

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Horry County

Honorable Robert E. Hood, Circuit Court Judge

Opinion No. 28089 (Sup. Ct. filed April 6, 2022)

THE STATE,

RESPONDENT,

V.

JEROME JENKINS, JR.,

APPELLANT.

APPELLATE CASE NO. 2019-001280

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, appellant respectfully requests rehearing because this Court may have misapprehended the fact that its definition of an “arbitrary factor” pursuant to S.C. Code §16-3-25 (C) being limited to some matter that occurred before the sentencing jury that imposed the death sentence is too narrow a definition of an “arbitrary factor.” State v. Jerome Jenkins, Op. No. 28089, Howard’s Adv. Sh. No. 12, at 70. For example, if it was clear from the record that a solicitor only sought the death penalty because the defendant was Black and the victim was white, appellant submits that would be an “arbitrary factor” even though the sentencing jury did not know of that impermissible fact.

Further, this Court may have overlooked the fact, since the Batson motion was not an appellate issue, that one of the reasons this Black Appellant wanted to plead guilty was because there were only a handful of Black potential jurors in the venire. Appellant, in fact, had a jury of eleven white individuals and only one Black person. R. 1439, l. 14 – 1441, l. 15. Appellant further argued that the only Black juror on his jury should have been disqualified for cause since he worked at the local detention center where appellant may have been housed at one point, and that juror strangely followed appellant’s case as it progressed towards trial. As this Court will recall, at oral argument counsel for the state claimed appellant may actually have wanted this correctional officer who the defense moved to disqualify for cause on the jury because the officer was “African American.” See Oral argument in State v. Jerome Jenkins, Jr., Tuesday, October 12, 2021 at 59:10.

In sum, appellant could not plead guilty because the trial judge told him he would be sentenced to death if he pled guilty. This Court correctly found, and emphasized, that it wished “to be very clear this was error by the trial court.” State v. Jerome Jenkins, Op. No. 28089, Howard’s Adv. Sh. No. 12, at 52.

On the other side of the mode of trial coin, appellant faced an overwhelmingly white jury panel in Horry County where there were only five Black individuals in the entire venire. Appellant understood he was facing an overwhelmingly white jury, 11-1 white after jury selection, where that jury was going to hear evidence this Black Appellant killed a white woman store clerk and that he also was responsible for the murder of another store clerk who also was not Black.

Our state death penalty statute, S.C. Code §16-3-20(B) provides that “[i]f the defendant pleaded guilty, the sentencing proceeding shall be conducted before the judge.” Thus, in order

for appellant to have the undoubtedly great advantage of pleading guilty and accepting responsibility for his crimes, he had to waive jury sentencing and be sentenced by a single judge. That judge told appellant he would be sentenced to death if he pled guilty, and appellant responded, "Not a chance." Appellant, despite his strong desire to plead guilty, was forced to plead not guilty and have a jury trial without the benefit of accepting responsibility for his crimes and pleading guilty. Appellant had a due process right to not be arbitrarily deprived of his right to choose the mode of his death penalty trial pursuant to our state's procedural law, S.C. Code §16-3-20 (B), and yet that was what occurred given the unique facts of this case. See Hicks v. Oklahoma, 447 U.S. 343 (1980).

Further, what occurred in this case where the trial judge told appellant he would sentence him to death if he pled guilty was so much more egregious than in each of the other cases where this Court reversed based on improper comments made by the trial judge to the defendant about the exercise of his rights. In none of those six cases did the defense attorney object to the judge's improper remarks yet this Court properly reversed since the judge's remarks, as here, involved fundamental trial rights.

In State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004), this Court reversed where the trial judge told the defendant that a potential juror or jurors who were opposed to the death penalty may lie to get on the jury, and then refuse to vote for the death penalty at the end of the trial knowing that one vote for life results in a life sentence. The defendant indicated his belief that the opposite could also happen. This Court, as it did in this case, found the trial court's comments to be fundamentally erroneous, and it reversed.

In State v. Crisp, 362 S.C. 412, 608 S.E.2d. 429 (2005), this Court also reversed where the trial judge told the defendant that potential jurors could lie to the trial judge during voir dire

about being open-minded about the death penalty where in fact they had their own agenda against the death penalty. They would vote for a life sentence assuring that the defendant would not be sentenced to death. This Court agreed that these extraneous comments regarding the exercise of a defendant's constitutional right to go to trial or plead guilty were improper, prejudicial and reversible error.

In State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986), the trial judge told the defendant that he would instruct the jury that they could not hold it against him if he did not testify but that the jurors were human beings and they would hold it against him. This Court found that these extraneous remarks regarding the defendant's exercise of his Fifth Amendment rights warranted reversal.

In State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985), the trial judge also told the defendant that he did not have to testify but that if he did not testify that the jury would hold it against him. This Court again found that the right of an individual to invoke his Fifth Amendment rights at trial was a substantial right and the judge's superfluous comments constituted reversible error because the remarks exceeded the scope of proper remarks on the subject.

Finally, in State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986), this Court found that similar remarks regarding the jury holding the defendant's decision not to testify against him to be reversible error. This Court stressed that the fact that the defendant chose not to testify despite the judge's extraneous remarks that the jury would hold it against him if he did not testify warranted reversal, and they were not subject to a harmless error analysis.

It is the defendant's decision to plead guilty or not guilty, and it is the defendant's decision whether to testify or not to testify. This Court, until now, where there is still time to

reconsider and grant rehearing, has guarded against the arbitrary erosion of these constitutional rights by reversing whenever a trial judge trampled on them through improper extraneous comments.

In another death penalty case, State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013), the judge informed the defendant of his right to testify in his own defense. However, when the defendant informed the judge that he wished to testify about another murder for which he was not on trial, the trial judge ruled the evidence of the other murder was not relevant, and the judge, complicit with trial counsel, refused to allow the defendant to testify seemingly for his own good. This Court wrote: “We fully appreciate the State’s issue preservation argument and its concomitant desire to have this issue vetted in a post-conviction relief action where a Petitioner must typically establish prejudice resulting from constitutionally deficient representation. Given the circumstances of this case, however, we find the issue is preserved for direct review.” State v. Rivera, 402 S.C. 225, 240, 741 741 S.E.2d 694, 702 (2013).

The paternalistic desire to protect the defendant from himself was not a legitimate basis for preventing him from testifying on the grounds that his testimony was irrelevant. This Court in Rivera found the wholesale exclusion of the defendant’s testimony constituted a structural error not subject to a harmless error analysis.

The trial judge here told appellant that he would sentence him to death if he pled guilty. Appellant responded, “not a chance.” State v. Jerome Jenkins, Op. No. 28089, Howard’s Adv. Sh. No. 12, at 52. This Court has reversed in cases dealing with much lesser intrusions on a defendant’s constitutional rights where the trial court made improper extraneous remarks as shown above.

Further, no competent defense attorney would have advised appellant to plead guilty after the judge told him he would sentence him to death if he pled guilty. The only reason a defense attorney would fear post-conviction relief in this situation would be if he advised the defendant to plead guilty even though the lone government official -- the judge -- who would sentence him had already told the defendant directly to his face that he would sentence him to death if he pled guilty. There was nothing funny or lighthearted about the judge's improper and highly offensive remarks, and the ship of pleading guilty sailed with those improper remarks.

There could be nothing more serious than a defendant deciding in a death penalty case whether to plead guilty and have his sentence imposed by a single judge or whether to plead not guilty and be sentenced by a jury of twelve individuals. Any defense attorney worth his salt in this situation would have advised appellant that his common sense instincts were correct and that he could not plead guilty after the judge told him that he would sentence him to death if he pled guilty. The record of what occurred in this case was more than sufficient for this Court to find that the judge's remarks, which it has already correctly found to be clear error, constituted an "arbitrary factor" in this case mandating reversal pursuant to its responsibilities under S.C. Code §16-3-25 (C) (1).

Our state statute is intended to offer a defendant a choice in a death penalty case of pleading guilty and having judge only sentencing or pleading not guilty and having jury sentencing, if convicted. Appellant had no choice in this case under the statute because he was not suicidal. He did not wish to be sentenced to death if he pled guilty as the judge told him would happen. Appellant was left with the only alternative -- having an almost all white jury to sentence him where appellant argued the only Black juror on his jury was not qualified. What happened in this case was far more egregious than the improper comments this Court found to be reversible in Owens, Crisp, Gunter, Cooper, Butler, Rivera, and Pierce.

This Court should respectfully reconsider its holding that an arbitrary factor has to be something that improperly influenced the sentencing jury to choose death. This Court found, “[T]he error was completely removed from the jury’s decision to impose the death penalty.” State v. Jerome Jenkins, Op. No. 28089, Howard’s Adv. Sh. No. 12, at 70. S.C. Code §16-3-25 (C)(1) mandates that this Court shall determine “whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.” Ensuring a death sentence did not result from “any other arbitrary factor” was a statutory mandate that the Supreme Court considered when it found Georgia’s death penalty statutory complex constitutional in Gregg v. Georgia, 428 U.S. 153, 204 (1976) noting “the Georgia statute has an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The new sentencing procedures require that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.’ s 27-2537 (c)(3) (Supp. 1975).”

This Court, on the same day appellant’s opinion was issued, decided Richard Bernard Moore v. Bryan P. Sterling, Op. No. 28088, Howard Adv. Sh. No. 12 (filed April 6, 2022) in which it found its mandatory proportionality review pursuant to S.C. Code § 16-3-25(C)(3) was too narrow as it had applied it in the past. This Court in Moore held its statutory obligation to determine proportionality was not statutorily limited to a pool of “similar cases” in which the death penalty had actually been imposed.

The Court’s determination that an “arbitrary factor” must be something improper upon which the jury may have based its decision to impose the death penalty is likewise unduly

narrow pursuant to S.C. Code § 16-3-25(C)(1). Again, if this Court had undisputed evidence in the record that a solicitor based his decision to seek the death penalty against the defendant on the sole basis that the defendant was Black and that the victim was white, appellant doubts that this Court would hesitate to find the ultimate imposition of the death penalty by the jury constituted an arbitrary factor that could not stand despite the fact that the jury was not aware that the solicitor only sought the death penalty because the defendant was Black and the victim was white.

Appellant was denied his choice under our state's statute to plead guilty because the judge erroneously and improperly told him he would be sentenced to death if he pled guilty. His only chance at life in this situation was to plead not guilty and have an almost all-white jury where that jury would hear he was guilty of the murder of a store clerk who was a white woman and of another store clerk who was also not Black.

The uniquely offensive facts of this case, which hopefully for the good of the integrity of our criminal justice system, over which this Court is the final arbiter, will likely never be repeated. However, justice in this case respectfully requires that this Court grant rehearing and hold appellant's death sentence was the result of an impermissible arbitrary factor pursuant to S.C. Code § 16-3-25(C)(1). Cf. State v. Woomer, 277 S.C. 170, 175, 284 S.E.2d 357, 359-60 (1981) ("When a solicitor's personal opinion is explicitly injected into the jury's deliberations as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor as required by S.C. Code §16-3-25(C)(1), and by the Eighth Amendment to the United States Constitution. Gardner v. Florida, 430 U.S. 349 (1977); Beck v. Alabama, 447 U.S. 625 (1980). Accordingly, the Solicitor's jury arguments in this case require that appellant's sentence of death be set aside."). See, also, State v. Butler, 277 S.C. 543, 546, 290 S.E.2d 420, 421 (1982) (same); State v. Sloan, 278 S.C. 435, 438, 298

S.E.2d 92, 93-94 (1982) (solicitor's remark during the guilt phase that if the defendant were not convicted, the murder would forever remain unsolved was an "[a]ppeal for a verdict based on fear and speculation [which] constituted an arbitrary factor affecting appellant's guilt, in violation of S.C. Code Ann. §16-3-25(C) (1) and the Eighth Amendment. Cf. State v. Butler, S.C. 290 S.E.2d 420 (1982)").

### **Dr. Maddox expert opinion testimony**

Appellant also submits that this Court should reconsider its holding that it was not error for the trial judge to exclude a critical piece of the penalty phase expert testimony of forensic psychiatrist Dr. Donna Maddox that McKinley Daniels admitted to her that he told appellant to kill the store clerk – Trisha Stull. This Court wrote: “Whether the trial court erred in excluding the statement McKinley made to Dr. Maddox is a close question. Some members of this Court would have admitted the statement, while others agree with the trial court and would have excluded it.” State v. Jerome Jenkins, Jr., Op. No. 28089, Howard’s Adv. Sh. No. 12, at 61.

Despite acknowledging that this was a close evidentiary call which divided members of this Court, the Court’s consideration of Green v. Georgia, 442 U.S. 95 (1979), was relegated to a truncated footnote. See State v. Jerome Jenkins, Jr., Op. No. 28089, Howard’s Adv. Sh. No. 12, at 62, n. 16. This Court apparently overlooked the significance of the fact that appellant had argued that Green v. Georgia provided that Dr. Maddox’s mitigating evidence opinion, which included the fact that McKinley Daniels admitted to her that he told appellant to shoot Trisha Stull, was admissible in support of her opinion regarding the statutory mitigating circumstance contained in S.C. Code § 16-3-20(C)(b)(5) that “the defendant acted under duress or under the domination of another person.” “The state cannot preclude the jury from considering ‘any relevant mitigating evidence’ the defendant proffers in support of a sentence less than death.” Payne v. Tennessee, 501 U.S. 808, 822 (1991) *citing* Eddings v. Oklahoma, 455 U.S. 104, 114

(1982). This is so because the imposition of death is so profoundly different from all other penalties. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

As appellant argued and this Court recognized, Dr. Maddox -- as a defense expert -- would likely be viewed by the jury as merely a "hired gun." Her boiler plate opinion regarding appellant acting under the dominion of McKinley and James Daniels, the older men, was going to be given little or no credence by the jury absent its evidentiary underpinning that McKinley Daniels admitted to Dr. Maddox that he told appellant to shoot Trisha Stull.

In addition, appellant has not argued that the trial court's application of our state's hearsay rules was "rote." See State v. Jerome Jenkins, Jr., Op. No. 28089, Howard's Adv. Sh. No. 12, at 62, n. 16. Green v. Georgia involved the desired admission of an exculpatory confession of a third-party offered through hearsay. That evidence was crucial in Green v. Georgia, and the proffered testimony that McKinley Daniels admitted to Dr. Maddox that he told appellant to shoot Trisha Stull was likewise critical mitigating evidence in this case that appellant was acting under the dominion of the two older men, McKinley and James Daniels.

The opinion in Green v. Georgia was therefore directly applicable to the exclusion of expert testimony on the grounds of hearsay during the penalty phase of appellant's capital trial because it directly touched on an essential statutory mitigating circumstance that went to the heart of appellant's defense. Dr. Maddox's opinion testimony which included McKinley's critical admission to her was admissible pursuant to Rule 703, SCRE, even if McKinley's admission to Dr. Maddox did not technically qualify as a statement against interest pursuant to Rule 804 (b)(3), SCRE. This Court should respectfully reconsider the significance of Green v. Georgia in this case.

Appellant also submits this Court should reconsider its holding on the "prejudicial effect" of the exclusion from the jury's consideration of McKinley's admission that he ordered appellant

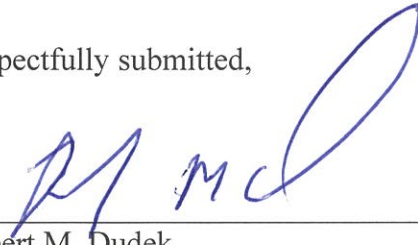
to shoot Victim Stull. This Court found it “[r]elates only indirectly to the first Sunhouse robbery and murder [which] diminishes the prejudice.” State v. Jerome Jenkins, Jr., Op. No. 28089, Howard’s Adv. Sh. No. 12, at 61. The point, however, is that the dominion and control of appellant by McKinley cannot be isolated or compartmentalized into only applying to one robbery and murder where these crimes were part of a crime spree. The dominion over appellant by McKinley and James Daniels applied to the entire crime spree. It would respectfully be counterintuitive to think otherwise.

Appellant’s most important mitigating evidence was that “the defendant acted under the duress or the dominion of another person” pursuant to the mitigating circumstance contained in S.C. Code § 16-3-2(C)(b)(5). The fact that Dr. Maddox’s expert opinion was anchored in the admission of McKinley Daniels to her that he ordered appellant to kill Trisha Stull was invaluable mitigating evidence in the same category as the improperly excluded hearsay evidence in Green v. Georgia, 442 U.S. 95 (1979).

Appellant respectfully requests that this Court reconsider its holding that the trial judge properly excluded this testimony pertaining to the admission by McKinley Daniels since it was inextricably entwined with Dr. Maddox’s expert opinion – and that opinion was hollow without its underlying factual basis -- as to this critical statutory mitigating circumstance contained in S.C. Code § 16-3-2(C)(b)(5).

For the reasons above, appellant respectfully requests that this Court grant rehearing.

Respectfully submitted,



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This 20th day of April, 2022.