorized.

2. There is a mandatory statutory requirement under Section 16-3-20 that when a guilty plea is accepted, the trial judge sentences the Appellant in the sentencing proceeding.

The Court has previously held that the pertinent language of S.C.Code Ann. §16-3-20(B)[2]

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[2] In its pertinent part, § 16-3-20(B) states:

"When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or

"[I]f trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge" *requires* sentencing by the trial judge, not a jury, when jury trial has been waived or the defendant has entered a guilty plea, State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982)[3]; State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982)[4]. In both Patterson and Truesdale, the Court interpreted in favorem vitae, that

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life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty- four hours unless waived by the defendant. *If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge.* In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. (*Emphasis added*)

[3]Addressing the guilty plea and jury sentencing ex mero motu, this Court, in Patterson, relying upon Section 16-3-20 concluded:

> We hold appellant's guilty plea and sentence must be vacated because a significant inducement for entering the plea was the condition that the jury determine punishment, an impermissible condition under the statutory mandate that the trial judge alone determines punishment when a defendant pleads guilty to murder.

State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 266 (S.C.,1982). The Court sua sponte vacated the conviction and death sentence and remanded for a new trial based upon the statutory violation.

[4] In Truesdale, this Court stated:

> "This Court has recently held that section 16-3-20(B), Code of Laws of South Carolina, 1976 (Cum.Supp.1981), requires sentencing by the trial judge, not a jury, when jury trial has been waived or the defendant has entered a guilty plea, *State v. Patterson,* 278 S.C. 319, 295 S.E.2d 264 (1982). We are compelled by that holding to vacate this appellant's plea, for in this case, as in Patterson, the sentencing phase of a capital proceeding was improperly tried to a jury."

State v. Truesdale, 278 S.C. 368, 369, 296 S.E.2d 528, 529 (S.C.,1982).

the agreeing to allow a jury sentencing after a guilty plea violated the mandates of the statute and was against legislative policy.

More recently, the Court addressed the guilty plea capital situation in State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005) and State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004). In Downs, the Court rejected the precise claim he is asserted in his petition:

> Appellant asserts *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), renders unconstitutional the requirement in S.C.Code Ann. § 16-3-20(B) (2003) that the sentencing proceeding be held before the judge when a defendant pleads guilty to murder. We disagree.
>
> The capital-sentencing procedure invalidated in *Ring* does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz.Rev.Stat. § 13-703© (2001) (amended 2002); *Ring,* 536 U.S. at 597, 122 S.Ct. at 2437, 153 L.Ed.2d at 569. In South Carolina, conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C.Code Ann. § 16-3-20(B) (2003); *Sheppard v. State,* 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004).
>
> In any event, *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. *See, e.g., Leone v. Indiana,* 797 N.E.2d 743, 749-50 (Ind.2003); *Colwell v. Nevada,* 118 Nev. 807, 59 P.3d 463, 473-74 (2003); *Illinois v. Altom,* 338 Ill.App.3d 355, 362, 272 Ill.Dec. 751, 788 N.E.2d 55, 61 (5 Dist.), *app. denied,* 204 Ill.2d 663, 275 Ill.Dec. 77, 792 N.E.2d 308 (2003).
>
> Appellant was informed that by pleading guilty he waived his right to a jury trial on both guilt and sentencing. He does not argue his waiver was made involuntarily, unknowingly, or unintelligently. *See Burnett v. State,* 352 S.C. 589, 576 S.E.2d 144 (2003) (discussing waivers of constitutional rights). Appellant was not deprived of his right to a jury trial.

State v. Downs, 361 S.C. 141, 146-147, 604 S.E.2d 377, 380 (S.C. 2004). [5] The Court also

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[5]Only six other states appear to have addressed this issue. See, e.g. and compare, Colwell v. Nevada, 59 P.3d 463 (Nev. 2002); Leone v. Indiana, 797 N.E.2d 743 (Ind.2003); and Illinois v. Altom, 788 N.E.2d 55 (Ill. 2003)(potential capital case) with Louisiana v. Louviere, 833 So.2d 885 (La. 2002); S.D. v. Piper, 709 N.W.2d 783, 803 (S.D. 2006) and S.D. v. Page, 709 N.W.2d

rejected a challenge to the constitutionality of Section 16-3-20(B) for the same reasons in *State v. Wood,* 362 S.C. 135, 607 S.E.2d 57, 61 (2004) (citing *Downs, supra*).

In Crisp, the Court held, after reconsideration that:

> We granted Appellant's motion to argue against the precedent of *Downs.* At oral argument, Appellant contended his case is factually distinguishable from *Downs* because, unlike the defendant in that case, Appellant sought a life sentence; he exhibited remorse for his crimes; and he offered a reason for his actions based on his statements to police that he murdered Blackwell and Watson, and tried to murder Gambrell, because he believed they were drug dealers who intended to harm his family.
>
> We do not find persuasive Appellant's effort to distinguish his case from *Downs.* The constitutionality of Section 16-3-20(B) does not rest on a defendant's desire for a particular outcome, his sense of remorse, or his rationale for committing a particular crime. Instead, it rests, *inter alia,* on whether the statute comports with the right to a jury trial as established by this Court and the United States Supreme Court in interpreting the state and federal constitutions. *See* U.S. Const. amend

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739, 762 (S.D. 2006); and Colorado v. Montour, 157 P.3d 489 (Colo. 2007). This conflict has its genesis in State death penalty statutes that mandate judicial sentencing after the entry of a guilty plea. For those States that have upheld judge-only sentencing after entry of a guilty plea, the reasoning has been founded on the premise that the capital defendant has waived any jury-trial right by virtue of the entry of the guilty plea. Colwell, 59 P.3d at 473 ("We conclude that Ring is not applicable to Colwell's case because, unlike Ring, Colwell pleaded guilty and waived his right to a jury trial."); Leone, 797 N.E.2d at 750 ("With a plea of guilty, Leone forfeits claimed entitlement to certain rights including the right to a jury trial."); and Altom, 788 N.E.2d at 59 ("There is no validity to the complaint that a defendant did not 'know' that he was waiving the right to have the State prove enhancing factors beyond a reasonable doubt, because by pleading guilty the defendant releases the State from proving anything beyond a reasonable doubt."). For those States overturning death penalty statutes that mandate judicial sentencing after the entry of a guilty plea, the reasoning has been founded on the premise that a capital defendant retains the right to a jury trial for sentencing after entry of a guilty plea and/or that a capital defendant has a right to present the guilty plea to a jury as mitigation. Louviere, 833 So.2d at 894 ("[D]enying a Defendant the choice to plead guilty arguably would impermissibly deprive the Defendant, per the Federal Constitution, of his strategic choice to acknowledge his crime and thereby appear remorseful before his jury."); Piper, 709 N.W.2d at 803 ("[U]nder Ring, a capital sentencing scheme would be unconstitutional if it prevented a Defendant who pleaded guilty from having alleged aggravating circumstances found by a jury."); Montour, 157 P.3d at 489 ("Once a capital Defendant enters a guilty plea, he retains the Sixth Amendment right to jury sentencing on the facts essential to the determination of death eligibility.").

> VI; S.C. Const. art. I, § 14. Accordingly, we adhere to our opinion in *Downs* and reject Appellant's arguments for the reasons expressed in that case. Section 16-3-20(B) is not unconstitutional in light of *Ring, supra,* and a capital defendant may be sentenced only by a judge pursuant to that statute after knowingly and voluntarily waiving his right to a jury trial.

State v. Crisp, 362 S.C. 412, 418-419, 608 S.E.2d 429, 433 (S.C. 2005).

Since 1982 and before, the South Carolina death penalty statutory complex has been read to require a knowing waiver of a defendant's right to jury sentencing as well as a jury determination of guilt when an individual enters a guilty plea when the state is seeking a death sentence. This Court may wish to take appellate court judicial notice of its records. See State v Passsaro, 350 S.C. 499, 567 S.E.2d 862 (2002) (record of guilty plea waivers); State v. Ray, 310 S.C. 431, 427 S.E.2d 171 (1993) (same); State v. Wilson, 306 S.C. 498, 413 S.E.2d 19, 20-21 (1992) (record of guilty plea waivers); State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979) (record of guilty plea waivers).

The right to trial by jury, a fundamental right guaranteed by the Sixth Amendment of the federal Constitution, is subject to knowing, intelligent, and voluntary waiver. "[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). A valid waiver of a fundamental constitutional right ordinarily requires "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). As a matter of state law, the jury waiver would exist for both phases.

3. Certiorari cannot be granted to hold a statute unconstitutional.

This Court has held that the constitutionality of a statute cannot be determined on a

petition for writ of certiorari. Floyd v . Thornton, 220 S.C. 414, 68 S.E.2d 334 (1951). The threshold problem with the assessment is that this is a statutory procedure created by the legislature in Section 16-3-20. Certiorari cannot lie because the remedy he requests is to hold the provision unconstitutional.

For the Petitioner to be successful, the Court would have to hold that the legislative act, Section 16-3-20 is unconstitutional under the Sixth Amendment, in addition to vacating and overruling its prior precedent in Downs, Truesdale, Patterson, Wood. Since 1982 when Truesdale and Patterson were decided, the General Assembly has made no change - thus continuing the applicability of the section. Since Truesdale and Patterson, the mandate of this Court concerning its interpretation of 16-3-20 is clear - there can be no jury sentencing in a guilty plea in a capital murder case since it was found *in favorem vita* by this Court. Absent legislative revision, the statutory procedure is clear and unambiguous.

4. Certiorari is not proper where the issues could be raised in a direct appeal.

Bryant asserts that South Carolina's statutory capital sentencing structure violates his constitutional right to a jury trial under the Sixth Amendment because if he pleads guilty, he cannot be sentenced by a jury. In Ring v Arizona, 536 U.S. 584 (2002), the United States Supreme Court determined that Arizona's capital sentencing structure, which "allow[ed] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty," violated the Sixth Amendment. 536 U.S. at 609, 122 S.Ct. at 2443. In so ruling, the Supreme Court effectively extended its holding in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to capital cases, concluding that "[c]apital defendants, no less than non-capital defendants, ... are entitled to a jury determination

of any fact on which the legislature conditions an increase in their maximum punishment." Ring, 536 U.S. at 589, 122 S.Ct. at 2432.

In Blakely v. Washington, 542 U.S. 296 (2004), the Court held that : *[N]othing prevents a defendant from waiving his Apprendi rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements* ***so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding.***" Contrary to claim by Petitioner, this does not create a right to enter a guilty plea under the Sixth Amendment right to a jury trial. Instead it merely requires that if a guilty plea is entered, judicial fact-finding for sentencing enhancement is authorized only if the defendant stipulates to the facts [in the aggravating circumstances] or consents to judicial fact finding. This is consistent with the South Carolina capital practice because a guilty plea can only be entered with a consent to judicial fact finding - otherwise the plea cannot be entered under either Patterson and Truesdale. All guilty pleas require this. Otherwise, he receives what the Constitution requires - a jury determination of guilt, as well as sentencing.

Nevertheless, his guilty plea right claim can be raised in a direct appeal. Recently, the Court addressed the jurisdictional problem in State v. Jerry B. Inman. In dismissing a notice of appeal from a similar denial of a "motion to determine the mode of trial" requesting a right to enter a plea and have jury sentencing, the Court stated that no justiciable controversy exists to allow an interlocutory appeal before the trial or entry of a guilty plea:

> However, it has long been held in South Carolina that a criminal defendant may not appeal until sentence is imposed. State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986)(We adhere to our view that under §14-3-330 a criminal defendant may not appeal until after sentence has been imposed."); Parsons v. State, 289 S.C. 542, 347 S.E. 2d 504 (1986); State v. Robinson, 287 S. C. 173,

> 337 S.E. 2d 204 (1985); State v. Washington, 285 S. SC. 457, 330 S.E. 2d 289 (1985); State v. Hubbard, 277 S.C. 568, 290 S.E. 2d 817 (1982); Ex parte Murray, 261 S.C. 255, 199 S.E.2d 718 (1973); State v. McMillan, 189 S.C. 444, 1 S.E. 2d 626 (1939); State v. Gellis, 158 S.C. 471, 155 S. E. 849 (1930); State v. Turner, 118 S.C. 383, 100 S.E. 525 (1922); State v. Timmons, 68 S. C. 258, 47 S.E. 140 (1904); State v. Hughes, 56 S.C. 540, 35 S. E. 214 (1900); State v. Mason, 54 S.C. 240, 32 S.E. 357 (1899); State v. Burbage, 51 S.C. 284, 28 S. E. 937 (1898); State v. McKettrick, 13 S.C. 439 (1880); see also State v. Wood, 362 S.C. 135, 607 S.E. 2d 57 (2004)(under similar circumstances defendant contested constitutionality of S.C. Code Ann. 16-3-02 (2003) *after being sentenced*). In addition, an appellate court will not make an adjudication where there remains no actual controversy. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001). The Court must inquire in every action whether a justiciable controversy exists. In re Care and Treatment of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338(2002). A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute. Id. In the case at hand, appellant has failed to show that a judicial controversy exists. See State v. Kerr, 330 S. C. 132, 498 S.E. 2d 212 (1999); State v. Whitted, 279 S.C. 260, 305 S.E. 2d 245 (1983), overruled on other grounds State v. Collins, 329 S. C. 23, 495 S..E. 2d 202 (1998); State v. Armstrong, 263 S.C. 594, 211 S.E. 2d 889 (1975); State v. Burgin, supra, rev'd on other grounds 404 U.S. 806 92 S. Ct. 46, 30 L. Ed. 2d 39 (1971); State v. Miller, 652 S. C. 444, 375 S.E. 2d 370 (Ct. App. 2007); Reed v. Becka, 333 S. C. 676, 511 S.E. 2d 396 (Ct. App. 1999). . . .

State v. Jerry Buck Inman, Order, (S.C. S.Ct. January 9, 2008). In finding that appellant had failed to show "real and substantial controversy which is ripe and appropriate for judicial determination" it resolved a similar evaporation of any right to seek certiorari in the same setting. The reliance on Kerr, Whitted, and Burgin indicates that certiorari cannot be authorized here because there remains no enforceable right to a guilty plea, because of the contingencies.

Absent legislation to amend Section 16-3-20 there remains no right to jury sentencing in a knowing and voluntary guilty plea where it is required to include a consent to judicial fact finding under our statute. Until the legislature acts, the statutory complex remains the same.

Simply put, certiorari does not empower the Supreme Court in its original jurisdiction to overturn legislative enactments and create new procedures expressly contrary the legislative mandate. Second, as recognized in Inman, where the notice of appeal was dismissed without prejudice - an appeal may provide a remedy to the claim violation, but it is premature to address it in a "contingent, hypothetical or abstract dispute." [6]

CONCLUSION

For all the foregoing reasons, this Court must be constrained to deny the petition for writ of certiorari in its original jurisdiction. [7]

---

[6] The Petitioner claims in his pleading that the entry of a guilty plea is "evidence in mitigation" that he is being deprived of creating by this statutory procedure. First, this matter is not ripe because there has been no exclusion of any evidence in mitigation in the trial court. Second, if such evidence is offered and denied the issue would then be ripe for an appeal. Further, it suggests that a person who seeks a constitutional right to a jury trial would then be disadvantaged where the death penalty is sought by the invocation of his right to a trial. This concept needs to be addressed with caution. Respondent can find no case law to support the concept that the entry of a guilty plea in a capital case is relevant "evidence" in mitigation under Lockett v. Ohio, 438 U.S. 586 (1978). There is no Eight Amendment right to plead guilty.

It should be noted that nothing prevents a capital defendant from stipulating guilt or making an admission of guilt before a jury in a guilt phase proceeding. This Court can take judicial notice of its prior capital cases that this has been done before. See e.g. State v. Sigmon (Brad). In Sigmon, the appellate record revealed he did not contest his guilt. Defense counsel advised the jury in opening statements: "You're going to find Brad Sigmon guilty... he confessed to it. He confessed to it more than one time... [your] job is to reach the ultimate decision in this case, whether Brad Sigmon lives or dies... you may wonder, well, why are we here? Well, I'll tell you.... Because if Brad Sigmon were to plead guilty, he wouldn't have a right to a jury to determine his sentence." (R. p. 1316, line 12 – p. 1317, line 23). Sigmon addressed the jury at the close of the guilt phase: "Ladies and gentlemen of the jury, I am guilty." (R. p. 1765, lines 11-15).

[7] Although not raised in his petition in the discussion, he asserts in his Fourth Ground a requirement that statutory aggravating factors be presented to the grand jury. This Court has rejected that issue previously in Downs and Crisp. Certiorari must be denied where the Court has addressed the merits in rejecting the same claim previously.

55

Respectfully submitted,

HENRY D. McMASTER
Attorney General
JOHN W. McINTOSH
Chief Deputy Attorney General

*DONALD J. ZELENKA
Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
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ATTORNEYS FOR RESPONDENT

By: _____
DONALD J. ZELENKA

May 1, 2008

56

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Return to Petition for Writ of Certiorari in Its Original Jurisdiction*** in the foregoing action by depositing two copies in the United States mail, postage prepaid, to the following:

James H. Babb, Esquire
Howle & Babb, LLP
P.O. Box 2685
Sumter, SC 29151-2685

Jack D. Howle, Jr., Esquire
Howle & Babb, LLP
P.O. Box 2685
Sumter, SC 29151-2685

This 1st day of May, 2008.

DONALD J. ZELENKA
Assistant Deputy Attorney General

JAMES H. BABB
ATTORNEY AT LAW

Seven East Hampton Avenue
Post Office Drawer 2685
Sumter, South Carolina 29151-2685

Office: (803) 775-3060
Mobile: (803) 468-0123
Facsimile: (803) 775-6727
email: JB@BabbLaw.com

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May 8, 2008

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211-1330

RE: Reply to Return to
Petition for Writ of Certiorari
In re: State v. Bryant
Docket No.: 2006-GS-43-699

Dear Mr. Shearouse:

Please find enclosed for filing an original and six (6) copies each of our Reply to the Return to the Petition for a Writ of Certiorari in the Court's Original Jurisdiction.

I believe you will find these documents self explanatory. Should you or your office have any questions or require additional information, however, please contact me at your earliest convenience. With kindest regards,

Sincerely,

James H. Babb
Jack D. Howle, Jr.
ATTORNEYS FOR PETITIONER

JHB/jb

Enclosures
– Reply
– Proof of Service

cc
C. Kelley Jackson
Donald J. Zelenka

(36)

The State of South Carolina
In the Supreme Court

RECEIVED
MAY 12 2008
S.C. SUPREME COURT

Case No. 2006-GS-43-699

In the matter of the State of South Carolina
- vs-
Stephen Corey Bryant, Petitioner.

REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR A WRIT OF CERTIORARI {PREMISED UPON ORIGINAL JURISDICTION}

In it's Return to the Petition, the State alleges , "A Right to Certiorari Has Not Been Established." It then sets forth four grounds in support of that proposition, which Petitioner will address *ad seriatim*. First, however, Petitioner would note that no claim of a "right" to a writ of certiorari has been made. Rather, the Petitioner has requested that this Court exercise its prerogative by asserting and exercising its Constitutional authority to consider the matters herein raised and joined.

In-fact, the arguments of the State as to a lack of grounds for exercise of "the common law writ" actually supports the position of the Petitioner. Granting the petition would permit this Court an opportunity: (A) to ascertain whether the trial court has acted within its jurisdictional limits in denying the claim of Petitioner to fully exercise his Sixth and Eight Amendment rights; and, (b) to correct the unlawful denial of those rights under the Constitution of the United States of America. Further, and with the holdings of the United

States Supreme Court in the Apprendi line of cases[1], (Blakely v. Washington in particular, this case does present a "novel" question of law with respect to the South Carolina statutory death penalty scheme, which does raise an issue of significant public interest. Further, a proper decision by this Court would be in the interest of judicial economy by eliminating inevitable additional appeals.

1. There is no Right to Plead Guilty in South Carolina.

Drawing upon SCRCrimP. 14(b), the State asserts that a defendant in a capital case has no right to plead "guilty as charged," and submit that fact in mitigation to a jury of his or her peers. The assertion is made in the absolute and without subject to any condition(s), such as issues of mental infirmity, duress, undue influence, etc., having been raised.

In a nutshell, the argument hinges on whether SCRCrimP. 14(b), and the cases cited by the State take precedent over the Petitioner's 8th Amendment Right to present mitigation under the Cruel and Unusual Punishment Clause as interpreted by Eddings v. Oklahoma, 455 U.S. 104 (1982), Lockett v. Ohio, 438 U.S. 586 (1984), Skipper v. S.C., 476 U.S. 1 (1986), and Payne v. Tennessee, 501 U.S. 808 (1991), and the Petitioner's 14th and 6th Amendment Right to present a defense under the Due Process Clause, the Confrontation Clause and the Compulsory Process Clause as interpreted by Holmes v. S.C., 547 U.S. 319 (2006). Petitioner maintains they do not, and that he therefore must and does have a right to enter guilty plea without requirement that he

---

[1] The so-called "Apprendi line of Cases,"began with the dissent in Almendarez-Torres v. U.S., 523 U.S. 224 (1998); includes Jones v. U.S., 526 US 227 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000); Harris v. U.S., 536 U.S. 545 (2002); Ring v. Arizona, 536 U.S. 584 (2002); Blakely v. Washington, 542 U.S. 296 (2004); U.S. v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 549 US, ____ (2007); and arguably culminating, even if only for the moment with, with Rita v. U.S., 551 U.S. ___ (2007).

forfeit and abandon his 6th Amendment Right to a jury trial as interpreted by Apprendi, Ring and Blakely with regard to the issue of sentencing.

2. **There is a mandatory statutory requirement under Section 16-3-20 that when a guilty plea is accepted, the trial judge sentences the Appellant in the sentencing proceeding.**

Given the facts presented and the posture of the case at hand, the statute at issue can not withstand any reasoned analysis under Blakey. While Petitioner certainly could waive his rights to a jury trial in both the quilt phase as well as in the sentencing case, the State may not compel him to do so. In Simmons v. U.S., 390 U.S. 377, 394 (1968), the United States Supreme Court stated, ". . . we find it intolerable that one constitutional right should have to be surrendered in order to assert another.

3. **Certiorari cannot be granted to hold a statute unconstitutional.**

This Court is vested with jurisdiction to issue the requested writ. The Constitution of the State of South Carolina expressly provides:

> The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs. S.C. Const. Art. V, § 5.

The issue is not whether the Court can grant the writ, but rather whether it should or will. For all of the reason herein and previously submitted, Petitioner believes the petition should be granted.

3. **Certiorari is not proper where the issue can be raised in a direct appeal.**

Substantial and fundamental Constitutional rights of the Petitioner have been violated by the trial court's rejection of his tender of a plea of guilty. A justiciable controversy therefore does exist, and should be expeditiously

addressed. As it now stands, the Petitioner, who is a capital defendant, must elect to either:

a.) Waive his right to have a jury determine his sentence if he wishes to plead guilty;

b.) Go to trial and tell the jury he is guilty in the guilt phase of the trail, thereby rendering virtually any conceivable error as harmless; or,

c.) Go to trail and let the jury determine his guilt, following which the prosecution may again introduce the previously submitted evidence to a jury who has just convicted a defendant who in their eyes pleaded not guilty, thereby forfeiting a substantial mitigation right.

Any one of those available choices prejudices the Petitioner and/or violates his Constitutional rights. Moreover, nowhere in its response does the State articulate a reading of Blakely that is consistent with the Apprendi line of case, of which Blakely itself is a very significant and important part. It does not, because it can not.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari, and establish a briefing schedule.

Respectfully Submitted By: James H Babb

James H. Babb
Jack D. Howle, Jr.
Counsel For Defendant

SUMTER, SOUTH CAROLINA

DATED: MAY 8, 2008

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(40)

The State of South Carolina
In the Supreme Court

Case No. 2006-GS-43-699

In the matter of the State of South Carolina
- vs-
Stephen Corey Brant, Petitioner.

PROOF OF SERVICE

I certify that I have served the Reply to the Respondent's Return to the Petition for a Writ of Certiorari on C. Kelly Jackson, Third Circuit Solicitor, and upon Donald J. Zelenka, Assistant Deputy Attorney General by causing a true copy thereof to be mailed to each of them at the below respective addresses:

C. Kelly Jackson
Sumter County Courthouse
Room 201
141 North Main Street
Sumter, South Carolina 29150

Donald J. Zelenka, Esq.
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

SO CERTIFIED BY: James H. Babb
JAMES H. BABB

SUMTER, SOUTH CAROLINA

DATED: MAY 8, 2008

SEVEN EAST HAMPTON AVENUE
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TELEPHONE: (803) 775-3060

The Supreme Court of South Carolina

The State, Respondent,

v.

Stephen Corey Bryant, Appellant.

Appellate Case No. 2008-103130

ORDER

By order dated March 3, 2011, we granted a request for a stay of execution in this matter and assigned the Honorable R. Ferrell Cothran, Jr. to petitioner's post-conviction relief action. The order stated that, absent 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 the date of the order.

In November 2011, Judge Cothran informed the Court that petitioner's lead counsel, Melissa J. Armstrong, had a death penalty case scheduled for trial in Horry County in January 2012 and that it may run into February. Judge Cothran stated Ms. Armstrong had requested an extension of time, but felt she would be ready to try petitioner's case in May or June of 2012. Judge Cothran stated he could hear the case the week of June 11, 2012, without the need for reassignment or any rearranging of his court schedule. Accordingly, we granted Judge Cothran an extension of time until September 4, 2012, to hold a final hearing and issue a final order in this matter.

In a status update dated July 13, 2012, Ms. Armstrong informed the Court that petitioner's case was called on June 11, 2012, however, the hearing was continued so that his counsel could address concerns about petitioner's competency to assist them in the matter. Ms. Armstrong informed the Court that she anticipated the case would be rescheduled for a hearing on the merits of petitioner's application in the near future.

However, on August 9, 2012, Judge Cothran informed the Court that Ms.

Armstrong indicated petitioner has competency issues and petitioner has been examined by Dr. Donna Schwartz-Watts. Judge Cothran stated it is not likely the case can be tried before September 4, 2012.

Indeed, Dr. Schwartz-Watts has since submitted an affidavit in which she states that she met with petitioner on three occasions and on two of those dates – May 1, 2012 and June 5, 2012 – she determined petitioner was not competent to proceed with this action. Due to Dr. Schwartz-Watts' concern that petitioner's intermittent incompetence and psychosis could be the result of a neurological impairment, a neurologist was retained and a neuroimaging study was performed on petitioner on August 1, 2012. Dr. Schwartz-Watts states that due to her workload, she is unable to review the results of the neuroimaging study and consult with petitioner's counsel earlier than late August or early September. Dr. Schwartz-Watts states that without the results of the neuroimaging study, any assessment of petitioner's mental functioning would be incomplete.

Based on the issues surrounding petitioner's competency and the fact that it appears those issues are being assessed in a timely and efficient, yet thorough, manner, we grant Judge Cothran a three month extension of time from September 4, 2012, to hold a final hearing and issue a final order in this matter. Ms. Armstrong and Judge Cothran shall provide the Clerk of this and Court Administration with an update on the status of this matter every thirty days from the date of this order.

C.J.

FOR THE COURT

Columbia, South Carolina

August 29, 2012

cc:
Cecil Kelly Jackson
Alan McCrory Wilson
Robert Michael Dudek
Donald J. Zelenka
John W. McIntosh
Melissa J. Armstrong
The Honorable R. Ferrell Cothran, Jr.

ALAN WILSON
ATTORNEY GENERAL

May 18, 2018

The Honorable James C. Campbell
Clerk of Court, Sumter County
Sumter County Judicial Center
215 North Harvin Street
Sumter, South Carolina 29150-4974

Re: Stephen Corey Bryant v. State of South Carolina
2016-CP-43-00828
Capital PCR

Dear Mr. Campbell:

Enclosed please find the Respondent's Response in Opposition to Motion to Amend Post-Conviction Relief Application, together with Certificate of Service in the above-referenced matter. Kindly file same in your office and return a copy marked "filed" to the undersigned in the self-addressed stamped envelope provided. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Melody J. Brown
Senior Assistant Deputy Attorney General

MJB/dmd
Enclosures
cc: The Honorable William H. Seals, Jr. (w/copy of encls.)
Diana Holt, Esq. (w/copy of encls.)
E. Charles Grose, Jr., Esq. (w/copy of encls.)

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF SUMTER	)	
Stephen Corey Bryant, SCDC #5252,	)	
	)	**C/A No. 2016-CP-43-828**
Applicant,	)	***CAPITAL PCR***
vs.	)	
	)	**RESPONSE IN OPPOSITION TO MOTION**
State of South Carolina,	)	**TO AMEND POST-CONVICTION RELIEF**
	)	**APPLICTION**
Respondent.	)	
	)	

On May 9, 2018, applicant moved to amend his post-conviction relief (PCR) application and filed a second amended application. Respondent opposes any amendment of the current application. Because applicant is proceeding only on one ground authorized by the Honorable Thomas Cooper and limited again by this Court, such an amendment is not proper and must be denied. In support, respondent would respectfully show the Court:

1. Applicant is proceeding in a unique position. He was allowed a successive action on a precise claim Judge Cooper found was not barred. (July 13, 2016 order, p.7). Judge Cooper allowed the instant action to continue only on the ground applicant is intellectually disabled and exempt from a death sentence pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). (July 13, 2016 order, p.7). Judge Cooper dismissed a second action (2016-CP-43-829) finding all grounds presented were improperly successive and untimely. Amendment to applicant's restricted action is not authorized by Judge Cooper's order, by this Court's order, by the PCR statute, or by United States Supreme Court precedent.

2. In an order dated March 13, 2017, this Court reaffirmed the restriction on the action based on Judge Cooper's previous ruling. This Court cited our Supreme Court's recent decision in *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016), to reconfirm the restricted

scope of the authorized litigation when proceeding in a successive action and restricted the action solely to an allegation of intellectual disability. (March 13, 2017 order, p.1; p.3). By citing to *Robertson*, the Court recognized the scope of jurisdiction in an allowed successive action is limited to the claim approved for hearing. (March 13, 2017 order, p.1); *see also Robertson*, 418 S.C. at 522, 795 S.E.2d at 38 (holding summary dismissal not warranted where conflicting evidence on a critical fact exists, and, though the action may ultimately be dismissed as untimely or successive or on the merits, the applicant must "be afforded a hearing *on this limited issue*") (emphasis added). Accordingly, in this action, applicant's claim is limited to one of intellectual disability and any attempt to amend the application is improper.

3. No psychologist has ever found applicant to be intellectually disabled. The evaluation done at the Department of Juvenile Justice (DJJ) when applicant was fifteen-years-old and reviewed by defense experts prior to the plea and applicant's first PCR indicated applicant was not intellectually disabled, and had an IQ score of 93.[1] (DJJ records, p.4; p.6).[2] Both the psychologist who evaluated applicant and the reviewing psychiatrist opined there was nothing to indicate applicant required further evaluation, even while noting risks applicant faced due to his history and incarceration as a juvenile. (DJJ records, pp.6-7; p.10).

There remains no finding of intellectual disability by applicant's own experts. Dr. George Woods (Woods) concedes in his affidavit applicant's IQ scores are above those required to meet the criteria for intellectual disability. (Woods affidavit, p.1). Dr. Woods opines applicant's adaptive functioning is "consistent with someone suffering from mild intellectual disability."

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[1] Applicant's school records indicate he also received IQ scores of 79 on April 28, 1993, 86 on June 6, 1994, and 92 on March 8, 1996.

[2] The DJJ records were previously submitted to the Court as an attachment to respondent's motion for summary judgment dated August 15, 2017.

(Woods affidavit, p.1). Respondent will assume Dr. Woods's opinion is correct for purposes of this response, but notes such an opinion has not been found to be correct, true, or persuasive. Further, even if true, the opinion cannot support a finding of intellectual disability. Deficits in adaptive functioning is only one of the three criteria required for a finding of intellectual disability rendering a person ineligible for the death penalty in South Carolina. *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 Franklin v. Maynard*, 356 S.C. 276, 278-79, 588 S.E.2d 604, 605 (2003) (approving approved the statutory definition as applicable in the death penalty context). Applicant cannot meet the statutory definition of intellectual disability. Accordingly, given the limited nature of the action, the purpose of the litigation is now moot because there is no evidence applicant is ineligible for a death sentence due to intellectual disability. *See Franklin*, 356 S.C. at 279-80, 588 S.E.2d at 606 (noting whether at trial or at PCR, the burden of proving intellectual disability is preponderance of the evidence); *see also Robertson*, 418 S.C. at 514, 795 S.E.2d at 33 (explaining, in every successive PCR action, it is applicant's burden to show a "sufficient reason" why the new ground for relief he asserts was not raised or was not raised properly) (citing *Aice v. State*, 305 S.C. 448, 450, 409, S.E.2d 392, 394 (1991)).

4. Further, there is no provision in the PCR statute which would allow applicant to amend his application to assert this untimely claim. South Carolina Code Ann. § 17-27-45(B) allows the start of a new one-year statute of limitations where a substantive standard was not previously recognized for prior litigation and does not prevent the filing of a successive application since the claim could not have been presented in the prior litigation. However, applicant attempts to make a claim that has never been recognized by the United States Supreme

Court. The *Atkins* Court held people who are intellectually disabled are categorically excluded from execution, but the exclusion is narrow in scope. *Atkins*, 536 U.S. at 320-21. Intellectual disability is defined as requiring "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.* at 318. Applicant concedes he does not have IQ scores required to meet the criteria for intellectual disability, but, rather asserts he has Fetal Alcohol Spectrum Disorder (FASD) and is developmentally impaired in a manner "similar" to that defined in *Atkins*. (Woods affidavit, p.1; Second Amended Application, pp.2-3). Applicant claims his impairments are supported by his social history and mother's alcohol use. (Woods affidavit, pp.1-3; pp.7-9). Applicant asserts a categorical ban on imposing the death penalty on people suffering from FASD is a natural expansion of *Atkins*. (Second Amended Application, p.3). Applicant seeks to have this Court carve out another class of persons as exempted from the death penalty, i.e., those with FASD. Applicant's expert opines the functioning of a person with FASD is similar to the functioning of an intellectually disabled individual. (Woods affidavit, pp.9-10). *Atkins*, however, is specifically limited to those who are intellectually disabled and the Supreme Court has not expanded its narrow scope to any other class. Applicant has not cited to any authority recognizing an extension of *Atkins* to include people with FASD and/or developmentally impaired persons. In fact, federal and state courts have consistently declined to extend the ruling in *Atkins* to any other class of individuals, such as the mentally ill. *See, e.g.*, *Franklin v. Bradshaw*, 695 F.3d 439, 455 (6th Cir. 2012) (noting absence of case law extending *Atkins* to prohibit the execution of those with mental illness); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) (per curiam) (explaining the rule in *Atkins* does not extend to those with mental illness); *Lawrence v. State*, 969 So.2d 294 (Fla. 2007) (declining to extend *Atkins* to mentally

ill); *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005) (same). Accordingly, there is no new standard by which applicant can excuse the untimeliness of the new claim.

Next, S.C. Code Ann. § 17-27-45(C) allows an applicant to file a successive application if there is evidence of material facts not previously presented and heard, but the filing must occur one year after the date of actual discovery of the facts or "*after the date when the facts could have been ascertained by the exercise of reasonable diligence.*" (emphasis added). Applicant cannot demonstrate such evidence exists despite his claim in the amended application. (Second Amended Application, p.3). As respondent has continuously maintained during this action, applicant's exposure to alcohol as a fetus and his past social history were factors considered in the previous proceedings against applicant, and was brought to the courts' attention through expert testimony, testimony from family members, and the introduction of applicant's mental health history. Specifically, information about possible alcohol abuse involving applicant's mother was presented through the testimony of Dr. Donna Maddox (Maddox) and Dr. Marti Loring (Loring) during applicant's plea hearing. (App.p.814; pp.926-29; p.942; p.949).[3] Dr. Maddox testified she spoke with applicant's paternal aunt about his possible exposure to alcohol in utero, while Dr. Loring spoke to applicant's mother and other family members. (App.p.814; pp.926-29; p.942; p.949; p.974). Both doctors also reviewed applicant's school records, DJJ records, and his mental health history. Dr. Maddox testified her review indicated applicant was in the "low average range of intelligence" and noted applicant's diagnosis of ADD, which was consistent with the reports and findings from doctors at DJJ. (App.pp.812-17; pp.836-38). Dr. Loring testified the abuse applicant suffered as a child led him to become anxious, hostile, and aggressive. (App.pp.953-54). During applicant's first PCR action, Dr. Maddox reiterated her

[3] "App." refers to the PCR Appendix prepared for the PCR appeal.

understanding of applicant's mental health history as "a complication from post-traumatic stress disorder" and that applicant could be "[f]rightened, anxious, acutely paranoid." (App.p.2078). Accordingly, the "material facts" applicant cites to in an attempt to improperly amend his application were available in all the previous proceedings against him and applicant cannot demonstrate a sufficient reason to excuse the untimeliness of the claim.

Conclusion

WHEREFORE, having made its response in opposition to the motion to amend the post-conviction relief application, respondent submits applicant is not entitled to any amendment, the amended claim is barred by this Court's order dated March 13, 2017 restricting the action solely to a claim of intellectual disability, and by the successive action prohibition and the statute of limitations as set out in the PCR statute. For these reasons, the amendment should be denied as improper.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

SHERRIE BUTTERBAUGH
Assistant Attorney General
S.C. Bar No. 101477

BY: _____
SHERRIE BUTTERBAUGH

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Columbia, SC 29211
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COUNSEL FOR RESPONDENT

May 18, 2018.

STATE OF SOUTH CAROLINA) **)** **COUNTY OF SUMTER)**	**IN THE COURT OF COMMON PLEAS**
Stephen Corey Bryant, SCDC #5252,) **)** **Applicant,)** **vs.)** **)** **State of South Carolina,)** **)** **Respondent.)** **)**	**C/A No. 2016-CP-43-828** ***CAPITAL PCR*** **CERTIFICATE OF SERVICE**

I, Melody J. Brown, do hereby certify that on this date, I served the Respondent's Response in Opposition to Motion to Amend Post-Conviction Relief Application in the foregoing action on the Petitioner by depositing one copy of the same in the United States mail, first-class postage prepaid, and addressed as follows:

E. Charles Grose, Jr., Esq.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646

and to

Diana L. Holt, Esq.
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This 18th day of May, 2018.

By: _____
MELODY J. BROWN
Senior Assistant Deputy Attorney General
ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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 the Supplemental Appendix 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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