No. 18-6110

IN THE SUPREME COURT OF THE UNITED STATES

MIKAL MAHDI,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS FOR CALHOUN COUNTY, SOUTH CAROLINA

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Is *Hurst v. Florida,* ___ U.S. ___, 136 S.Ct 616 (2016) a new substantive standard of constitutional law, binding on state court criminal procedures, that applies retroactively?

(Petition, i).

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CAPITAL CASE
NO EXECUTION DATE SET

OPINION BELOW

Petitioner seeks to challenge the opinion of the Honorable Doyet A. Early, III, dated June 29, 2017 and filed July 6, 2017. It is a trial court opinion addressing the viability of a successive state post-conviction relief action. The opinion finding the action procedurally barred is unpublished. It is provided in the Petition Appendix at pp. A.70a – A.116a.

JURISDICTION

Petitioner may meet the jurisdictional requirements of 28 U.S.C. § 1257(a) because, though state post-conviction relief was denied on the basis of state procedural bars, the procedural bars were dependent upon finding *Hurst v. Florida,*

577 U.S. ___, 136 S.Ct. 616 (2016), did not constituted a new rule under federal law, and was not applicable factually to Mahdi's guilty plea and judge sentencing. (See Petition Appendix, pp. A.83a – 92a and A.103a – A.110a). "When application of a state law bar 'depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded.'"). *Foster v. Chatman*, 578 U.S. ___, ___, 136 S. Ct. 1737, 1746 (2016) (quoting *Ake v. Oklahoma,* 470 U.S. 68, 75, 105 S.Ct. 1087 (1985)). Thus, the petition may fall within the permissible jurisdiction of this Court for discretionary review. [1]

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner submits the rights secured by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution are at issue. (Petition, p. 2).

STATEMENT OF THE CASE

I. Introduction to the Procedural History.

Mahdi is currently challenging his guilty plea and death sentence by way of this petition from a procedurally barred, successive and untimely, state post-conviction relief action, and also in federal habeas review by way of a petition filed pursuant to 28 U.S.C. § 2254. The District Court of South Carolina, in its Order of

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[1] Though Judge Early's 2017 order is challenged, for purposes of determining adherence to the Court's time limitations, Respondent submits the petition was timely filed within 90 days of the June 27, 2018 Order of the Supreme Court of South Carolina denying the petition for rehearing following the order denying certiorari review. See Supreme Court Rule 13.1, Rules of the Supreme Court. The Order denying the petition for rehearing on the order denying certiorari review is in the Petition Appendix at p. 207a.

September 24, 2018, granted Respondents' motion for summary judgment and denied federal habeas relief. (8:16-cv-03911-TMC, ECF No. 138). The issue of whether "South Carolina's death penalty statute, S.C. Code Ann. § 16- 3-20, is unconstitutional because it automatically precludes jury sentencing following a guilty plea," in light of *Hurst v. Florida,* 577 U.S. ___, 136 S.Ct. 616 (2016), was addressed on the merits in the federal habeas action, and relief was denied. (8:16-cv-03911-TMC, ECF No. 138 at 84-88). Mahdi filed a motion to alter or amend on October 22, 2018, which is currently pending. (8:16-cv-03911-TMC, ECF No. 144). Mahdi advised the District Court in his latest motion that he has also filed a petition in this Court from the second state post-conviction relief action; however, Mahdi has not moved to stay a ruling on the motion to alter or amend. The District Court action, as of this filing, remains active.

II. General Facts of the Crime.

A detailed recitation of the facts may be found in the concurring opinion in the state direct appeal:

> On July 14, 2004, Petitioner, then a resident of Virginia, embarked upon a crime spree that would span four states. Petitioner stole a .380 caliber pistol from his neighbor, a set of Virginia license plates, and a station wagon. Petitioner left Virginia and headed to North Carolina.
>
> On July 15, Petitioner entered an Exxon gas station in Winston–Salem, North Carolina armed with the .380 pistol. Petitioner took a can of beer from a cooler and placed it on the counter. The store clerk, Christopher Jason Boggs, asked Petitioner for identification. As Boggs was checking Petitioner's identification, Petitioner fatally shot him at point-blank range. Petitioner fired another shot into Boggs as he lay on the floor. Petitioner then attempted unsuccessfully to open the store's cash register. Petitioner left the store with the can of beer, and headed to South Carolina.

Early in the morning of July 17, Petitioner approached Corey Pitts as he sat at a traffic light in downtown Columbia, South Carolina. Petitioner stuck his gun in Pitts' face, forced him out of his car, and stole Pitts' Ford Expedition. Petitioner replaced the Expedition's license plates with the plates he had stolen in Virginia, and headed southeast on I–26.

About thirty-five minutes down the road, Petitioner stopped at a Wilco Hess gas station in Calhoun County and attempted to buy gas with a credit card. The pump rejected the card, and Petitioner spent forty-five minutes to an hour attempting to get the pump to work. Due to his suspicious behavior, the store clerks called the police. Aware that the clerks' suspicions had been alerted, Petitioner left the Expedition at the station and fled on foot through woods behind the station.

About a quarter to half mile from the station, Petitioner came upon a farm owned by Captain James Myers, a thirty-one year veteran law enforcement officer and fireman. Petitioner broke into a work shop on the Myers property. Once inside the work shop, Petitioner watched television and examined Myers' gun collection. Petitioner found Myers' shotgun and used the tools in the shop to saw off the barrel and paint it black. Petitioner also took Myers' .22 caliber rifle and laid in wait for Myers.

That day, Myers had been at the beach celebrating the birthdays of his wife, sister, and daughter. Myers had visited with his father before returning to his farm. Upon arriving at the farm, Myers stopped by the work shop, where he was confronted by Petitioner. Petitioner shot Myers nine times with the .22 rifle. Petitioner then poured diesel fuel on Myer's body and set the body on fire. Petitioner stole Myers' police-issued truck, and left with Myers' shotgun, his .22 rifle, and Myers' police-issued assault rifle.

Later that evening, Myers' wife, also a law enforcement officer, became worried when Myers did not return home. Mrs. Myers drove to the work shop and discovered Myers' burned body lying in a pool of blood. Petitioner escaped to Florida, where he was spotted by police on July 21 driving Myers' truck. Fleeing the police, Petitioner abandoned the truck on foot in possession of the assault rifle. When cornered by police, Petitioner abandoned the rifle and was eventually taken into custody.

Mahdi v. State, 678 S.E.2d 807, 809 (S.C. 2009) (Toal, C.J., concurring).

The District Court of South Carolina relied upon these facts as presented in the concurring opinion for the factual recitation in the federal habeas order. (8:16-cv-03911-TMC, ECF#138 1-3).[2] The District Court also noted that Mahdi had pleaded guilty to first-degree murder in North Carolina for the murder of Mr. Boggs, and received a life sentence. (8:16-cv-03911-TMC, ECF#138 at 2, n. 1).

III. General Procedural History.

a. State Court Actions.

The District Court of South Carolina in the federal habeas order further set out a comprehensive general procedural history which Respondent submits best summarizes the criminal charges, plea and sentencing, and multiple challenges Mahdi has pursued in state proceedings:

Guilty Plea & Sentencing

> On August 23, 2004, the Calhoun County grand jury indicted Mahdi for murder, grand larceny, and second degree burglary, and the State filed its Notice of Intent to Seek the Death Penalty. (ROA 1829-35). The South Carolina Supreme Court ordered South Carolina Circuit Court Judge Clifton Newman to preside over Mahdi's case. (ROA 1841). Judge Newman appointed attorneys Carl Grant and Glenn Walters to represent Mahdi. (ROA 8). However, in 2016, upon Grant's motion and with the State and Mahdi's consent, the court relieved Mr. Grant as counsel because he had sustained a serious injury in a motorcycle accident. (ROA 104-05). Mr. Walters replaced

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[2] The detailed summary was set out in the state opinion "to record the facts of this particularly heinous case," and the Chief Justice, who authored the concurring opinion, explained her reason:

> I recite these facts to emphasize the egregious nature of Petitioner's crimes. In my time on this Court, I have seen few cases where the extraordinary penalty of death was so deserved. I therefore concur with the majority and vote to affirm Petitioner's conviction and sentence.

Mahdi, 678 S.E.2d at 809.

Mr. Grant as lead counsel and the court appointed Joshua Koger, Jr., as second chair counsel. (ROA 109).

From November 26th to 29th, 2006, the parties engaged in individual *voir dire* and selected a capital jury. (ROA 207-1318). However, on November 30th, prior to the jury being sworn, Mahdi waived his right to a jury trial and pled guilty to all charges. (ROA 1336-68). Following the mandatory twenty-four hour statutory waiting period, Mahdi's sentencing proceeding before Judge Newman began on December 4, 2006. (ROA 1372). As aggravating circumstances, the State alleged that Mahdi: (1) committed the murder during the commission of a burglary; (2) committed the murder during the commission of a larceny with a deadly weapon; (3) committed the murder during the commission of a robbery while armed with a deadly weapon; and (4) murdered a law enforcement officer during or because of the performance of his official duties. (ROA 1838). Judge Newman found the State proved the first two aggravating circumstances beyond a reasonable doubt and, after carefully considering all of the evidence, sentenced Mahdi to death. (ROA 1810-26).

Direct Appeal

On direct appeal, Mahdi raised one issue:

> Did the trial judge improperly consider Mikal Mahdi's initial exercise of his constitutional right to a trial by jury in imposing a death sentence?

(ECF No. 31-1 at 3). On June 15, 2009, the South Carolina Supreme Court affirmed Mahdi's sentence. *See Mahdi v. State*, 678 S.E.2d 807 (S.C. 2009). (App. A000193). Mahdi did not appeal this decision, but moved for a stay of execution in order to pursue post-conviction relief ("PCR"). On July 23, 2009, the South Carolina Supreme Court granted Mahdi's motion and assigned South Carolina Circuit Court Judge Doyet A. Early, III, to preside over Mahdi's PCR action.

First PCR Action

On August 18, 2009, Mahdi filed his initial PCR application *pro se*. (App. A000853-59). Through appointed counsel, Teresa Norris and Robert Lominack, Mahdi amended his application and raised the following grounds:

10(a) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.*

11(a)(I) Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right. Counsel's deficient performance in failing to preserve the issue for appellate review deprived petitioner of the right to effective assistance of counsel.

(ii) Counsel failed to adequately advise Applicant of the advantages of jury sentencing, which resulted in the Applicant pleading guilty and purporting to waive his right to jury sentencing.

(iii) Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history.

(iv) Counsel failed to assert that Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.

(v) Counsel failed to assert that S.C. Code § 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth, Eighth, and Fourteenth Amendments as addressed in *Ring v. Arizona*, 536 U.S. 584 (2002). Moreover, this statute forces a capital defendant to choose between his right to a jury trial and his right to present mitigating evidence, namely that he has accepted responsibility for the crime. While this issue has been rejected by state courts, *see State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004), it has not been reviewed by federal courts and counsel were thus ineffective in failing to adequately preserve the record for subsequent litigation.

Counsel's conduct in each instance separately and cumulatively was both unreasonable and prejudicial in

sentencing. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008).

10(b) *Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.*

11(b) At the time of the offenses, Applicant was developmentally impaired such that he had the "mental age" of a juvenile due to his atrocious background of deprivation, neglect, abuse, and institutionalization. The Cruel and Unusual Punishment Clause precludes the infliction of the death penalty upon him, just as it precludes execution of those under the age of 18 at the time of the offenses, because of these grave developmental deficits. *See Roper v. Simmons*, 543 U.S. 551 (2005).

(App. A000458-62) (emphasis in original).

From March 9th to 11th, 2011, the PCR court held an evidentiary hearing on Mahdi's application. (App. A001240-1960). After considering all of the evidence, the PCR court dismissed Mahdi's application. (App. A000011-58). In Ground 10(a)/11(a)(iii), the PCR court found trial counsel failed to conduct an adequate mitigation investigation, but that this deficiency did not prejudice Mahdi. The State moved to alter or amend that finding (*see* App. A000787-852); the PCR court heard argument on the State's motion (App. A001204-1232); and, on August 20, 2014, the PCR court filed an amended order of dismissal, finding trial counsel had adequately investigated potential mitigating evidence. (App. A000059-191 ("PCR Order")). On August 27, 2014, Mahdi moved to alter or amend the amended order (App. A000257-59), and the PCR court denied Mahdi's motion on September 9, 2014 (App. A000192).

PCR Appeal

Mahdi, through counsel Seth C. Farber, Brandon W. Duke, and Teresa L. Norris, appealed the PCR court's decision by filing a petition for a writ of certiorari to the South Carolina Supreme Court raising one issue:

> Was Petitioner denied the effective assistance of counsel at his capital sentencing proceeding by trial counsel's decision to rely entirely on a single expert witness to present mitigating evidence about petitioner's background instead of calling available lay witnesses who could have provided detailed and specific testimony in mitigation?

(ECF No. 31-18 at 5). On September 8, 2016, after full briefing by the parties, the Supreme Court of South Carolina denied the petition. (ECF No. 31-21). Remittitur issued on September 26, 2016. (ECF No. 31-22).

Mahdi petitioned the United States Supreme Court for certiorari review of the South Carolina Supreme Court's decision, presenting virtually the same issue:

> Whether counsel in a capital sentencing proceeding can, consistent with this Court's holdings in *Williams v. Taylor*, 529 U.S. 362 (2000), and its progeny, properly rely exclusively on expert testimony and forgo calling available lay witnesses with detailed, firsthand information about mitigating circumstances in the defendant's background.

(ECF No. 51-1 at 2). The United States Supreme Court denied certiorari on February 21, 2017. (ECF No. 51-4).

Second PCR Action

On January 10, 2017, after filing the instant federal habeas petition, Mahdi through his federal habeas counsel filed a second PCR application, raising the following grounds:

> 10) Statement of grounds for relief:
>
> a) S.C. Code Ann. § 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution, which is applicable to the states through the Fourteenth Amendment, because a judge rather than a jury finds facts required for imposition of a death sentence. *Hurst v. Florida*, ___U.S. ___, 136 S.Ct. 616 (2016).

b) Mr. Mahdi was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial because his trial counsel advised him that the guilty plea would be considered as mitigation.

c) Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Mr. Mahdi seeks an appeal on the following grounds for relief and supporting facts raised in his initial application for post-conviction relief (Case No. 2009-CP-09-164), as amended:

- Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

  -- Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right. Counsel's deficient performance in failing to preserve the issue for appellate review deprived petitioner of the right to effective assistance of counsel.

  -- Counsel failed to adequately advise Applicant of the advantages of jury sentencing, which resulted in the Applicant pleading guilty and purporting to waive his right to jury sentencing.

  -- Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history.

  -- Counsel failed to assert that Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to

the United States Constitution due to Applicant's developmental deficits.

-- Counsel failed to assert that S.C. Code Section 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth, Eighth, and Fourteenth Amendments as addressed in *Ring v. Arizona*, 536 U.S. 584 (2002). Moreover, this statute forces a capital defendant to choose between his right to a jury trial and his right to present mitigating evidence, namely that he has accepted responsibility for the crime. While this issue has been rejected by state courts, *see State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004), it has not been reviewed by federal courts and counsel were thus ineffective in failing to adequately preserve the record for subsequent litigation.

- Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.

-- At the time of the offenses, Applicant was developmentally impaired such that he had the "mental age" of a juvenile due to his atrocious background of deprivation, neglect, abuse, and institutionalization. The Cruel and Unusual Punishment Clause precludes the infliction of the death penalty upon him, just as it precludes execution of those under the age of 18 at the time of the offenses, because of these grave developmental deficits. *See Roper v. Simmons*, 543 U.S. 551 (2005).

d) If the State contends that any of the grounds for relief identified in paragraph 10(c) were not ruled on by the initial post-conviction relief judge, then Mr. Mahdi seeks a ruling so that he may appeal.

(ECF No. 46-1 at 2-4).

> The State responded to Mahdi's application, asserting that it should be dismissed as improperly successive and time barred. (*See* ECF No. 46-2). The second PCR court heard argument on the State's motion and, on June 29, 2017, dismissed Mahdi's application on procedural grounds. (ECF No. 66-1). Mahdi moved to alter or amend the court's order (ECF No. 103-6), and the court denied that motion (ECF No. 79-1).
>
> Mahdi appealed the second PCR court's order. (ECF No. 103-8). On April 19, 2018, the South Carolina Supreme Court found Mahdi had failed to show an arguable basis for asserting the lower court's determination was improper and dismissed the matter. (ECF No. 126-1). Mahdi filed a petition for rehearing (ECF No. 135-1), which the South Carolina Supreme Court denied on June 27, 2018 (ECF No. 135-2). Remittitur issued the same day. (ECF No. 135-3).

(8:16-cv-03911-TMC, ECF No. 138 at 3-9).

b. Federal Habeas Action.

On February 9, 2017, Petitioner Mahdi filed a petition pursuant to 28 U.S.C. § 2254 seeking federal habeas relief. The litigation continued with the District Court denying relief by granting Respondents' motion for summary in its order filed September 24, 2018. In addition to other claims, Mahdi raised a claim similar to the issue presented in his currently pending petition to this Court:

> S.C. Code Ann. § 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth and Fourteenth Amendments to the United States Constitution as addressed in *Hurst v. Florida*, U.S. , 136 S. Ct. 616 (2016), which is a new rule of constitutional law that applies retroactively to Mr. Mahdi's death sentence.

(8:16-cv-03911-TMC, ECF No. 138 at 10).

Respondents submitted and argued the claim presented was procedurally defaulted and not available for review on the merits. However, the District Court of

South Carolina did not resolve the procedural default argument, but determined to consider, and deny, the claim on the merits:

> Mahdi first presented this claim in his second PCR application as an independent ground, arguing that the United States Supreme Court's decision in *Hurst v. Florida*, U.S. ___, 136 S.Ct. 616 (2016), announced a new rule of constitutional law that applied retroactively to his death sentence. Mahdi contends the second PCR court decided this claim on the merits. But, Respondents assert the second PCR court dismissed the claim as time-barred and improperly successive on adequate and independent state law grounds. The court will not decide this procedural dispute, but instead addresses this ground on the merits.

(8:16-cv-03911-TMC, ECF No. 138 at 84 n. 36).

Mahdi filed a motion to alter or amend on October 22, 2018, which is, as of the filing of this brief, still pending. (8:16-cv-03911-TMC, ECF No. 144).

REASONS WHY CERTIORARI SHOULD BE DENIED

There are two. First, this issue is being simultaneously litigated on the merits in an existing federal habeas action filed pursuant to 28 U.S.C. § 2254, along with other issues not part of the question presented. The merits ruling on the one issue raised here is subject to continued review in the ordinary course of federal appellate procedure. That process will provide an opportunity to include challenges to all claims and defenses in the federal habeas action, thus, is the most efficient and comprehensive process for the development of the case. Second, if Petitioner Mahdi should avoid procedural hurdles, *Hurst v. Florida* could not apply factually to his case as Mahdi pleaded guilty and waived his right to a jury. The District

Court in the federal habeas action came to this conclusion, and it is soundly supported by the record.

Respondent will address each reason to deny the petition in turn.

I.

> The issue presented was raised in state litigation but found procedurally barred from review on the merits. This adds an unnecessary layer of consideration where the issue has also been raised, and actually litigated on the merits, in the existing federal habeas action. This issue, along with any and all other issues Petitioner chooses to litigate within his federal action, could be reviewed through the federal action in the normal course of the federal appeal process.

Petitioner did not comply with state procedural rules in presenting his issue in the second state post-conviction relief action. The second post-conviction relief action was barred as untimely and improperly successive. Most particularly, the issue Mahdi presents in his petition to this Court was procedurally barred in state court because the state court found *Hurst v. Florida* did not create a new rule. Rather, this Court applied its 2002 ruling in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), to the procedure at issue in *Hurst*. *See Hurst,* 136 S.Ct. at 621 ("We granted certiorari to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*. We hold that it does, and reverse.") (citation omitted). Petitioner Mahdi pleaded guilty on November 30, 2006. *Ring* was available precedent. Because *Ring* was available, *Hurst*, which applied *Ring*, provided no new rule of law or basis for an exception to the state procedural bars.

Based on the procedural bars in the state litigation, Respondents argued procedural default in the federal habeas action; however, this issue was addressed

on the merits in Mahdi's federal habeas action. The District Court declined to "decide th[e] procedural dispute," noting Mahdi's offered argument that the state court decided the claim on the merits within the order. (8:16-cv-03911-TMC, ECF No. 138 at 84 n. 36). When the motion to alter or amend is resolved, an appeal to the Fourth Circuit Court of Appeals is expected, though the District Court denied a certificate of appealability. The issue was directly presented in the federal litigation and does not have the complication of the procedural bars applied in the state action.

Consequently, this Court should deny Mahdi's petition from the procedurally barred state litigation as the federal litigation more squarely presents the issue, and the federal appellate process will allow more comprehensive review of this, and, for that matter, any other claims and/or defenses arising in or from the federal action.

II.

Hurst v. Florida could not apply factually to Petitioner Mahdi as Mahdi pleaded guilty and waived his right to a jury.

Under state law, when Mahdi pleaded guilty, he could only be sentenced by the plea judge. S.C. Code Ann. § 16-3-20 (B) ("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."). *See also State v. Downs,* 604 S.E.2d 377, 380 (S.C. 2004) ("... *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty" and finding the waiver valid where the defendant "was informed that by pleading guilty he waived his right to a jury trial

on both guilt and sentencing."). The record shows Petitioner Mahdi made a knowing and intelligent waiver of his right to a jury.

As noted above, the District Court of South Carolina rejected Mahdi's challenge to South Carolina's statute in the federal habeas action. The District Court's ruling is sound and reflects the position Respondent would offer here – *Hurst* did not create a new rule, but was an application of *Ring*, and, the logic of *Ring* is not applicable because Mahdi pleaded guilty, admitted relevant facts, and waived his right to a jury:

> ***GROUNDS THREE & FOUR – CONSTITUTIONALITY OF SOUTH CAROLINA'S DEATH PENALTY STATUTE***
>
> In Ground Three, Mahdi claims South Carolina's death penalty statute, S.C. Code Ann. § 16-3-20, is unconstitutional because it automatically precludes jury sentencing following a guilty plea. Although this claim was not presented in Mahdi's original PCR application, Mahdi asserts it is appropriate for habeas review because the United States Supreme Court's decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016), established a new constitutional rule requiring jurors to make all factual findings necessary for imposition of the death penalty and that rule applies retroactively to Mahdi's sentence. Respondents contend *Hurst* did not create a new rule of constitutional law, but was an application of *Ring v. Arizona*, 536 U.S. 584 (2002), to Florida's capital sentencing scheme.
>
> The court previously addressed this issue in its order denying Mahdi's motion to stay (ECF No. 91) and agreed with Respondents, finding "[t]he holding in *Hurst* was not a significant change in the law as the Supreme Court simply applied prior precedent, its holdings in *Ring* and *Apprendi*, to Florida's capital sentencing statutes." (ECF No. 91 at 4); *see also Hurst*, 136 S.Ct. at 621–22 (granting certiorari "to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*" and analyzing Florida's statute under *Ring*'s framework). In addition, the court found the holding in *Hurst* did not apply retroactively. (ECF No. 91 at 4-5 (citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already

final on direct review"); *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001) (holding the new rule announced in *Apprendi* not retroactively applicable to cases on collateral review); *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (holding that a "new rule of constitutional law" is "made retroactive to cases on collateral review by the Supreme Court" only if the Supreme Court holds as much). Mahdi has not provided the court with reason to alter these findings.

Further, the court finds South Carolina's capital sentencing procedures have not violated Mahdi's constitutional rights. In *Ring*, the Supreme Court found that Arizona's capital sentencing structure violated the Sixth Amendment right to a jury trial in capital prosecutions. Under Arizona's statute, "following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determine[d] the presence or absence of the aggravating factors required" to impose the death penalty. *Ring*, 536 U.S. at 588. Applying its reasoning from *Apprendi*, the Court found that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" a defendant has a right to submit those factors to a jury for determination. *Id.* at 609. Thus, *Ring* established that when a defendant exercises his right to a jury trial on a capital offense, he is entitled to have a jury determine any aggravating factors necessary to impose a death sentence.

In *Hurst*, the Court applied its reasoning in *Ring* to Florida's capital sentencing scheme. In Florida, "[a] person who ha[d] been convicted of a capital felony [would] be punished by death" only if an additional sentencing proceeding "result[d] in findings by the court that such person [would] be punished by death." Fla. Stat. § 775.082(1) (2010) (amended 2016). Under this statute, if a jury convicted the defendant of a capital felony, a sentencing judge would conduct an evidentiary hearing before the jury and the jury would issue an "'advisory sentence' of life or death without specifying the factual basis of its recommendation." *Hurst*, 136 S. Ct. at 620 (citing Fla. Stat. § 921.141(1)–(2) (2010) (amended 2016)). "Notwithstanding the recommendation of the jury, the court, after weighing the aggravating and mitigating circumstances, [would then] enter a sentence of life imprisonment or death." Fla. Stat. § 921.141(3) (2010) (amended 2016). Thus, although the court afforded some weight to the jury's recommendation, "[l]ike Arizona at the time of *Ring*, Florida [did] not require the jury to make the critical findings necessary to impose the death penalty." *Hurst*, 136 S. Ct. at 622. Because this procedure allowed a judge to increase a defendant's maximum penalty based on

his own factfinding, the Court held Hurst's sentence violated the Sixth Amendment. *Id.*

The South Carolina Supreme Court has distinguished South Carolina's statute from Arizona's (and Florida's) because, in South Carolina, "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." *State v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004); *State v. Wood*, 607 S.E.2d 57, 61 (S.C. 2004). Thus, if a capital defendant in South Carolina exercises his right to a jury trial, a jury must determine both his guilt and sentence. However, if a capital defendant pleads guilty, and waives his right to a jury trial, *Ring* is not applicable. *See id.* (finding *Ring* "did not involve jury-trial waivers and is not implicated when a defendant pleads guilty" under South Carolina's death penalty statute); *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010) (discussing a challenge to Virginia's capital sentencing scheme, which is functionally equivalent to South Carolina's, and finding *Ring* did not hold "that a defendant who pleads guilty to capital murder and waives a jury trial under the state's capital sentencing scheme retains a constitutional right to have a jury determine aggravating factors").

During his colloquy with Judge Newman, Mahdi expressed, under oath, an understanding of his right to a jury trial and sentencing; what that trial and sentencing would require, including the State's burden of proof; the nature of the charges against him and possible sentences, including death; and that if he pled guilty, Judge Newman would determine his sentence, not a jury. (*See* App. A003219–32). Along with waiving his right to a jury trial (App. A003227), Mahdi expressly and voluntarily waived his right to jury sentencing (App. A003225). In addition, Mahdi admitted to the facts of the crime as stated by the Solicitor. (App. A003233-43).

Mahdi argues that, although he pled guilty to grand larceny and second-degree burglary and admitted to the relevant facts, in order to find the related statutory aggravating circumstances and impose the death penalty, Judge Newman had to find the additional fact that Mahdi murdered Captain Myers while committing these crimes with the use of a deadly weapon. (ECF No. 75 at 31). However, Mahdi specifically admitted to this fact during his guilty plea:

> **THE COURT**: And did you, on or about July 18th, 2004, at around the same time and date as the murder, enter the building belonging to James E. Myers and Amy Tripp Myers

without their consent, with intent to commit a crime therein? And while in the building or during the immediate flight or leaving the building, were you armed with a deadly weapon? And did you cause physical injury, including the killing of Mr. Myers with the pistol during this same burglary?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: And did you steal the officer's - - the 2003 Dodge Ram truck in the possession of the officer and owned by the City of Orangeburg?

DEFENDANT MAHDI: Yes, sir, Your Honor.

(App. A003243-44).

Mahdi also asserts *Hurst* requires jurors to consider "statutory and non-statutory mitigating factors, the specific circumstances of the crime, [and] the character of the defendant." (ECF No. 75 at 32). This argument misses the central holding of *Apprendi*, *Ring*, and *Hurst* — juries must find facts necessary to *increase* a defendant's penalty. These cases do not address mitigation.

Given Mahdi's voluntary waiver and admission to the relevant facts, judicial sentencing did not violate Mahdi's Sixth Amendment rights. *See Blakely v. Washington*, 542 U.S. 296, 303, 310 (2004) (holding that under *Apprendi*, a judge may impose any sentence authorized "on the basis of the facts . . . admitted by the defendant" and noting "nothing prevents a defendant from waiving his *Apprendi* rights"). Accordingly, Mahdi's constitutional challenge to South Carolina's death penalty statute fails on the merits.

(8:16-cv-03911-TMC, ECF No. 138 at 84-88).

In particular, the *Lewis v. Wheeler* case, as relied upon in the District Court order, well illustrates the point as Virginia's statute, like South Carolina's, provides:

...when a defendant is charged with a death- eligible offense, the trial court first submits the issue of guilt or innocence to a jury. If the defendant is found guilty, then the same jury decides the penalty. However, if a defendant pleads guilty and waives his right to a jury

> determination of guilt, a judge conducts the sentencing proceeding alone and determines the existence of any aggravating factors. *See* Va. Code Ann. § 19.2-257.

(8:16-cv-03911-TMC, ECF No. 138 at 87 n. 38).

In short, like the defendant's position in *Lewis,* Mahdi's position fails on the merits because of the waiver of jury proceedings. It is a different process under scrutiny – and different matter of law – than that addressed in *Ring* and *Hurst.* This is a matter of waiver. The state court record shows Mahdi specifically waived his right to a jury trial, understood the waiver would result in being sentenced by the plea judge, and also shows that Mahdi – who had selected a jury before his decision – preferred to be sentence by a judge rather than a jury:

> THE COURT: And, Mr. Mahdi, you do understand that we have selected a jury to hear the case and decide your guilt or innocence concerning these charges?
>
> DEFENDANT MAHDI: I'm fully aware of that, sir.
>
> THE COURT: And do you understand that that same jury, if they were to find you guilty, will then, in a second phase of the trial known as the penalty phase of a trial, would then hear additional evidence and determine whether or not your sentence should be death or life imprisonment without the possibility of parole?
>
> DEFENDANT MAHDI: I understand that, sir.
>
> COURT: And do you understand that in order for a jury to find you guilty, all 12 jurors must unanimously agree?
>
> DEFENDANT MAHDI: I understand that, Your Honor.
>
> THE COURT: And do you also understand that in order for a jury to recommend a death sentence, that all 12 jurors must agree to recommend the death sentence?
>
> DEFENDANT MAHDI: Yes, sir.

THE COURT: And do you understand that you have the constitutional right to have the jury decide your guilt or innocence and, also, you have the constitutional right to have the jury determine your sentence?

DEFENDANT MAHDI: I fully understand that, Your Honor.

THE COURT: And do you understand that if I were to accept your guilty plea today, the jury will have no role in your sentencing and the decision as to what sentence you will receive will be left solely up to me?

DEFENDANT MAHDI: Yes, sir.

THE COURT: And do you voluntarily give up such a right?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: And do you understand what waiving that right means?

DEFENDANT MAHDI: I do, Your Honor.

THE COURT: And what does it mean?

DEFENDANT MAHDI: It means I've given up all of my rights to a 12 party jury. And I just admitted guilt to the crimes I'm being charged with.

(8:16-cv-03911-TMC-JDA, Entry No. 32-10 at 91-93).

In Petitioner Mahdi's first state post-conviction relief proceeding, plea counsel confirmed there was no cause to challenge the statute: "We wanted the judge." (8:16-cv-03911-TMC-JDA, Entry No. 32-6 at 299). Counsel explained, in part, that strategically, the judge would be a preferred option as judges have exposure to facts of violence from other cases such that the facts of the case presented can be assessed critically without the initial shock of seeing that kind of evidence for the first time. (Id., at 298-300). The record indicates a knowing and

intelligent waiver. Petitioner Mahdi knew he had a right to a jury trial and jury sentencing. He waived that right to a jury.

Mahdi is not the only South Carolina capital litigant attempting this argument. There are two others.

This same claim is being litigated in another capital post-conviction relief action, and has been raised in another capital federal habeas action. (See Jerry Inmon (a/k/a Inman), C/A 2012-CP-39-918, October 2016 Amendment, at 7, state capital post-conviction relief action, ("S.C. Code Ann. § 16-3-20, as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Inmon his right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed."); Stephen Corey Bryant v. State, C/A 9:16-cv-01423-DCN-BM, ECF No. 37 at 23-25, Federal Habeas under 2254, District Court of South Carolina[3] ("S.C. Code Ann. § 16-3-20, allowing for judge sentencing, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution," citing *Hurst v. Florida*)). Further, as noted, Virginia has also engaged in litigation on this point, as well. The structure is not unique to South Carolina. *See Mullens v. State,* 197 So. 3d 16, 38 (Fla. 2016), *cert. denied sub nom. Mullens v. Fla.,* 137 S. Ct. 672, 196 L. Ed. 2d 557 (2017) (collecting cases from jurisdictions "where defendants who pleaded guilty to capital offenses

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[3] The federal habeas action in the District Court of South Carolina is presently stayed to allow Bryant to pursue successive litigation in a state post-conviction relief action. Bryant also attempted to amend the successive action with a *Hurst* claim, but that amendment was disallowed as untimely, improperly successive and as exceeding the scope of the allowable litigation as authorized.

automatically proceeded to judicial sentencing" where the "courts have held that *Ring* did not invalidate their guilty plea and associated waiver of jury factfinding."). Thus, the issue may be raised repeatedly until ultimately addressed by this Court.

Respondent brings this to the Court attention should the Court wish to factor this into the certiorari decision. Accepting the case as it is developed here may prevent additional, unnecessary litigation; and, critically, prevent inconsistent rulings among state and federal courts considering the same state statute, perhaps even in the same capital case. The issue is clear and is not fact bound in that, at bottom, the issue is whether *Ring* (and, in particular, *Ring* as applied in *Hurst*) applies where a capital defendant has waived his right to a jury trial and he is given notice that the state statute provides only judicial sentencing if he pleads guilty. Decision at this juncture may bring finality to a federal question that is being simultaneously litigated in both state and federal court based on this Court's 2016 *Hurst* decision.

However, Respondent submits the petition should be denied. Petitioner brings neither an adequate vehicle nor a meritorious issue to this Court.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

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