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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
The Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

Respondent,

v.

JEROME JENKINS, JR.,

Petitioner.

Appellate Case No. 2019-001280

Opinion No: 28089

RETURN TO PETITION FOR REHEARING

April 6, 2022, this Court filed a published opinion affirming Petitioner's Horry County conviction and death sentence for murder, as well as his convictions and sentences for attempted murder and armed robbery. *State v. Jerome Jenkins, Jr.*, Op. No. 28089, 2022 WL 1022581 (S.C. S.Ct., Apr. 6, 2022) (Howard's Adv. Sh. No. 12 at 46-71). Petitioner filed a Petition for Rehearing on April 20, 2022, and this Court directed Respondent to file a return to the petition on the same date. Respondent submits that the Petition for Rehearing should be denied because this Court's Opinion correctly addressed the issues before it, and none of the points raised on rehearing warrant further consideration by it:

I.

Initially, Respondent notes that Petitioner posits a hypothetical involving overt racial discrimination in the prosecutor's decision to seek the death penalty. While racial discrimination is properly condemned in every facet of American life, including charging decisions by

prosecutors, Petitioner’s hypothetical has absolutely nothing, whatsoever, to do with the present case or the sentencer’s consideration of an “arbitrary factor” in this case. This hypothetical is obviously not before the Court because not presented to the trial judge. *See* Rule 210(h), SCACR (stating an appellate court need not consider any fact which does not appear in the record); *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 319 (1991) (abolishing *in favorem vitae* review and holding a contemporaneous objection is required to properly preserve an error for appellate review); see also *State v. Black*, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) (“It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review”) (citing *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994)).¹

II.

Petitioner is unable to attack this Court’s holding, on his Argument 1, that S.C. Code Ann. § 16-3-20(B) (2019) is not unconstitutional after *Ring v Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 577 U.S. 92 (2016), because it requires a defendant to plead not guilty if he wishes to be sentenced by a jury in a capital case.² Instead, he raises a claim that is procedurally barred because it has never been previously asserted at trial or on appeal, and that is frivolous as a matter of both Eighth Amendment jurisprudence and state law. Specifically, he urges the Court to expand the definition of an “arbitrary factor” in S.C. Code § 16-3-25(C)(1) (2015) to include matters of which the sentencer is completely unaware and which had no bearing on the sentence imposed.

¹ This faulty premise leads to a misleading argument.

² Respondent notes that the PCR judge in *Jerry Buck Inman*, #5256 v. *State*, 2012-CP-39-918 (filed April 21, 2020), disregarded this Court’s binding precedent and found that §16-3-20(B) was unconstitutional under *Hurst*. The State’s Petition for Writ of Certiorari is currently pending in that case. Because this was the only basis on which the PCR judge granted relief to Inman, the Court may wish to grant the State’s Petition in *Inman*, reverse the judgment, and reinstate his convictions and sentence based on its decision in *Jenkins*.

III.

Respondent submits that Petitioner's argument is not properly before this Court for several reasons. First, the Court properly found that his argument the trial judge's response to him at a March 7, 2019, status conference when he asked the judge whether the State could refuse to offer a plea bargain was not raised by him in the trial court. Because trial counsel did not object on any basis at the March 7, 2019, status conference (*R. 3164, line 8 – 3165, line 13*), the April 26, 2019, motions hearing (*see R. 3428-34*) or on the morning of the trial (*R. 1455-64*), this Court properly found that the issue was not preserved for review on appeal. *See Jenkins*, Howard's Adv. Sh. No. 12 at 51-56 (citing *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003)). *See also Torrence*, 305 S.C. at 51, 406 S.E.2d at 319. Indeed, the Court expressly stated that the remarks were barred because the Court saw "no indication in the record that the trial court was ever aware his March 7 comments could have been an issue or could have improperly influenced Jenkins' decision on his constitutional right to not plead guilty." *Jenkins*, Howard's Adv. Sh. No. 12 at 55.³

Second, his "arbitrary factor" argument was not raised in his Questions Presented, as required by Rule 208(b)(1)(B), SCACR (stating the Brief of Appellant must contain "[a] statement of each of the issues presented for review. The statement shall be concise and direct as to each issue Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal"). *See* Initial Brief of Appellant at pp. 1-3. Likewise, neither the term "arbitrary factor" nor § 16-3-25(C)(1) were even mentioned in connection with this argument in the Initial Brief of

³ Further, his speculation and conjecture that the composition of the venire motivated the request to have jury sentencing following a plea is not preserved because not raised below. Also, that claim ignores that counsel told jurors in his guilt phase opening statement that Petitioner was guilty of the crimes charged and that there was a trial because it was the only way he could have a jury determine the proper sentence. *R. 1492*. Thus, he received jury sentencing after admitting guilt.

Appellant (*See* Initial Brief of Appellant at pp. 5-14), much less fully briefed as required to preserve the issue for this Court’s consideration. *Contra* Rule 208(b)(1)(D), SCACR. *See also Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (“[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court”); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (an issue is abandoned where the appellant fails to provide argument or supporting authority); *cf. Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct.App. 1989) (“An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief.”).

Further, in *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001), this Court specifically held that:

The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)). Appellants had the opportunity to present their arguments and evidence when this case was originally heard by the trial court. Therefore, contrary to the dissent's argument, this Court should not consider appellants' previously unrepresented evidence when deciding whether to grant the petition for rehearing.

See also Atl. Coast Lumber Corp. v. Litchfield, 90 S.C. 363, 73 S.E. 728 (1912) (This Court will not grant a rehearing to consider points not presented in the briefs or arguments on which the case was submitted for decision).

“Error preservation requirements are intended ‘to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*’” *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)) (emphasis added).

Further, Petitioner seeks to have the Court overrule precedent. Specifically, he seeks to

have the Court abandon the contemporaneous objection requirement adopted for capital cases in *Torrence*, as well as the other procedural requirements for error presentation discussed, *supra*. He likewise is asking the Court to expand its definition of an “arbitrary factor” in § 16-3-25(C)(1). Yet, he does so without complying with still another procedural requirement: *i.e.*, he has never petitioned to argue against precedent, as required by Rule 217, SCACR. Accordingly, Respondent submits his argument on rehearing is not preserved for the Court’s review.

III.

More importantly, his argument is flawed both as a matter of Eighth Amendment jurisprudence and as a matter of state law. An arbitrary and capricious death sentence is clearly unconstitutional. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). *See also Moore v. Stirling*, Howard’s Adv. Sh. No. 12 at 32 (Hearn, J., concurring in part and dissenting in part). Yet, Petitioner misunderstands the purpose and nature of this Court’s review for the presence of an “arbitrary factor” under § 16-3-25(C)(1).

In *Furman v. Georgia*, 408 U.S. 238 (1972), the United States Supreme Court held that Georgia’s capital scheme violated the Eighth Amendment’s prohibition against cruel and unusual punishment because, like others throughout America, it permitted the jury “unguided and unrestrained discretion regarding the imposition of the death penalty in a particular capital case.” *Lockett v. Ohio*, 438 U.S. 586, 598 (1978); *see also Furman*, 408 U.S. at 306 (Stewart, J. concurring). Under these circumstances, a death sentence was unconstitutional because “wantonly and ... freakishly imposed” and cruel and unusual “in the same way that being struck by lightning is cruel and unusual.” *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).

Subsequently, the United States Supreme Court reviewed the amended Georgia capital sentencing statutes in *Gregg v. Georgia*, 428 U.S. 153 (1976), and the majority concluded that “the

concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary and capricious manner can be met by a carefully drafted statute that ensures that **the sentencing authority** is given adequate information and guidance. As a general proposition, these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.” *Id.* at 195. (Emphasis added).

Both the majority and three concurring Justices found that that the Georgia system “**adequately directed and limited the jury’s discretion.** The bifurcated proceedings, the limited number of capital crimes, the requirement that at least one aggravating circumstance be present, and the consideration of mitigating circumstances minimized the risk of wholly arbitrary, capricious, or freakish sentences.” *See Pulley v. Harris*, 465 U.S. 37, 45 (1984) (citing *Gregg*, 428 U.S. at 197-98 and 428 U.S. at 222 (White, J., concurring)) (emphasis added). *See also Moore*, Howard’s Adv. Sh. No. 12 at 23.

In response to *Gregg*, the South Carolina General Assembly enacted S.C. Code Ann. § 16-3-25(C) (1977) (1977 Act No. 177, § 2, eff. June 8, 1977).⁴ In *Bowman v. State*, 422 S.C. 19, 44, 809 S.E.2d 232, 245 (2018) (*Bowman II*), this Court held that:

We hold that section 16-3-25(C)(1) requires reversal of a death sentence **only when the death sentence is influenced by an arbitrary factor**; not every irrelevant piece of evidence introduced during the course of a sentencing proceeding may be viewed as *influencing the jury’s decision*. Whether improperly admitted evidence influenced the outcome must be determined on a case by case basis, and where the error is deemed harmless beyond a reasonable doubt, reversal is not required.

⁴ This Court has previously found § 16-3-25(C) “bears a strong resemblance to” the Georgia statute upheld in *Gregg* although it “does not specify the ‘universe’ of similar cases,” unlike the Georgia statute. *See State v. Copeland*, 278 S.C. 579, 589, 300 S.E.2d 63, 73 (1982), *cert. denied*, 460 U.S. 1103(1983), and *cert. denied*, 463 U.S. 1214 (1983). *See also State v. Shaw*, 273 S.C. 194, 203, 255 S.E.2d 799, 803-04 (1979), *cert. denied*, 444 U.S. 957 (1979), and *cert. denied*, 444 U.S. 1027 (1980) (finding South Carolina’s death penalty statute is “constitutionally indistinguishable” from the Georgia statute upheld in *Gregg*).

(italics in original) (bold emphasis added). The Court in *Bowman* thereafter explained that:

[S]ection 16-3-25(C)(1) was enacted in the wake of *Furman* and requires the Court to determine whether a sentence of death “was imposed under the influence of passion, prejudice, or any other arbitrary factor.” **The constitutional concerns this statute was enacted to address relate broadly to the procedural process through which juries arrive at sentencing conclusions during the penalty phase of a capital trial**—namely, a bifurcated sentencing proceeding guided by specified aggravating and mitigating factors. Neither the Supreme Court in *Furman* nor the South Carolina General Assembly in the wake of *Furman* envisioned this statute as requiring this Court to evaluate for arbitrariness every infinitesimal evidentiary ruling throughout a lengthy death penalty trial.

Bowman, 422 S.C. at 43, 809 S.E.2d at 245 (Emphasis added).

The above authority makes clear beyond cavil that the purpose of the Court’s statutory review under § 16-3-25(C)(1) is to ensure that the **sentencer** – here, the jury – did not impose a sentence of death “under the influence of passion, prejudice, or any other arbitrary factor.” *See also Gregg*, 428 U.S. at 206 (stating that proportionality review is “a check against the random or arbitrary imposition of the death penalty ... [and] substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury”); *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (“evaluat[ing] the [Solicitor’s closing argument in light of S.C. Code Ann. § 16–3–25(C)(1) (2003) to determine ‘whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor’ ”). The trial judge’s comments months before the jury was selected and of which jurors were unaware, could not have any bearing, whatsoever, on the death sentence imposed by them. So, even if Petitioner’s constitutional argument had been preserved for this Court’s review, it fails because the trial judge’s remarks here are not and cannot be an arbitrary factor under § 16-3-25(C)(1).

IV.

Moreover, this Court has already correctly found, in lengthy *dicta*, that although the trial judge's comments were clearly improper, Petitioner was not prejudiced by those remarks. *Jenkins*, Howard's Adv. Sh. No. 12 at 52-56. The Court further correctly found that the comments here differed from those cases in which the Court found a trial judge's comments regarding the defendant's exercise of his right to a jury trial or right to remain silent prejudicial, such as *State v. Crisp*, 362 S.C. 412, 415-16, 608 S.E.2d 429, 431-32 (2005) (comments on right to jury trial), *State v. Owens*, 362 S.C. 175, 178, 607 S.E.2d 78, 79-80 (2004) (same), and *State v. Pierce*, 289 S.C. 430, 434, 346 S.E.2d 707, 710 (1986) (exercise of right to remain silent), *overruled on other grounds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

As a further reason for finding no prejudice and without belaboring all of the points in its brief, Respondent notes that it previously argued that Petitioner had "take[n] the comments out of context. Rather than indicating that the trial judge was predisposed to imposing a death sentence if [Petitioner] pled guilty, he was merely explaining that the State could seek the death penalty without offering [Petitioner] the opportunity to plead to a life sentence and that a death sentence was still possible if he entered a plea without the State withdrawing its notice of intent to seek the death penalty." Final Brief of Respondent at 17. This was the question posed by Petitioner. Respondent would merely add that in *Brown v. Davenport*, No. 20-826, 2022 WL 1177498, at *12 (U.S. Apr. 21, 2022), the United States Supreme Court emphasized that " 'the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute.' " (Quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)). Respondent submits the same should hold true for the trial judge's comments here, particularly where he was never alerted to Petitioner's claim on appeal that "his March 7 comments could have been an issue or could have

improperly influenced Jenkins' decision on his constitutional right to not plead guilty." *Jenkins*, Howard's Adv. Sh. No. 12 at 55 .

V.

Petitioner further argues that this Court should reconsider its holding that the trial judge did not abuse his discretion by refusing to allow Dr. Donna Schwartz-Maddox to testify that co-defendant McKinley Daniels made a statement to her that he told Petitioner to kill victim Stull. Respondent submits that this Court properly affirmed the trial judge's ruling. See *Jenkins*, Howard's Adv. Sh. No. 12 at 57-62. Respondent would stand by this Court's Rule 703, SCRE, analysis and would merely point out that Petitioner was not prejudiced by the trial judge's ruling and that his reliance on *Green v. Georgia*, 442 U.S. 95 (1979) is misplaced because McKinley Daniels was present in the courtroom and under defense subpoena. *R. 2179*. Accordingly, he could have been called to testify to the statement that he made to Petitioner. See also *Jenkins*, Howard's Adv. Sh. No. 12 at 57 n. 12.⁵

Petitioner was likewise available and could have testified to McKinley Daniels' statement to him. See *State v. Terry*, 339 S.C. 352, 356, 529 S.E.2d 274, 277 (2000) (defendant cannot make himself "unavailable" as a witness by exercising Fifth Amendment right not to testify). "While no

⁵ Additionally, Respondent has argued (Final Brief of Respondent at 27-28) that none of the circumstantial guarantees of trustworthiness surrounding the statement in *Green* are present in Daniels' statement to Dr. Maddox. Daniels was not under oath when he made the statement. Instead, his statement was made to Dr. Maddox to assist in preparation for Petitioner's capital trial. Also, both this Court's opinion and Petitioner's own Statement of the Case reflects that Daniels had already been tried, convicted, and sentenced to forty-five years imprisonment when he made the statement to Dr. Maddox. So, he did not and could not potentially expose himself to further criminal liability by making the statement. Moreover, he was found to be intellectually disabled at his trial. See Brief of Appellant, p. 4 n. 1. Accordingly, it was not "a statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Rule 804(b)(3), SCRE.

inference of guilt can be drawn from [Petitioner's] refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those facts." *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1990). Another reason he cannot show any prejudice is that the trial judge twice stated that if Petitioner wanted to tell the jury the same thing that he had told Dr. Maddox in his closing statement, he could do so, and he would not be subject to cross-examination. *See R. 21 70-71; 21 78*. Although this would not have constituted proper argument under § 16-3-28, *see State v. Moore*, 357 S.C. 458, 462-63, 593 S.E.2d 608, 610-11 (2004), the State did not object when the trial judge told Petitioner he could say this in his argument and Petitioner cannot complain of any error in the trial judge's offer to permit such an argument under § 16-3-28 because the error inured to his benefit.

CONCLUSION

Based on the forgoing, Respondent submits that the Petition for Rehearing should be denied.

Respectfully submitted,

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