No. 18-6110

IN THE
SUPREME COURT OF THE UNITED STATES

MIKAL D. 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

REPLY TO THE STATE OF SOUTH CAROLINA'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF *CERTIORARI*

THIS IS A CAPITAL CASE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

IN REPLY

Mikal Mahdi replies to the State of South Carolina's Brief in Opposition ("BIO") to his petition for a writ of *certiorari*.

1) Although pointing out this issue arrives at this Court through an application for post-conviction relief, found to be procedurally barred by the state court below, the State acknowledges, "[T]he procedural bars were dependent upon finding *Hurst v. Florida*, 577 U.S. ___, 136 S.Ct. 616 (2016), did not constituted [sic] a new rule of law," BIO at 1-2, *i.e.* a decision on the merits. And, "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." BIO at 2 (citing *Foster v. Chatman*, 578 U.S. ___, ____, 136 S.Ct. 1737, 1746 (2016) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)). Mr. Mahdi, in fact, raised this issue in state court pursuant to S.C. Code Ann. § 17-27-45(B), which provides:

> When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

Mr. Mahdi sought to invoke this provision in his application for post-conviction relief, but the court below concluded *Hurst* is not retroactive. *See* Appendix to Petition for Writ of *Certiorari* at 65a, 103a-110a. As set forth in Mr. Mahdi's petition for a writ of *certiorari*, at 10, the decision by the court below conflicts with decisions by the highest courts in Florida and Delaware.

2) The State argues, "*Hurst v. Florida* could not apply factually to Petitioner Mahdi as Mahdi pleaded guilty and waived his right to a jury trial." BIO at 15-23. Mr. Mahdi's guilty plea, however, does not preclude application of *Hurst* because of this Court's holding in *Blakely*

v. Washington, 542 U.S. 296 (2004); *see also* Mr. Mahdi's petition for a writ of *certiorari*, at 7-8, discussion *Blakely*. The State's BIO did not address the impact of *Blakely*.[1] Because of the procedural posture of this case, this Court does not need to address whether *Hurst*, if retroactive, would apply factually to Mr. Mahdi. A decision by this Court that *Hurst* is retroactive would require the court below to convene additional proceedings pursuant to S.C. Code Ann. § 17-27-45(B), which likely would include taking testimony to determine whether or not the guilty plea colloquy waived the protections extended by *Hurst* and *Blakely.*

3) Finally, despite setting forth reasons why this Court should deny Mr. Mahdi's petition for a writ of *certiorari*,[2] that State recognizes this issue is being litigated in *Jerry Inmon v. State of South Carolina*, Case No. 2012-CP-39-00918 and *Stephen Cory Bryant v. Stirling*, C/A 9:16-cv-01423-DCN-BM. BIO at 22. The State then concedes Mr. Mahdi's petition presents a "clear" legal issue that "is not fact bound," and this Court accepting this case would "bring finality to a federal question that is being litigated simultaneously" in multiple cases. BIO at 22-23.

[1] The State's BIO, at 15, cites *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004). As pointed out in Mr. Mahdi's petition for a writ of *certiorari*, at 9 (fn. 2), neither *Downs* nor any of the other state court cases addressing the constitutionality of South Carolina's capital sentencing procedure following a guilty plea considered *Blakely*.

[2] The State points out, "[T]his issue is being simultaneously litigated on the merits in an existing federal habeas action filed pursuant to 28 U.S.C. § 2254" in *Mahdi v. Stirling*, C/A 8:16-cv-03911-TMC. BIO at 13. Mr. Mahdi, in fact, filed a "mixed" habeas petition, and the federal court should have granted his petition to stay the federal proceeding pending exhaustion in state court (ECF No. 78), but the federal court denied that motion (ECF No. 91). *See Rhines v. Weber*, 544 U.S. 269, 275-78 (2005) (a stay should be granted where (1) "there was good cause for the petitioner's failure to exhaust his claims" in a prior state court proceeding; (2) the unexhausted claims are not "plainly meritless;" and (3) "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics."). Mr. Mahdi's petition arrived at this Court through the preferable practice of allowing the state courts to address constitutional issues before the federal courts consider a habeas petition.

CONCLUSION

For the reasons set forth in the petition for a writ of *certiorari* and this reply, this Court should grant the writ and consider the narrow constitutional issue presented. This Court's intervention is needed to resolve a conflict between the states.

Respectfully submitted,

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