

No. 21-5515

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH HAIRSTON,
Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

STEPHEN A. ZAPPALA, JR.
District Attorney

MICHAEL W. STREILY
Deputy District Attorney

FRANCESCO L. NEPA*
Assistant District Attorney
PA. I.D. NO. 78939

Office of the District Attorney
401 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219-2489
(412) 350-4377

**Counsel of Record*

QUESTION PRESENTED

The petitioner, in challenging the prosecutor's comment made during closing argument of the penalty phase of his death case (and, more particularly, counsel's stewardship in failing to object to the comment), relies on this Honorable Court's decisions in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207 (1989), which the petitioner asserts "carry the day." But *Booth*, which held that the Eighth Amendment prohibits a jury from considering a victim impact statement at the sentencing phase of a capital trial, and *Gathers*, which extended the holding of *Booth* to also include the prosecutor's argument to the jury relating to the impact of the victim's death on the victim's family, have both been expressly overruled by this Court's decision in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 2611 (1991). Given that the petitioner has offered no compelling reasons why *Payne* should be reversed and that the law set forth in the other two cases be reinstated, should not his petition for review be denied on this basis?

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CITATIONS.....iii

OPINION BELOW1

JURISDICTION2

STATEMENT OF THE CASE.....2

REASONS FOR DENYING THE WRIT17

I. THE PROSECUTOR'S CLOSING ARGUMENT OFFERED DURING THE PENALTY PHASE OF THE PETITIONER'S CAPITAL CASE, WHEREIN HE COMMENTED ON THE IMPACT THAT THE VICTIMS' DEATHS HAD ON THEIR DAUGHTER/SISTER, WAS PERMISSIBLE UNDER THIS HONORABLE COURT'S DECISION IN *PAYNE V. TENNESSEE*, 111 S.CT. 2597 (1991), AND BECAUSE THE PETITIONER HAS OFFERED NO COMPELLING REASONS WHY *PAYNE* SHOULD BE REVERSED AND THAT PRIOR DECISIONS OF THIS COURT PROHIBITING THE USE OF VICTIM IMPACT EVIDENCE SHOULD BE REINSTATED, THE INSTANT SITUATION DOES NOT WARRANT REVIEW..... 17

CONCLUSION21

TABLE OF CITATIONS

Cases

Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).....19

Commonwealth v. Ballard, 80 A.3d 380 (Pa. 2013).....20

Commonwealth v. Eichinger, 915 A.2d 1122 (Pa. 2007).....20

Commonwealth v. Frein, 206 A.3d 1049 (Pa. 2019).....20

Commonwealth v. Hairston, 985 A.2d 804, 808 (Pa. 2009).....14

Commonwealth v. Hairston, 84 A.3d 657 (Pa. 2014)..... 14

Commonwealth v. Hairston, 249 A.3d 1046, 1067-69 (Pa. 2021).....15

Commonwealth v. Johnson, 107 A.3d 52 (Pa. 2014).....20

Commonwealth v. Means, 773 A.2d 143, 157-58 (Pa. 2001).....20

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).....19

South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989)..19

Rules and Statutes

42 Pa. C.S. §9711(a)(2).....20

42 Pa. C.S. §9711(d)(9).....11, 17

42 Pa. C.S. §9711(d)(11).....11

OPINION BELOW

The Order and Opinion of the Supreme Court of Pennsylvania affirming the denial of post-conviction relief has been included as an Appendix to the Petition for a Writ of Certiorari filed by the petitioner, Kenneth Hairston.

JURISDICTION

The petitioner has invoked jurisdiction under 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

A. Factual History

When Chetia Hurtt was five years old, Kenneth Hairston, the petitioner in this matter, began dating her mother, Katherine (*see* TT1, 34).¹ Hairston and Katherine would eventually marry and have a son, Sean, who was diagnosed at birth with acute autism (TT1, 34, 36, 38). The four of them, as well as Katherine's mother, Goldie, all lived together on Rosetta Street in Pittsburgh's Garfield section until Hurtt, after turning 21, moved into a one-bedroom apartment in the Squirrel Hill section of the city (TT1, 36-39; TT2, 36).² On the evening of May 20, 2000, Hurtt and her boyfriend, Jeffrey Johnson, went to the movies, and when they returned to Hurtt's apartment, there were approximately ten messages on her answering machine from Hairston, asking her who she was with and saying that she should have been home by now (TT1, 41-42, 77-78). Such behavior was characteristic of how Hurtt had always been treated by Hairston, who had prohibited her from socializing with boys during her junior-high and high-school years and beyond (TT1, 40-41). Upset by Hairston's numerous messages and fearful that something bad would happen involving him,

¹ Numbers in parentheses preceded by the designation "TT1" refer to the pages of Volume I of the petitioner's jury-trial transcript, dated April 15, 2002.

² Numbers in parentheses preceded by the designation "TT2" refer to the pages of Volume II of the petitioner's jury-trial transcript, dated April 16, 2002.

Hurtt asked Johnson to spend the night in her apartment (TT1, 43-44, 78).

The following morning, May 21, 2000, there was a banging on the door, and Hurtt heard Hairston yelling for her to open up (TT1, 45, 78). Hurtt jumped up and hid in a closet, saying, "He's going to kill me," but Johnson nevertheless went to the front door (TT1, 45-46, 79-80). He opened the door and Hairston entered, asking what was going on (TT1, 80). Johnson tried to calm Hairston down, as he was very agitated, but Hairston demanded that Hurtt, who had emerged from the closet by this point, tell Johnson to leave (TT1, 47, 80). Hurtt refused, and Hairston removed a gun from his waistband, pointing it at both Hurtt and Johnson (TT1, 47-48, 80, 82). He said, "We can all die," and that he was not going to jail (TT1, 48, 81-82). Hairston's words were reminiscent of threats that Hurtt had heard him make multiple times in the past; namely, that he would "take us all out of here," which she interpreted as Hairston saying that he would kill her and her entire family (TT1, 49-50, 68, 72).

Against Hurtt's wishes, Johnson told her that he was leaving, and he exited the apartment (TT1, 51, 82). Hurtt began sobbing uncontrollably, and after Johnson had gone, Hairston pointed the gun at her face and said, "If you're going to be F'ing anybody, it's going to be me" (TT1, 51-52). Hurtt pleaded with Hairston, but he pushed her into the bedroom and removed all of his clothes; he then tried to take off Hurtt's shirt while she attempted to fight him off (TT1, 52-53). Meanwhile, Johnson flagged down a police car outside the building and detailed to Officer William Gorman what was happening inside Hurtt's apartment (TT1, 82, 85). Pittsburgh Police subsequently surrounded the apartment, with one officer knocking on the bedroom

window and identifying himself (TT1, 53, 86-87). At that point, Hairston removed the clip from his firearm and proceeded to throw the clip behind the door and the gun under the bed (TT1, 53). He then put his pants back on and told Hurtt to tell the police that everything was ok and that they should leave (TT1, 54). Hurtt instead fled the apartment and told Officer Gorman, who observed her to be ashen and shaking uncontrollably, that her stepfather was inside with a gun (TT1, 54-55, 87).

Officer Gorman entered the apartment and encountered Hairston, who was shirtless; Hairston said that he was Hurtt's father, that he resided in that apartment, and that he had come home to find a man there (TT1, 88-89). Despite Hairston's claims of residency, Officer Gorman observed only female clothing in the apartment (TT1, 89). He also recovered a firearm from the floor of the bedroom, and a live bullet about a foot away from it (TT1, 90). Hairston was taken into custody, and as a result of the aforementioned events, charges were filed against him with Hurtt as the key witness (TT1, 56, 90).

Approximately one year later, at 7:15 on the morning of June 11, 2011, the dispatcher for the City of Pittsburgh School District's school bus company received a call from a man who told her that he would be driving his son Sean to school himself that day and, for that reason, the bus did not need to come by and pick him up; the man then provided his address (TT1, 148-50). Henrietta Hardy, a neighbor of the Hairstons who was familiar with Kenneth Hairston, his wife, and their son, confirmed that Sean's bus never arrived and also she had not seen Katherine or Sean that morning, which was rather unusual (TT1, 131, 136-37). At around 8:20

a.m., Hardy was outside and encountered Hairston, who had come over to her side of Rosetta Street; his eyes were red, he smelled of alcohol, and he appeared very agitated and angry, asking Hardy whether she had heard the “bullshit” that Hurtt had been saying regarding how, after Hairston’s sexual-assault trial was over, she would get custody of Sean and would get Katherine the help that she needed (TT1, 132-34, 144-45). Hairston told Hardy that Hurtt was not going to get custody of his son, and he then stormed back across the street toward his house (TT1, 135).

Another neighbor, Angelo Morsillo, noticed Hairston talking to Hardy that morning when Morsillo went outside to retrieve his newspaper (TT1, 104). The previous night, Morsillo had spoken with Hairston, who told him that Hurtt had been attempting to take Sean away from Katherine and himself because she did not think that they were good parents, and Hairston said that if the sexual-assault case caused him to lose Sean, he would kill himself (TT1, 101-02, 112). On the morning in question, Morsillo went back inside to make breakfast after getting his paper, but about 20 minutes later, he noticed—as did Hardy—that smoke was coming out of the Hairston residence (TT1, 106-08, 145). Morsillo proceeded to call 911 (TT1, 107, 110).

At approximately 8:50 a.m., Pittsburgh firefighters and paramedics responded to a structure fire at 5447 Rosetta Street (TT2, 47, 57, 65, 72-73). Battalion Commander Roger Short attempted to enter the house through the front door, but the door was barricaded by two mattresses that had been placed horizontally behind it (TT2, 51). The back entrance was also blocked (TT2, 52). Captain James Holtz and firefighter Mike Karczewski were finally able to gain access through the front door

and, upon entering the living room, the two men heard a boy's moaning sounds coming from the couch (TT2, 58-60, 74). Holtz and Karczewski, in a room filled with smoke, were able to discover Sean Hairston on the couch with bags of clothing and garbage on top of his body and a blanket over his face; the boy was bleeding and having a hard time breathing (TT2, 58, 60, 75). They carried Sean outside to paramedic Jason Romano, who placed him on a stretcher (TT2, 60-61, 66). Romano observed that Sean was in critical condition, with no verbal or motor response and blood near his right nostril and right ear canal (TT2, 67). The posture of the boy's arm indicated some type of blunt-force trauma to the head (TT2, 68). Although Sean was still breathing, the breathing was inadequate, and Romano ultimately transported him to Children's Hospital, where he was intubated (TT2, 68-70).

Meanwhile, Holtz and Karczewski re-entered the house and went into the kitchen, where Karczewski could feel heat coming up from the basement (TT2, 61-62, 76). They found Kenneth Hairston, bleeding from the chest, on the floor of the kitchen near the top of the basement steps (TT2, 61-62, 76). Karczewski carried Hairston outside, placed him on the ground in front of the house, and then entered the house a third time (TT2, 62, 77, 81). Karczewski found Katherine Hairston on the floor of the kitchen with a hole in the side of her head (TT2, 77).³ From her appearance, Karczewski assumed that she had been shot (TT2, 77). He carried her outside—she felt like “dead weight” to him—and placed her next to her husband on the sidewalk

³ Battalion Commander Short, who observed Katherine being taken out of the house, actually observed two puncture wounds to the temple areas (TT2, 54).

(TT1, 158; TT2, 78, 81). There, she was attended to by Pittsburgh paramedic Jeffrey LaBella, who observed, in addition to the holes in her head, what he believed to be puncture wounds to her chest (TT2, 81). After checking her pulse and determining that chest compressions were having no effect, LaBella pronounced Katherine dead at the scene (TT2, 81).⁴

LaBella then focused his attention on Kenneth Hairston, who became extremely combative with LaBella and his partner, necessitating the use of a police officer's handcuffs and the efforts of several other people to place him on a stretcher (TT2, 82, 85). Paralytic drugs were administered at the scene so that Hairston could be transported to Presbyterian Hospital for treatment for his chest wounds and a laceration to his neck (TT2, 83-85). Later that day, Pittsburgh homicide detectives Dennis Logan and Richard McDonald proceeded to Presbyterian Hospital to talk to Hairston about the day's events (TT3, 11).⁵ Hairston agreed to speak to the detectives at the hospital without an attorney present, and he acknowledged killing his wife; he also acknowledged that the motivation for the killing, as well as for the fire, was the sexual-assault charges brought against him by Hurtt (TT3, 13). Hairston denied the accuracy of those charges (TT3, 13).⁶

⁴ Katherine's mother, Goldie, would ultimately be rescued by firefighters from her second-floor bedroom (TT2, 36, 44, 88).

⁵ Numbers in parentheses preceded by the designation "TT3" refer to the pages of Volume III of the petitioner's jury-trial transcript, dated April 17, 2002.

⁶ With regard to the fire itself, firefighters had smelled a strong odor of gasoline in the house and, after proceeding to the basement, discovered a gas can floating in water at

An autopsy was performed on the body of Katherine Hairston on the date of her death by Dr. Shaun Ladham of the Allegheny County Coroner's Office (TT3, 67). Dr. Ladham detected multiple depressed fractures to Katherine's skull and trauma to the brain brought about by a total of six separate impacts to the head; given the size of the wounds, he believed that the blows had been inflicted by a sledgehammer, and he conveyed as much to the police (TT3, 73-76, 85). Dr. Ladham concluded that the cause of death was blunt-force trauma to the head and that the manner of death was homicide (TT3, 85).

Sean Hairston, unlike his mother, was still alive after being transported by paramedics from Rosetta Street to Children's Hospital (TT2, 70). Sean, however, suffered two cardiac arrests while being treated at the hospital—one while being operated on and the other while in intensive care—resulting in him entering a brain-dead state (TT2, 138, 144). He would die a few days later (TT2, 145). On June 15, 2001, an autopsy was performed by Dr. Abdulrezak Shakir, who determined that Sean had endured multiple incidents of blunt-force trauma to his head, possibly inflicted by a sledgehammer (TT2, 129, 138). Dr. Shakir concluded that this blunt-force trauma was the cause of Sean's death and that the manner of death was homicide (TT2, 138-39).

On June 19, 2001, Detectives Logan and McDonald again spoke with Kenneth

the bottom of the basement steps (TT2, 56, 89-91). William Hardy, a fire investigator with the City of Pittsburgh, concluded that the fire had been deliberately set in the basement of the home with the use of some sort of flame, such as a match or lighter (TT2, 110-11, 115).

Hairston (TT3, 14). During the interview, which was conducted at the homicide offices, Hairston said that he had woken up at 6:30 on the morning of June 11 and was worried about his upcoming trial stemming from the sexual allegations made against him by his stepdaughter Hurtt (TT3, 14, 20-21). Hairston told the detectives that after getting out of the bed that he shared with Katherine, he sat in a chair next to the bed contemplating what to do for about fifteen minutes before arriving at the decision that he would kill his wife and son and then kill himself (TT3, 21-22, 43-44, 58). He said that while his wife was asleep, he wrapped a pillowcase around a 10-pound sledgehammer, and that after she woke up and sat on the edge of the bed, he came up behind her and hit her with the sledgehammer, using a two-hand grip when he swung (TT3, 23-24, 48). The blow caused his wife to fall to the floor, but because he did not want her looking at him, Hairston said that he hit her with the sledgehammer a second time (TT3, 23-24). Hairston then dragged her into the kitchen by her feet (TT3, 24).⁷

After finishing with his wife, Hairston said that he went upstairs and woke up his son Sean (TT3, 24). Sean went downstairs and proceeded to fall back to sleep on the couch, at which point Hairston took the sledgehammer and struck Sean in the side of the head (TT3, 24). Sean was still moving after the first blow, and because he did not want him stumbling out of the house, Hairston struck his son a second time

⁷ Hairston and his wife slept in a bed in the living room (TT3, 21).

(TT3, 24).⁸ Hairston said that at that point he heard Katherine moaning in the kitchen, which resulted in him hitting her with the sledgehammer again as she lay on the floor (TT3, 26).

Believing that both his wife and son were now dead, Hairston, with the sledgehammer in tow, drove to a bar, got two shots of alcohol and two bottles of Heineken, and then drove to a wooded field on North Evaline Street, where he disposed of the sledgehammer (TT3, 25). Upon returning home, he poured gasoline on the basement floor, but Hairston claimed that the gas ignited before he had intended it to, causing him to leave the basement and come back up to the kitchen (TT3, 25). There, he got a knife, stabbed himself in the chest, and laid down next to his wife, waiting, according to him, to die (TT3, 25-26).

Hairston agreed to put his confession on tape, following which he agreed to show Detectives Logan and McDonald where he had hidden the sledgehammer (TT3, 30-31, 35-37). The detectives, with Hairston's assistance, located the sledgehammer in six-foot tall weeds in a field on North Evaline, about two blocks away from Rosetta Street (TT1, 109; TT3, 31-32).⁹

⁸ Hairston said that he swung with a two-handed grip both times (TT3, 26).

⁹ The knife that Hairston used to stab himself was located by police in the kitchen, as was a bottle of Heineken (TT1, 165, 167; TT2, 35).

B. Procedural History

As a result of Hairston having killed his wife and autistic son, the Commonwealth of Pennsylvania filed a Criminal Information against him at No. CC 200109056, charging him with two counts of criminal homicide, in violation of 18 Pa. C.S. §2501. In addition, the Commonwealth, on March 14, 2002, filed a Notice of Intention to Seek Death Penalty and of Aggravating Circumstances, with the aggravating circumstances being the two set forth at 42 Pa. C.S. §9711(d)(9) and (d)(11).¹⁰

Hairston proceeded to a trial by jury on April 15, 2002 before the Honorable Jeffrey A. Manning of the Allegheny County Court of Common Pleas (*see* TT1, 7). At the conclusion of the guilt-phase portion of the proceedings two days later, the jury convicted him of two counts of murder in the first degree (*see* TT3, 166-67). The following day, April 18, 2002, the penalty phase commenced. During her penalty-phase testimony, Hurtt, Hairston's stepdaughter, stated that despite years of sexual abuse at the hands of Hairston, she never told her family about it because she had not wanted to hurt anyone (*see* TT4, 42-43).¹¹ She said that her reluctance to come forward stemmed from the fact that Hairston had threatened to harm her family if

¹⁰ The aggravating circumstance at subsection (d)(9) states: "The defendant has a significant history of felony convictions involving the use or threat of violence to the person." The aggravating circumstance at subsection (d)(11) states: "The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the commission of the offense."

¹¹ Numbers in parentheses preceded by the designation "TT4" refer to the pages of Volume IV of the petitioner's jury-trial transcript, dated April 18, 2002; this portion of the transcript contains the penalty phase exclusively.

she told them about what he was doing (TT4, 36, 42). Finally, after the incident that occurred on May 21, 2000, which is recounted in detail above in the Commonwealth's Factual History, Hurtt told a detective with the City of Pittsburgh Police sex abuse unit about what Hairston had been doing to her through the years (TT4, 44). Despite still being concerned about her family, Hurtt agreed to pursue charges against Hairston, stating that by that point she had grown "tired of being afraid" (TT4, 46). It was approximately one year later that Hairston, as detailed above, would kill Hurtt's mother and brother by hitting them in their heads multiple times with a sledgehammer, and when Hairston confessed his actions to the police afterward, he said that the reason that he had killed them—and intended to kill himself—was because of the charges of sexual abuse levied against him by Hurtt (*see* TT3, 21). Hurtt had testified at the guilt phase that when a cousin had called her and told her that her mother and brother had been killed, she knew that Hairston had done it, given the prior threats that he had made to that effect (*see* TT1, 60-61), and she testified at the penalty phase that their two deaths "destroyed me" (TT4, 48). During his closing argument in that latter phase of the proceedings, the prosecutor told the jury, "I want you to think about the pain that Chetia Hurtt went through...And I want you to think about the guilt that she's going to have to live with for the rest of her life because finally she had the courage to speak up and talk about the abuse that she had suffered for years" (TT4, 207).

At the outset of the penalty-phase proceeding, Judge Manning, after explaining the concept of aggravating and mitigating factors, had informed the jurors

that two aggravating factors would be submitted to them in this matter, the first being that the defendant has a significant history of felony convictions involving the use or threat of violence to a person (TT4, 9-10). Later, during his penalty-phase closing argument, the prosecutor contended that the Commonwealth had established both aggravating factors beyond a reasonable doubt and that with regard to the one dealing with a defendant's significant history of felonies involving the threat or use of violence, it had done so through the evidence pertaining to Hurtt (*see* TT4, 196-97). The trial court subsequently instructed the jury again about the two aggravating circumstances and stated that Hairston had four prior convictions upon which the first aggravating circumstance was based that had been stipulated to by the parties, those convictions being a rape, an attempted rape, and two involuntary deviate sexual intercourse convictions, all of which involved Hurtt as the victim (*see* TT4, 228-29; *see also* TT4, 52-53). The jury subsequently returned a verdict of death at each of the two first-degree murder counts, finding both aggravating circumstances sought by the Commonwealth (*see* TT4, 251).¹² Judge Manning would formally impose sentence on Hairston on July 11, 2002.

On May 8, 2006, Hairston, through appointed counsel, filed post-sentence motions in which he alleged eight separate claims of error or ineffectiveness. The Commonwealth filed its answer in opposition to Hairston's post-sentence motions on September 27, 2007. Judge Manning denied the post-sentence motions in an opinion

¹² The jury also found certain mitigating factors.

and order entered on the record on June 2, 2008. Hairston, through his same counsel, then appealed to the Supreme Court of Pennsylvania; that appeal was docketed at No. 566 CAP. In his brief, Hairston raised four claims, but the state supreme court, in an opinion issued on December 28, 2009, concluded that because Hairston had not filed timely post-sentence motions, his appeal was not timely filed and, therefore, his claims had not been properly preserved for review; as a result, the specific claims were not addressed. *See Commonwealth v. Hairston*, 985 A.2d 804, 808 (Pa. 2009). The court did, however, review the record to determine whether the evidence presented at trial was sufficient to sustain the first-degree murder convictions, and it concluded that it was. *Id.* at 809. The court also determined that both aggravating circumstances were amply supported by the record and that, therefore, the jury's verdict had not resulted from an improper factor. *Id.* at 809-10. Hairston's subsequent petition for writ of certiorari was denied by this Honorable Court on May 17, 2010. *See* 560 U.S. 913, 130 S.Ct. 3295 (2010).

Through newly appointed counsel, Hairston, in a petition for post-conviction relief, sought and received permission from the trial court to appeal *nunc pro tunc* from his judgment of sentence. That appeal to the Pennsylvania Supreme Court, wherein Hairston raised eight issues, was docketed at 643 CAP. On January 21, 2014, the court rejected the claims on their merits and affirmed Hairston's judgment of sentence. *See Commonwealth v. Hairston*, 84 A.3d 657 (Pa. 2014). His petition for certiorari was then denied by this Court on October 6, 2014. *See* 574 U.S. 863, 135 S.Ct. 164 (2014).

On January 21, 2015, the trial court appointed current counsel, Thomas N. Farrell, Esquire, to represent Hairston further. On January 26, 2015, Hairston, through Attorney Farrell, requested that the court stay his execution pending the resolution of a petition to be filed pursuant to Pennsylvania's Post-Conviction Relief Act, *see* 42 Pa. C.S. §9541 *et seq.* On February 9, 2015, the trial court entered an order staying Hairston's execution pending final disposition of the post-conviction proceedings. Ultimately, on August 26, 2019, the trial court dismissed Hairston's petition for post-conviction relief.

Hairston, through Attorney Farrell, appealed to the Pennsylvania Supreme Court, and that appeal was docketed at No. 786 CAP. In his brief to that court, Hairston raised eight claims, including whether his trial counsel had rendered ineffective assistance for failing to object to the portion of the prosecutor's penalty-phase closing argument in which he spoke about the "pain" and "guilt" experienced by Hurtt. The court denied Hairston relief on all claims and specifically held that there was no merit to his assertion that the prosecutor's comment was improper or that it resulted in any unfair prejudice to him. *See Commonwealth v. Hairston*, 249 A.3d 1046, 1067-69 (Pa. 2021).¹³

On August 20, 2021, Hairston, through Attorney Farrell, filed with this Honorable Court the instant Petition for a Writ of Certiorari, which was docketed at

¹³ Justice Saylor, in a concurring opinion, limited his determination to the conclusion that Hairston had failed to demonstrate that he had suffered prejudice as a result of the prosecutor's comment.

No. 21-5515. The Allegheny County District Attorney's Office did not receive a copy of the petition—nor any electronic notification that such had been filed—and, thus, was not aware that this Court was awaiting a response until it received a telephone call from a representative of this Court on October 19, 2021. On that date, the Commonwealth, through undersigned counsel, sought and received a thirty-day extension of time, until November 18, 2021, to file a response to Hairston's petition.

REASONS FOR DENYING THE WRIT

- I. THE PROSECUTOR'S CLOSING ARGUMENT OFFERED DURING THE PENALTY PHASE OF THE PETITIONER'S CAPITAL CASE, WHEREIN HE COMMENTED ON THE IMPACT THAT THE VICTIMS' DEATHS HAD ON THEIR DAUGHTER/SISTER, WAS PERMISSIBLE UNDER THIS HONORABLE COURT'S DECISION IN *PAYNE V. TENNESSEE*, 111 S.CT. 2597 (1991), AND BECAUSE THE PETITIONER HAS OFFERED NO COMPELLING REASONS WHY *PAYNE* SHOULD BE REVERSED AND THAT PRIOR DECISIONS OF THIS COURT PROHIBITING THE USE OF VICTIM IMPACT EVIDENCE SHOULD BE REINSTATED, THE INSTANT SITUATION DOES NOT WARRANT REVIEW.

Kenneth Hairston contends that his Petition for Writ of Certiorari should be granted because trial counsel in his death-penalty case gave ineffective assistance by failing to object to the portion of the prosecutor's penalty-phase closing argument that referenced the "pain" and "guilt" experienced by Chetia Hurtt, Hairston's stepdaughter and the daughter and sister of Hairston's two murder victims (*see* Petition for Writ of Certiorari, at pp. 8-9, 14-15). During that phase of the proceedings, the Commonwealth of Pennsylvania, via stipulation with the defense, had introduced Hairston's four prior convictions for sexually assaulting Hurtt in order to establish the aggravating factor set forth at 42 Pa. C.S. §9711(d)(9), which takes into consideration the capital defendant's significant history of felony convictions involving the use or threat of violence (*see* TT4, 52-53). As set forth in the Statement of the Case, the Commonwealth also elicited testimony from Hurtt that after having remained silent about the abuse for many years for fear that Hairston would act on his threats to harm her family if she told anyone, she finally agreed to pursue charges against him (TT4, 36, 42-44, 46). Hairston subsequently murdered his wife and son, and he told police that the reason for his actions was because of the

sexual-assault charges levied against him by Hurtt (*see* TT3, 13). When questioned during the penalty phase as to how the loss of her mother and brother had affected her, Hurtt replied, “It destroyed me... They were all I had” (TT4, 48). The prosecutor, in his closing argument, then spoke of the impact that the death of the victims had on Hurtt and asked the sentencing jury to “think about the pain that Chetia Hurtt went through” and to “think about the guilt that she’s going to have to live with for the rest of her life because finally she had the courage to speak up and talk about the abuse that she had suffered for years” (TT4, 207). Hairston considers the prosecutor’s comment regarding Hurtt’s victim impact testimony to have been objectionable and apparently worthy of relief from this Honorable Court.

The petitioner’s claim is grounded in an attack on victim impact testimony in general, evidenced by his assertion that “the introduction of victim impact statements, whether at the penalty phase and/or closing arguments, misdirects the jury’s focus from the finding of aggravating circumstances to the emotions and passions of the jury when rendering a death or life sentence. This is the effect of victim impact statements” (*see* Petition for Writ of Certiorari, at pp. 12-13). Thus, Hairston is seemingly contending that any comment by the prosecutor regarding the effect that the victims’ deaths had on Hurtt was improper because the statements themselves should be forbidden.¹⁴ In sole support of his position, he relies on this Court’s

¹⁴ *See also* Petition for Writ of Certiorari, at p. 12 (“It is remiss to believe that the victim impact statements, as horrifying and moving as they are dictated to the jury, do not prejudice the defendant.”).

decisions in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), arguing that “the rules and supporting arguments made in [those two cases] continue to carry the day” (Petition for Writ of Certiorari, at p. 12). But *Booth*, which held that the Eighth Amendment prohibits a jury from considering a victim impact statement at the sentencing phase of a capital trial, and *Gathers*, which extended the holding of *Booth* to also include the prosecutor’s argument to the jury relating to the impact of the victim’s death on the victim’s family, were both expressly overruled by this Court in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 2611, 115 L.Ed.2d 720 (1991).

This Court declared in *Payne* that, with regard to a capital case, “[w]e are now of the view that a State may properly conclude that, for the jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.” 111 S.Ct. at 2608. Consequently, it was held that where a State chooses to allow the admission of victim impact testimony and prosecutorial argument related to that impact, the Eighth Amendment does not bar either, as “[a] State may legitimately conclude that evidence...about the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.” *Id.* at 2609.¹⁵

¹⁵ The Commonwealth of Pennsylvania has indeed chosen to permit such evidence and

Hairston seems to acknowledge that *Payne* is the law of the land with regard to the constitutionality of victim impact statements and prosecutorial argument thereon and that the holdings of *Booth* and *Gathers* have been rejected (see Petition for Writ of Certiorari, at pp. 9-12). He also, somewhat confusingly, does not expressly state that *Payne* should be overturned and that the principles espoused in *Booth* and *Gathers* be reinstated, only that those principles “carry the day.” But if this in fact an attempt by Hairston to ask this Honorable Court to overrule the precedent established in *Payne*, the Commonwealth would respectfully submit that he has offered this Honorable Court no reasons at all for doing so, and, as a result, he has presented no basis for the granting of his Petition. See U.S.Sup.Ct. Rule 10, 28 U.S.C.A. (“Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.”). Accordingly, the Petition should be denied.

argument by the prosecutor. See *Commonwealth v. Frein*, 206 A.3d 1049, 1072 (Pa. 2019); *Commonwealth v. Johnson*, 107 A.3d 52, 78 (Pa. 2014); *Commonwealth v. Ballard*, 80 A.3d 380, 402-05 (Pa. 2013); *Commonwealth v. Eichinger*, 915 A.2d 1122, 1139-40 (Pa. 2007); and *Commonwealth v. Means*, 773 A.2d 143, 157-58 (Pa. 2001). See also 42 Pa. C.S. §9711(a)(2).

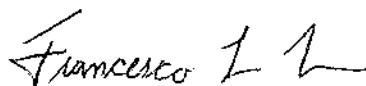
CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests this Court deny the Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

STEPHEN A. ZAPPALA, JR.
District Attorney

MICHAEL W. STREILY
Deputy District Attorney



FRANCESCO L. NEPA
Assistant District Attorney
PA. I.D. NO. 78939

Allegheny County Office of the
District Attorney
Pittsburgh, PA 15219-2489
(412) 350-4377
FNepa@da.allegheny.pa.us

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