NO. 22-5513

IN THE
Supreme Court of the United States

JEROME JENKINS, JR.,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Sr. Assist. Deputy Attorney General

*WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT

**Counsel of Record*

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1. Could a South Carolina trial judge who had told Petitioner he would sentence him to death if he pled guilty still rule, consistent with Hurst v. Florida, 577 U.S. 92 (2016), that Petitioner had to waive jury sentencing and be sentenced by him alone if Petitioner's choice under the state statute was to plead guilty and accept responsibility for his crimes?

2. Whether the decision by the South Carolina Supreme Court in this case conflicts with this Court's opinion in Green v. Georgia, 442 U.S. 95 (1979) which instructed that a defendant's fundamental right to present critical mitigating evidence in his or her defense should not be excluded during the penalty stage of a capital trial due to the mechanical application of state hearsay evidence rules?

RESPONDENT'S COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Should the Court deny certiorari on Jenkins' claim that S.C. Code Ann. § 16-3-20(B) (2019) is unconstitutional in light of *Hurst v. Florida*, 577 U.S. 92 (2016) because it requires capital defendants who want jury sentencing to plead not guilty since (1) neither *Ring v. Arizona*, 536 U.S. 584 (2002), nor *Hurst* mandate jury sentencing following a guilty plea, and (2) this Court has twice denied certiorari to review claims that the sentencing procedure in § 16-3-20(B) violates *Ring*.

II. Does the Court lack jurisdiction to address Jenkins' claim that the trial judge's comments to him at a pretrial hearing prevented the judge from ruling Jenkins could not obtain jury sentencing following a guilty plea because the Supreme Court of South Carolina relied on an independent and adequate state procedural rule in refusing to address the merits of his argument which, at most, only set forth a potential violation of state court precedent, as opposed to the United States Constitution.

III. Does Jenkin's argument the trial judge violated *Green v. Georgia*, 442 U.S. 95 (1979) by not allowing the defense's forensic psychiatrist to testify to a hearsay declaration made by Jenkins' co-defendant attempts to constitutionalize a purely state law evidentiary issue, which could not have violated *Green* because despite the trial judge's ruling either Jenkins or his co-defendant could have testified to the excluded statement, or he could have discussed it in his personal sentencing phase closing argument.

RESPONDENT'S BRIEF IN OPPOSITION

Respondents hereby make a Brief in Opposition to the Petition for Writ of Certiorari and would show the Court the following:

Following his capital trial, a state court jury convicted Petitioner, Jerome Jenkins, Jr., of murdering Bala Parachuri and attempting to murder Jimmy McZeke, during the January 2, 2015 armed robbery of a Horry County convenience store. After a separate sentencing proceeding, the jury sentenced him to death. The Supreme Court of South Carolina affirmed his convictions and death sentence on direct appeal and denied a timely Petition for rehearing. This Court should deny certiorari review.

CITATIONS TO OPINIONS BELOW

The Supreme Court of South Carolina's published opinion affirming Jenkins' convictions and death sentence is reported at 872 S.E.2d 620, and is similarly reproduced in the petition appendix. App. 1a-26a. The state court order denying his petition for rehearing is unreported but is included in the petition appendix. App. 27a-28a.

JURISDICTION

The Supreme Court of South Carolina's published opinion affirming Petitioner's convictions and death sentence was entered on April 6, 2022. Jenkins' timely petition for rehearing was denied on June 7, 2022. He invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right to ... an impartial jury ...." U.S. Const. amend. VI.

This case also involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part, that "no state shall … deprive any person of life, liberty, or property, without due process of law ...."

STATEMENT OF THE CASE

A. Facts of the murder.

The Supreme Court of South Carolina adequately summarized the evidence the State presented at Jenkins' trial as follows:

> On January 2, 2015, James Daniels entered the Sunhouse convenience store at the intersection of Highway 905 and Red Bluff Road in Longs, South Carolina, on the pretense of buying a bottle of lemonade. James' actual purpose was to scout the store for Jerome Jenkins and James' brother McKinley Daniels to rob it. Minutes after James left the store, Jenkins and McKinley entered, masked and armed with pistols. They first encountered Jimmy McZeke, who worked at the store. Jenkins and McKinley fired at McZeke, but both missed. McZeke then ran into the bathroom at the back of the store and locked the door. Jenkins followed McZeke and shot at him through the bathroom door. The gunshots shattered several glass bottles, and the shattered glass cut McZeke on his head.
>
> McKinley stayed at the front of the store where the store clerk—Bala Paruchuri—stood behind the cash register. McKinley pointed his pistol at Paruchuri, went behind the counter, and robbed Paruchuri of the money in the register. Jenkins quickly returned to the front of the store. As he and McKinley left the store, both shot Paruchuri. According to the store's video security system that recorded the entire sequence, Jenkins and McKinley were in the store for thirty-seven seconds. Paruchuri died as a result of multiple gunshot wounds.

The State charged Jenkins with murder of Paruchuri, attempted murder of McZeke, and armed robbery, and sought the death penalty for the murder charge. During defense counsel's opening statement in the guilt phase of trial, Jenkins admitted his guilt, stating through counsel, "Let me say this to you. I listened to the Solicitor's presentation, and a lot of what he said is true. I will tell you this right up front, straight up: Jerome Jenkins is guilty.... He's guilty of the charges that the State has brought against him." The jury found Jenkins guilty of all three charges, and after the twenty-four-hour mandatory waiting period, the case proceeded to the sentencing phase of trial.

During the sentencing phase, the State introduced evidence that Jenkins and the Daniels brothers robbed two additional convenience stores—one Scotchman and a second Sunhouse—within hours of each other on January 25, 2015, three weeks after the first Sunhouse robbery and murder. As in the first Sunhouse robbery and murder, James scouted each store minutes before Jenkins and McKinley entered wearing masks and armed with pistols. In the course of the robbery of the second Sunhouse store, Jenkins shot and killed the store clerk Trisha Stull.[1]

> [FN1] We refer to robbery of the second Sunhouse store and the murder of Trisha Stull as "the second Sunhouse robbery and murder." The State indicted Jenkins for all of these crimes but tried only the indictments from the first Sunhouse robbery and murder.

Also during the sentencing phase, the State introduced Jenkins' prior convictions for burglary in the second degree and grand larceny in 2011, and for distribution of cocaine in 2013. The State also presented a written summary of Jenkins' twenty-six disciplinary infractions in pre-trial detention in South Carolina Department of Corrections (SCDC) as evidence of Jenkins' future dangerousness. Witnesses testified to several specific instances, including Jenkins throwing "unknown liquids" on correctional officers, cutting an officer with a sharp object, assaulting an officer and threatening to kill him, throwing a metal object at an officer, throwing feces in an officer's face, and throwing a homemade knife at an officer and threatening to kill another one of the officers. The jury heard that all of this conduct occurred while the State held Jenkins as a "safekeeper" in SCDC pending trial, but the jury did not hear the reasons Jenkins was held at SCDC instead of the county jail.[2]

> [FN2] Ordinarily, a defendant who has not been given—or who has not posted—bail is held in the county jail pending trial. Section 24-

> 3-80 of the South Carolina Code (Supp. 2021) provides a prisoner may be detained in SCDC for "safekeeping" when "commitment [is] duly authorized by the Governor, provided, a warrant in due form for the arrest of the person so committed shall be issued within forty-eight hours after such commitment and detention." A person held for safekeeping under section 24-3-80 is generally referred to as a "safekeeper."

State v. Jenkins, 872 S.E.2d 620, 624 (S.C. 2022).

B. Procedural History.

Jenkins received a bifurcated capital jury trial on May 6-16, 2019, before the Honorable Robert E. Hood. In the guilt phase, the jury convicted Jenkins of murder attempted murder, and armed robbery. R. 1-1673. Following the sentencing phase, the jury unanimously found the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon and that the murder was committed while in the commission of larceny while armed with a deadly weapon. It then unanimously sentenced him to death for murder. Judge Hood imposed the death sentence for murder and sentenced Jenkins to concurrent thirty year sentences for attempted murder and armed robbery. R. 1681-2349; 2363.

Jenkins timely perfected an appeal and he presented the issues before this Court. The Supreme Court of South Carolina affirmed his convictions and sentence. *State v. Jenkins*, 872 S.E.2d 620 (S.C. 2022). It denied his timely Petition for Rehearing on June 7, 2022. App. 27a-28a. He obtained a stay of execution from that court on June 28, 2022, so he could file the current Petition. App. 34a-35a.

REASONS WHY CERTIORARI SHOULD BE DENIED

Jenkins presents no compelling reason to consider his claims. He first claims the South Carolina General Assembly's chosen procedure for sentencing capital defendants who knowingly and voluntarily choose to waive their Sixth Amendment right to a jury trial, which he did not do, violates *Hurst v. Florida*. This argument lacks merit, as the state capital sentencing scheme is purely a state law issue and this Court has twice denied certiorari to review claims that this procedure violates *Ring v. Arizona*.

His second argument challenges the trial judge's remarks to Jenkins at a pretrial motions hearing that violate state law. This Court lacks jurisdiction to review his complaint about those comments because the Supreme Court of South Carolina relied on an independent and adequate state procedural rule in rejecting it, and because the comments merely violated state court precedent. His third argument attempts to constitutionalize the trial judge's ruling on a purely state law evidentiary issue, the exclusion of unsworn hearsay by a co-defendant, and he quite conveniently ignores that there could be no possible violation of *Green v. Georgia* since he could have presented the excluded hearsay to the sentencing jury despite the trial judge's ruling: either he or his co-defendant could have testified to the excluded statement, or he could have discussed it in his personal sentencing phase closing argument.

I. The Court should deny certiorari on Jenkins' claim that S.C. Code Ann. § 16-3-20(B) (2019) is unconstitutional in light of *Hurst v. Florida*, because it requires capital defendants who want jury sentencing to plead not guilty since neither *Ring v. Arizona*, nor *Hurst* mandates jury sentencing following a guilty plea. Rather, this capital sentencing procedure is purely a state law issue.[1]

There is no merit to Jenkins' claim S.C. Code Ann. § 16-3-20(B) (2019) violates *Hurst v. Florida*, 577 U.S. 92 (2016) because it requires capital defendants who want jury sentencing to plead not guilty. Neither *Ring v. Arizona*, 536 U.S. 584 (2002) nor *Hurst* mandate jury sentencing following a capital defendant's entry of a guilty plea. Rather, this sentencing procedure is purely a state law issue.

A. How issue was raised in the trial court.

In an April 25-26, 2019 motions hearing, Jenkins' lead counsel argued a motion to find § 16-3-20(B) unconstitutional because it requires a judge to determine the appropriate sentence in capital cases where the defendant pleads guilty. *See* R. 3480.[2] Counsel argued that this deprives a defendant of "his Constitutional right to have a trial by jury on the sentencing of his case if he elects to plead guilty to all of his charges." He further asserted that there were "two separate trials" because the guilt and sentencing phases were bifurcated. So, § 16-3-20(B) deprived him of his Fifth and Sixth Amendment right to a jury trial on sentencing. Counsel indicated Jenkins

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[1] As he did below, Jenkins has combined this argument with his complaint about the trial judge's comments, which Respondent addresses in Argument II, *infra*. Respondent addresses these issues separately because the Supreme Court of South Carolina did so and found that the claim in II was procedurally defaulted because it was not presented to the trial judge. See App. 8a; 9a n. 8; 11a.

[2] In relevant part, § 16-3-20(B) provides that: "[i]f 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."

would have otherwise pled guilty to all of the charges against him because he did not contest his guilt of those charges. R. 3428-30.

The trial judge thought this issue had been rejected in another capital case. The Deputy Solicitor was unfamiliar with that case but observed that Rule 14(b), SCRCrim.P., governed a defendant's waiver of his right to a jury trial and that, pursuant to the Rule, a defendant cannot plead guilty without waiving the right to a jury trial. He stated the State would not agree to Jenkins entering a guilty plea without waiving his right to a jury sentencing. R. 3430-31.

Counsel asserted the State's response made his position "clearer," and that Jenkins was "not asking for any special favors." He wanted to plead guilty but the State would not allow him to do so. Yet, counsel agreed with the trial judge's observation that he was "mixing two rules:" Rule 14 and the death penalty statute. R. 3431-32.

The trial judge would not permit the State to bar someone from pleading guilty as indicted. However, he noted "with [guilty pleas to] death penalty offenses, then the judge does the sentencing." He understood why counsel made the motion but felt "the only way to actually … create that issue, is for [Jenkins] to plead and for me to sentence him, … for you to have it preserved for appeal; otherwise, … I'm not sure that the issue is even preserved." R. 3432-33. The trial judge denied the motion because he found the statute is constitutional. R. 3434.

After jury selection, counsel indicated that he and co-counsel had discussions with Jenkins "over the last … several weeks" about what the State's evidence would

show. Because § 16-3-20(B) did not permit jury sentencing following a guilty plea, counsel and Jenkins discussed how he wished to proceed. Counsel stated that the defense had decided to "explain to the jury … that we are not pleading not guilty, … that we admit guilt as to the issues in this case, but that the only way we could have a jury do the sentencing is to go through this process, which means the State has to present evidence and we have to wait and let the jury hear the aggravating and mitigating factors in order to make their decision." As a result, counsel asked the trial judge to address Jenkins and determine whether this was Jenkins' understanding and whether he agreed to this strategy. R. 1455-56.

The trial judge first ascertained that both attorneys agreed with this strategy, that both felt this strategy was in Jenkins' best interest, that they had discussed it with him, that he understood their discussions and agreed with the strategy, and that he was freely and voluntarily agreeing to it. R. 1456-59. The trial judge stated that he would allow counsel to follow the strategy if Jenkins agreed to it. R. 1459-60.

The trial judge's on-the-record colloquy with Jenkins addressing this strategy established Jenkins fully agreed with the proposed strategy, he had not been threatened or coerced, he was not under the influence of any medication impairing his ability to understand the strategy, and his agreement was freely, knowingly, and voluntarily given. In the course of the colloquy, the trial judge said, "I completely understand the strategy that is employed. I think it is a very good strategy, and a very positive strategy." R. 1460-64.

Counsel thereafter informed jurors in his opening statement that Jenkins was guilty of the crimes charged and that there was a trial because it was the only way Jenkins could have a jury determine the proper sentence. R. 1492.

B. The ruling of the Supreme Court of South Carolina.

On appeal, the Supreme Court of South Carolina rejected Jenkins' argument § 16-3-20(B) was unconstitutional because it required a judge to determine the appropriate sentence in capital cases where the defendant pleads guilty. The court found that it had "repeatedly addressed this very argument" and had upheld the constitutionality of the statute "on each occasion." *See* App. 4a-5a (citing *State v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004) (holding a defendant is not deprived of his right to a trial by jury when he pleads guilty because—as a predicate to pleading guilty—he must voluntarily waive his right to a jury trial on both guilt and sentencing; distinguishing *Ring v. Arizona,* 536 U.S. 584 (2002)), *cert. denied*, 544 U.S. 972 (2005); *State v. Allen*, 687 S.E.2d 21, 25 (S.C. 2009) (same), *cert. denied*, 560 U.S. 929 (2010); *State v. Crisp*, 608 S.E.2d 429, 433 (S.C. 2005) (same); *State v. Wood*, 607 S.E.2d 57, 61 (S.C. 2004) (same), *cert. denied*, 545 U.S. 1132 (2005)).

The court rejected his contention that *Hurst* "effectively overru[led]" these state court decisions and requires jury sentencing in all capital cases. It distinguished *Hurst* for the same reasons it had distinguished *Ring* in the earlier cases, and it reaffirmed the constitutionality of § 16-3-20(B):

> *Hurst* dealt with a Florida statute under which "the jury renders an 'advisory sentence' of life or death," after which, "Notwithstanding the recommendation of a majority of the jury, the [trial] court ... shall enter a sentence of life imprisonment or death." 577 U.S. at 95-96, 136 S.Ct.

> at 620, 193 L. Ed. 2d at 509 (quoting Fla. Stat. § 921.141(2)-(3) (Supp. 2012)). The Florida procedure applied even in cases in which the defendant exercised his right to a trial by jury. As we explained in *Allen*, *Crisp*, *Wood*, and *Downs*, the situation is different when the defendant makes a valid waiver of his right to a trial by jury as a predicate to pleading guilty. *See, e.g.*, *Crisp*, … 608 S.E.2d at 433 ("The constitutionality of Section 16–3–20(B) ... rests ... on whether the statute comports with the right to a jury trial as established by this Court and the United States Supreme Court in interpreting the state and federal constitutions."); *Downs*, … 604 S.E.2d at 380 ("*Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty."). Thus, we disagree *Hurst* has any impact on *Allen*, *Crisp*, *Wood*, or *Downs*. We once more affirm the constitutionality of the subsection 16-3-20(B) requirement that a capital defendant who pleads guilty to murder must be sentenced by the trial court.

App. 5a-6a.

C1. The state courts properly found *Hurst* does not render § 16-3-20(B) unconstitutional.

The state courts properly found *Hurst* does not mandate jury sentencing where a defendant knowingly and intelligently waives his right to a jury trial. This Court has never mandated that states follow a particular capital sentencing scheme. Rather, it has made clear, "We take statutes as we find them." *Pulley v. Harris*, 465 U.S. 37, 45 (1984). *Cf. Gregg v. Georgia*, 428 U.S. 153, 195 (1976) ("We do not intend to suggest that only the above-described procedures would be permissible under [*Furman v. Georgia*, 408 U.S. 238 (1972)] or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman, for each distinct system must be examined on an individual basis"). Here, South Carolina has chosen to require jury sentencing only where the capital defendant has a jury trial,

and it leaves sentencing to the trial court when the defendant waives that right or pleads guilty. This is constitutional under *Ring* and *Hurst*.

In *Ring*, this Court addressed Arizona's capital sentencing scheme, which provided that "following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required" to impose the death penalty. *Ring*, 536 U.S. at 588. The Court found this sentencing scheme violated the Sixth Amendment right to a jury trial in capital prosecutions because it "allow[ed] a sentencing judge sitting without a jury to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609. Applying its reasoning from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court concluded that "[c]apital defendants, no less than non-capital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* 536 U.S. at 589. The Court held 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* held 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. *Ring* did not mandate jury sentencing where a capital defendant knowingly and intelligently waives a jury trial and pleads guilty.

The Court in *Hurst* applied *Ring* to Florida's capital sentencing scheme, which provided that if a jury convicted the defendant of a capital murder, 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*, 577 US. at 95 (citation to statute omitted). While the trial court afforded some weight to the jury's recommendation, the jury's role was "advisory only," *id*. at 99; and "[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*, 577 U.S. at 98. Because this procedure allowed a judge to increase a defendant's maximum penalty based on his own fact-finding following a jury trial, the Court held that Hurst's death sentence violated the Sixth Amendment. *Id*. at 98-100.

Hurst did not require the Supreme Court of South Carolina to revisit its earlier precedent because it is not a new rule. Rather, the Court in *Hurst* merely "applied *Ring* and decided that Florida's capital sentencing scheme impermissibly allowed 'a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding that is necessary for imposition of the death penalty.' " *McKinney v. Arizona*, 140 S.Ct. 702, 707 (2020).

Additionally, "nothing prevents" waiver of the right to a jury trial, other than showing a knowing and intelligent decision: "[i]f appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." *Blakely v. Washington*, 542 U.S. 296, 310 (2004) (rejecting the argument "*Apprendi* works to the detriment of criminal defendants who plead guilty by depriving them of the opportunity to argue sentencing factors to a judge" and

explaining that "nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding"). The Court logically reasoned that its precedent could not "possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable." *Id.* See also *Hurst*, 577 U.S at 100 ("*Blakely* … was a decision applying *Apprendi* to facts admitted in a guilty plea, in which the defendant necessarily waived his right to a jury trial. …. Florida has not explained how Hurst's alleged admissions accomplished a similar waiver") (citation omitted); Lewis *v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010) (rejecting an argument *Ring* established "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"), cert. denied sub nom, *Lewis v. Hobbs*, 561 U.S. 1055 (2010); *Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015) (citing *Lewis* as persuasive), *cert. denied*, 576 U.S. 1091 (2015); *Mahdi v. Stirling*, No. CV 8:16-3911-TMC, 2018 WL 4566565, at *42 (D.S.C. Sept. 24, 2018) (noting in rejecting a similar challenge to the state statute that Mahdi not only "waiv[ed] his right to a jury trial," he also "expressly and voluntarily waived his right to jury sentencing," and "admitted to the facts of the crime as stated by the Solicitor"), aff'd, 20 F.4th 846 (4th Cir. 2021).

Jenkins' contention § 16-3-20(B) precludes a defendant from offering mitigation evidence to the jury of his willingness to accept responsibility by pleading

guilty was rejected by the Supreme Court of South Carolina in *Crisp*. *See* 362 S.C. at 418-19, 608 S.E.2d at 433. Also, this argument is factually inaccurate in Jenkins' case because counsel told jurors in his guilt phase opening statement that Jenkins 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.

In short, Jenkins cannot show that South Carolina's capital sentencing scheme violates a defendant's right to a jury trial. Neither *Ring* nor *Hurst* mandates jury sentencing for capital defendants who waive their right to a jury trial and plead guilty. Section 16-3-20(B) simply does not mirror the infirmities in Arizona (*Ring*) or Florida (*Hurst*). There is no provision in our state statute – as there was in the Arizona statute – that even when the jury is impaneled, the judge must nonetheless conduct sentencing. And, unlike *Hurst*, a judge cannot reject a jury's finding.[3]

2. This Court has twice denied certiorari to review claims that the sentencing procedure in § 16-3-20(B) violates *Ring*.

The lack of merit to Jenkins' claim is underscored by the fact this Court has twice denied certiorari to review claims that the sentencing procedure in § 16-3-20(B)

[3] Jenkins vainly relies on the state Post-Conviction Relief judge's Order in *Jerry Buck Inman, #5256 v. State*, 2012-CP-39-918 (filed April 21, 2020), in which the judge flagrantly disregarded the state supreme court's binding precedent and found §16-3-20(B) unconstitutional under *Hurst*. Not only is that aberrant Order contrary to state court precedent, it cannot stand in light of this Court's explanation in *McKinney* that *Hurst* did not create a new rule. Respondent has appealed the wrongly decided grant of relief in *Inman* and that decision should be reversed for the reasons set forth in the Petition for Writ of Certiorari filed in that case. See *Jerry Buck Inman, #5256 v. State*, Appellate Case No. 2020-000881. Similarly, Jenkins' reference to the federal sentencing guidelines (Pet at 10-11) is irrelevant to the issue before this Court.

violates *Ring*. See *State v. Downs*, 544 U.S. 972 (2005); *State v. Allen*, 560 U.S. 929 (2010). Because *Hurst* simply applied *Ring* to Florida's capital sentencing scheme, see *McKinney*, 140 S.Ct. at 707, and because it does not affect the rule allowing a capital defendant to knowingly, intelligently, and voluntarily waive his right to a jury trial, see *Blakely*, 542 U.S. at 310,[4] certiorari should once again be denied.

II. The Court lacks jurisdiction to address Jenkins' claim that the trial judge's comments to him at a pretrial hearing prevented the judge from ruling Jenkins could not obtain jury sentencing following a guilty plea because the Supreme Court of South Carolina relied on an independent and adequate state procedural rule in refusing to address the merits of his argument which, at most, only set forth a potential violation of state court precedent, as opposed to the United States Constitution.

The Court lacks jurisdiction to address Jenkins' claim that the trial judge's comments to him at a motions hearing held almost two months before trial prevented the judge from ruling Jenkins could not obtain jury sentencing following a guilty plea because (1) the Supreme Court of South Carolina relied on an independent and adequate state procedural rule in refusing to address the merits of his argument, and (2) at most, the trial judge's comments merely violated state court precedent, as opposed to the United States Constitution.

A. How issue developed at trial.

At a March 7, 2019 status conference, which was almost two full months before trial, the trial judge asked the State whether or not there had been any plea offers or

[4] Respondent notes that the Court has stated it "would not assert … that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." *Duncan v. Louisiana,* 391 U.S. 145, 257-58 (1968).

whether any plea offers were still "on the table." The Deputy Solicitor stated, "[t]here are no plea offers. There has never been a plea offer in it. Once we served notice, we have no intention absent an order of incompetency or something by the Court to retract that notice." However, he noted that Jenkins' lead trial counsel had said "we can take care of this if you let him plead to life and offers that in a discussion. And he has been relentless in working for his client in that regard …." R. 3154-55.

After the prosecution left the courtroom, the trial judge had an *ex parte* discussion with Jenkins in the presence of both of his attorneys. Of relevance to the present issue, Jenkins asked the trial judge if the State could "make me go to trial," without offering a plea bargain. The trial judge told him that he could plead guilty as charged. R. 3163-64. An exchange then occurred as follows:

> THE DEFENDANT: So if I plead guilty to the death sentence, I would be on death row?
>
> THE COURT: Yeah.
>
> THE DEFENDANT: Not a chance.
>
> THE COURT: Right. So, you know, you say can they make me. The issue with plea negotiations and judges is this, is that I can't make -- this morning, I taught a fourth grade class government, okay.
>
> So let's go back to fourth grade. Fourth grade government is the way I look at things, right. In the fourth grade government, it says the legislative branch is over here; the executive branch is over here, and the judicial branch is over here.
>
> Your prosecutors are in the executive branch of government. … [T]he law does not allow me the power to make them give you a plea offer.
>
> THE DEFENDANT: No, I understand that. I was just asking was it legal --

> THE COURT: Yeah, they don't have to offer --
>
> THE DEFENDANT: -- to refuse.
>
> THE COURT: As long as they have the statutory notice in place for the death penalty, they don't have to offer you any -- make you any plea offer at all, yeah. There's nothing I can do to stop them from doing that. Does that make sense?
>
> Now, they can change their mind. You know, I don't know that they're going to. I doubt that they are. But I promise you that Mr. Wilson has probably asked them to more times than he cares to remember.
>
> THE DEFENDANT: Oh, I know that. I can say that because he's asked me will I take a life sentence.

R. 3164, line 8 – 3165, line 13. Neither of Jenkins trial attorneys objected to the trial judge's remarks on any basis and the matter was not mentioned again in the trial court.

B. The Supreme Court of South Carolina's ruling that the issue was not preserved for appellate review.

Although Jenkins had not objected to the trial judge's remarks at trial, he combined his challenge to the constitutionality of § 16-3-20(B) with his claim that the judge's comments should bar denial of a request for jury sentencing. As discussed, however, the Supreme Court of South Carolina addressed this claim separately. See App. 9a n. 8; 11a. In addressing the trial judge' comments, the court found in dicta that although the comments violated state law, Jenkins had not presented any objection to the comments to the trial judge. The court also observed that the comments were not prejudicial *per se* for several reasons and it was confident that if the error had been brought to the trial judge's attention, he would have corrected it. App. 6a-10a. So, the court concluded that Jenkins' argument was procedurally barred

on appeal. App. 11a (citing *State v. Dial*, 838 S.E.2d 501, 503 (S.C. 2020) "('It is firmly established law that, ordinarily, an issue must be presented to the trial court or it is not preserved for appellate review.' (citing *State v. Dunbar*, [587 S.E.2d 691, 693-94 (S.C. 2003)]))."

C. There is no constitutional error for the Court's review.

This Court lacks jurisdiction to review matters of state law. See 28 U.S.C. § 1257(a); *Missouri Pac. Ry. Co. v. McGrew Coal Co.*, 256 U.S. 134, 135 (1921) ("The objection now made, that the shipper did not pay freight charges and, therefore, was not damaged, raised no substantial federal question but a question of state law which we have no jurisdiction to review"). A corollary to this rule is that the Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *See*, *e.g.*, *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L.Ed. 635 (1872). "This rule applies whether the state law ground is substantive or procedural," *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

"In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id.* (citing *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). *See also Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). The state law rule is

adequate if it is regularly or consistently applied by the state court, *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), and is independent if it does not "depend[ ] on a federal constitutional ruling." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

Here, the Supreme Court of South Carolina relied on Jenkins' failure to object to the trial judge's comments on the basis argued on appeal. It is a regularly and consistently applied rule in South Carolina that an argument or objection is not preserved for appellate review unless it is first presented to the trial judge. See, *e.g.*, *Dial*, 838 S.E.2d at 503; *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 641 S.E.2d 903, 907 (S.C. 2007) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity") (internal quotation marks omitted); *State v. Bailey*, 377 S.E.2d 581, 584 (S.C. 1989) (a party cannot argue one theory at trial and a different theory on appeal); *State v. Dunbar*, 587 S.E.2d 691, 693-94 (S.C. 2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal"); S*tate v. Torrence*, 406 S.E.2d 315, 324-29 (S.C. 1991) (Toal, J., concurring in result) (abolishing the doctrine of *in favorem vitae* review in capital cases and requiring contemporaneous objection or motion to preserve issue for appellate review); *State v. Vanderbilt*, 340 S.E.2d 543 (S.C. 1986) ("Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [124 S.E. 81 (S.C. 1924)], may be

inconsistent with this result it is overruled"). Even if the comments were in violation of the United States Constitution, the Court lacks jurisdiction to address the supposed error in light of this independent and adequate state procedural bar.

Yet, the comments do not violate the Constitution. The Supreme Court of South Carolina found, and even the Petition makes clear (see Pet. at 12-14), the trial judge's remarks merely violated state court precedent, as opposed to the Constitution. Specifically, the court found the remarks violated *Crisp*, 608 S.E.2d at 431-32 (discussing the propriety of a trial court's statements to a capital defendant concerning his right to a trial by jury); *State v. Owens*, 607 S.E.2d 78, 79-80 (S.C. 2004) (same and finding that "comments were improper and contrary to South Carolina law"); *State v. Gunter*, 335 S.E.2d 542, 543 (S.C. 1985) (a trial court must inform the defendant of his choices accurately and stating, "A statement by the trial judge which intimates that the jury will ignore his instructions is improper"); *State v. Pierce*, 346 S.E.2d 707, 710 (S.C. 1986) (relying on *Gunter* and stating the defendant "had the right to make that decision free of any influence or coercion from the trial judge"), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Cooper*, 353 S.E.2d 441, 443 (S.C. 1986) (relying on *Gunter* and *Pierce*), *overruled on other grounds by Torrence*; and *Butler v. State*, 397 S.E.2d 87, 87 (S.C. 1990) (relying on *Gunter*, *Pierce*, and *Cooper*). See App. 7a-8a & n. 7.

Nor were the trial judge's remarks prejudicial. In an effort to tie the remarks to his decision to receive a jury trial, Jenkins argues he "had no choice [but to receive a jury trial] even though he wanted to plead guilty and accept responsibility for his

part in the crime because the trial judge told him he would sentence him to death if he chose to plead guilty." Pet. at 9. See also Pet. at 11. Yet, this contention is *quite obviously* false and belied by his motion to have § 16-3-20(B) declared unconstitutional. The trial judge's comments did not prevent him from entering a guilty plea. Rather, the statute, itself, bars jury sentencing following a plea, which was the reason for his motion: i.e., he wanted to be sentenced by a jury and did not want *any* judge to sentence him. Again, this is a state law issue, even after *Ring* and *Hurst*, and South Carolina's capital sentencing scheme is constitutional. *Blakely*, 542 U.S. at 310.

Moreover, even if this Court were to address the claim, it is clear the remarks were nonprejudicial. The Supreme Court of South Carolina found that the remarks in this case were distinguishable from others where the court had found comments prejudicial *per se* for several reasons:

- The erroneous comments were made at a motions hearing almost two months before the trial, as opposed to during the trial;
- Jenkins never made an objection to the comments at the time they were made, at a subsequent motions hearing, or at trial, even though he did argue that § 16-3-20(B) was unconstitutional on two occasions;
- "The trial court's playful May 10 recitation of the March 7 conversation indicates he did not realize what he told Jenkins on March 7;"
- There was "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;
- "If defense counsel had objected to the March 7 comments at any of the at least three opportunities, the trial court could have taken steps

to correct its error. Or, in the unlikely event the trial court actually meant what he said, a different error would be confirmed;

- "The Sixth Amendment requires counsel to independently explain to a criminal defendant the law applicable to each significant issue in his case, particularly where the defendant must make an important decision about exercising a constitutional right;"

- " It is inconceivable that defense counsel did not have an extended conversation with Jenkins—probably on more than one occasion—about his right to a trial by jury, and consequently, what the law permitted and required of the trial court if Jenkins decided not to exercise his right to a trial by jury. This is particularly true in this case, where we know the question of a guilty plea was very much on the mind of Jenkins and his lawyers;"

- It is "equally inconceivable counsel did not explain to Jenkins that the trial court would be required by law to consider both death and life as options for his sentence, and to do so with an open mind without preconceptions as to which sentence the evidence would warrant the trial court impose."

App. 8a-10a.

Additionally, the comments cannot be prejudicial since Jenkins had neither a statutory nor a constitutional right to have his guilty plea accepted. See *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[t]here is, of course, no absolute right to have a guilty plea accepted") (citing *Lynch v. Overholser*, 369 U.S. 705, 719 (1962)). See also Rule 14(b), SCRCrim.P. ("A defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge"); *State v. Chisolm*, 439 S.E.2d 850 (S.C. 1994) (solicitor was not required to plea bargain with appellant charged with murder when appellant wished to plead to voluntary manslaughter). Rather, the constitutional right protected by the Sixth Amendment is the one afforded to him: the right to plead not guilty and have a jury trial. *North Carolina v. Alford*, 400 U.S.

25, 39 (1970) ("The States in their wisdom may take this course by statute or otherwise and may prohibit the practice of accepting pleas to lesser included offenses under any circumstances"). And, counsel informed jurors at the outset of trial that Jenkins was admitting guilt to the crimes charged. R. 1492. So, this mitigating factor was before the sentencer. Thus, while the trial judge's remarks may have violated state law, they are nonprejudicial and do not violate the Constitution and this Court lacks jurisdiction to correct them.

III. Jenkin's argument the trial judge violated *Green v. Georgia* by not allowing the defense's forensic psychiatrist to testify to a hearsay declaration made by Jenkins' co-defendant attempts to constitutionalize a purely state law evidentiary issue, which could not have violated *Green* because despite the trial judge's ruling either Jenkins he or his co-defendant could have testified to the excluded statement, or he could have discussed it in his personal sentencing phase closing argument.

Jenkins contends that the trial judge erred by not allowing the defense forensic psychiatrist to testify to a declaration by his co-defendant admitting the co-defendant told Jenkins to kill a second murder victim. Though garbed in constitutional clothing, Jenkins' argument is truly attacking the trial judge's ruling on a purely state law evidentiary issue: the admissibility of a hearsay declaration relied upon by an expert in forming her opinion. And, his argument quite conveniently and necessarily ignores that the judge's ruling could not have violated *Green v. Georgia*, 442 U.S. 95 (1979), because he could have presented the excluded hearsay to the sentencing jury despite the trial judge's ruling: either he or his co-defendant could have testified to the excluded statement, or he could have discussed it in his personal sentencing phase closing argument. See S.C. Code Ann. §16-3-28 (2019) ("Notwithstanding any other

provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument").

A. How the issue was presented at trial.

Before the defense forensic psychiatrist, Dr. Donna Maddox, testified in the sentencing phase, the trial judge heard the State's objection to portions of her report (Defense Exhibit 12, R. 3544-57) in camera. Of importance to this claim, counsel argued that Dr. Maddox should be allowed to testify about co-defendant McKinley Daniels' admission to her that he told Jenkins to kill the other murder victim in the case, Trisha Stull. He cited *Green v. Georgia*, 442 U.S. 95 (1979), for the proposition that "even though it is hearsay, if it is related to an issue, and especially in the penalty phase of the case, that … the rules are more relaxed about allowing that testimony coming in than would ordinarily be." So, "it would be admissible … under that [theory]." R. 2162-63; Defense Exhibit 12 at 14, R. 3557.

Counsel also asserted this statement was admissible under Rule 803(4), SCRE, because Dr. Maddox would testify that it was part of the basis of her opinion that Jenkins was acting under the dominion of others, which was a mitigating circumstance relied on by the defense. Further, counsel argued the statement was admissible as a statement by a co-conspirator made in furtherance of the conspiracy. The trial judge found that Rule 801(d)(2)(E), SCRE, was inapplicable because the statement was not being offered against a party to the conspiracy. R. 2161-64. He also rejected counsel's suggestion that Daniels' statement was not being offered for the

truth of the matter asserted, since it formed part of the basis for Dr. Maddox's opinion. R. 2164-65. He found that Daniels' statement was not admissible simply because it was made to an expert who relied on it as a basis for her opinion. While she could testify that she relied on her interview of Daniels as a basis for her opinion because "[t]he rules are clear that experts are allowed to rely on hearsay," any statement Daniels made to her was inadmissible hearsay. The trial judge also gave an example of how Dr. Maddox could testify to the basis of her opinion without testifying to the hearsay statement. R. 2165-67.

The Deputy Solicitor agreed with the trial judge that Daniels' "specific statements about the circumstances of the crime" were being offered for the truth of the matter asserted and argued that they were offered to support a statutory mitigating circumstance for which no evidence had then been presented.[5] In response to the trial judge's questioning, counsel indicated that evidence Jenkins acted under duress or under the domination of another person was contained in the two statements by Jenkins that the State had introduced because Jenkins "had told Detective Lent that he was under gunpoint … by these individuals, [and was told] that if he didn't participate, they would shoot him." R. 2167-70.

During the course of further argument on the admissibility of Jenkins' statement to Dr. Maddox, the trial judge indicated that if Jenkins wanted to tell

[5] The Deputy Solicitor also argued it could not be admitted as the statement of a co-conspirator because it was not being offered against a party to the conspiracy and because the conspiracy ended before the statement was made. The trial judge agreed it was inadmissible under Rule 801(d)(2)(E), SCRE, because it was not being offered against a party to the conspiracy.

jurors "I followed a leader, a tyrant with no soul"[6] in his closing statement authorized by §16-3-28 (2019), the trial judge would allow him to do so "without cross-examination." R. 2170-71. The Deputy Solicitor observed that Rule 803(4), SCRE, provided that the admissibility of statements made after litigation commences were in the trial judge's discretion. R. 2172-73. Counsel argued that this Court's decision in *Green* supported his claim that Jenkins' statement to Dr. Maddox was admissible because she was an expert and not a lay witness. R. 2173-74.

The trial judge stated he had read *Green* and found that "it stands for the proposition that the rules should not be so … mechanistically applied as to prevent the ends of justice and prevent someone from being able to present mitigation in the penalty phase of a death penalty case." The Deputy Solicitor indicated that this was why he had not objected to hearsay statements to which the defense's social worker had testified but maintained *Green* did not stand for the proposition that the rules of evidence are inapplicable in the sentencing phase of a capital trial. R. 2176.

The trial judge then made the following comments:

> Here is what I don't understand: Why can't Dr. Maddox say based upon my interview of Jerome Jenkins, based upon the hours I spent with him, based upon my interview with McKinley Daniels, based upon the discovery, based upon the school records, all of these different things, none of which are admissible in court, right? The school records are not admissible in court. All of these things, which are inadmissible in court, experts are allowed to form their opinion based upon documents and/or statements and/or other things that are inadmissible. Why can't you say based upon all of that information, I believe that Mr. Jenkins was under the dominion and control or the domination of another person and, you know, I've interviewed these people and read their statements, read this and read that. If the State wants to get up and open that door, then they can get up and open that door. They know what the answers will be

[6] Again, this was Jenkins' statement to Dr. Maddox.

> before they do it. But, … just because [experts] are allowed to rely on it does not make it, per se, admissible in court ….

R. 2177, line 5 – 2178, line 1.

The trial judge reiterated that Jenkins could tell the jury the same thing he had told Dr. Maddox in his closing statement, if he wished to. R. 2178. The Deputy Solicitor noted that "[t]he defense subpoenaed McKinley Daniels here. He was here and prepared and could have testified as to some of those issues, and for whatever reason, declined to [call him]." The trial judge found that Daniels was not an unavailable witness and that the defense could have presented Daniels and cross-examined him as a hostile witness. R. 2179.

The following morning, counsel read a previously filed memorandum on the admissibility of the statement into the record, in which he again relied on *Green*. He also argued that, if necessary, the trial judge could give a limiting instruction. Yet, he contended one was unnecessary because the statements were not being offered for their truthfulness, but as a basis for Dr. Maddox's opinion. Relying on *Green* and *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973), counsel claimed that excluding Daniels' statement violated Jenkins' right to due process because South Carolina law did not clearly bar an expert from testifying to statements made by a criminal defendant which formed the basis of the expert's opinion and, here, Daniels' statement had "assurances of trustworthiness because it is a statement against his interest, and he provided the same information on multiple occasions." R. 2184-89.

The State, however, distinguished *Green* and *Chambers* because the statement in *Green* was a statement against penal interest and made by a witness that the State

had presented in its case-in-chief, whereas Daniels' statement was not made before being charged with a crime. Rather, it was made to defense investigators after his arrest and "in preparation for testimony by the expert." Likewise, the statement in *Chambers* had substantial assurances of trustworthiness and was "not made in preparation for litigation." The statements here simply were not trustworthy. R. 2189-92.

The trial judge ruled that he would allow "Dr. Maddox to say that she's interviewed these people and that is the basis of her forming her opinion, but she's not allowed to get into the specific statements, unless the state opens the door." R. 2192. Dr. Maddox told the trial judge that she understood his ruling. The judge then cited to *People v. Powell*, 6 Cal.5th 136, 425 P.3d 1006 (2018), in which the court held that "the self-serving statements to the expert psychologist by the defendant in [the penalty phase of] a death penalty case … were inadmissible." R. 2193.

Of importance to the present issue, Dr. Maddox, testified that she had consulted with the defense's social worker, Dr. Andrews, one of SCDC's mental health clinicians, and she had spoken to Jenkins' mother. She had also reviewed the incident reports, "some investigative notes," and "the statements and discovery" related to Jenkins' charges, Jenkins' school records, family history records, and all SCDC records relating to Jenkins' prior incarceration. R. 2203-04. Further, she had interviewed Jenkins three times and she had interviewed his co-defendant, McKinley Daniels, on the Monday before her testimony. R. 2203; 2250.

Dr. Maddox diagnosed Jenkins with post-traumatic stress disorder (PTSD), an

unspecified depression disorder, substance abuse disorder, and a learning disability. R. 2209; 2242-49. She further opined that Jenkins' brain was not fully developed at the time of the murder because he was only twenty. R. 2249-50. She testified that she learned through interviewing McKinley Daniels that the Daniels brothers were both older than Jenkins, that both had more extensive criminal histories, and that McKinley Daniels had been released from prison only four months before the murders. Jenkins, who lived across the street from McKinley, was having financial difficulties. Also, McKinley cared about Jenkins and would console him when he and his wife had problems. In her expert opinion, Jenkins was "absolutely" under the influence of James or McKinley Daniels. R. 2250-54.

The trial judge subsequently instructed jurors on the statutory mitigating circumstance that "the defendant acted under duress or under the dominion of another person." R. 2333, lines 17-18. *See* § 16-3-20 (C)(b)(5).

B. The ruling of the Supreme Court of South Carolina.

On appeal, the Supreme Court of South Carolina found that the trial judge did not abuse his discretion by ruling Daniels' statement to Dr. Maddox was not admissible as forming a basis for her opinion under Rule 703, SCRE.[7] The court observed that:

> This Court and our court of appeals have made it clear that—in South Carolina—Rule 703 allows admissibility of otherwise inadmissible evidence only in limited circumstances. In other words, the mere fact an

[7] The court also rejected Jenkins' argument that the declaration by Daniels was admissible as a statement against interest under Rule 804(b)(3), SCRE, because Daniels was not "unavailable." Rather, he "was present by subpoena at Jenkins' trial, had already pled guilty to murder and armed robbery, and had been sentenced to forty-five years in prison at the time of Jenkins' trial." App. 12a-13a n. 12.

> expert relies on inadmissible evidence does not make the evidence admissible. As this Court stated in *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), Rule 703, SCRE, "does not ... make hearsay automatically admissible simply because it was relied upon by the expert." 401 S.C. at 358, 737 S.E.2d at 499 (citing *Allegro, Inc. v. Scully*, 400 S.C. 33, 46-47, 733 S.E.2d 114, 122 (Ct. App. 2012)), *remanded on other grounds*, 408 S.C. 200, 758 S.E.2d 716 (2014); *see also Jones v. Doe*, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006) (stating Rule 703 "does not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion"). We have yet to be so clear, however, as to how a trial court should determine whether to admit evidence reasonably relied on by an expert when the evidence is otherwise inadmissible.
>
> We begin our analysis of whether the trial court properly excluded the evidence in this case by observing the obvious fact that evidence often serves dual purposes. Here, McKinley's statement to Dr. Maddox would be useful to the jury for the improper hearsay purpose of determining whether McKinley did in fact tell Jenkins to kill Stull during the second Sunhouse robbery and murder. McKinley's statement would also be useful for the legitimate purpose of explaining the basis for Dr. Maddox's opinion that Jenkins was "under the influence of ... McKinley." In *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020), we addressed how a trial court should analyze this situation. We stated, "To the extent a trial court finds evidence ... does serve these dual purposes, the court must determine whether the evidence has sufficient probative force for serving the legitimate purpose that the evidence should be admitted, despite its inherent tendency to serve the improper purpose." 430 S.C. at 31, 842 S.E.2d at 657-58.
>
> We hold the same analysis must be conducted under Rule 703, SCRE. This application of Rule 703 is consistent with the Federal Rules Advisory Committee's interpretation of the original version of Federal Rule 703, which is identical to South Carolina's existing Rule 703.

App. 14a-15a.

Applying this analysis, the court found no abuse of discretion. It noted that "Dr. Maddox's opinion did not specifically address the subsection 16-3-20(C)(b)(5);" rather she simply answered "Yes," when asked if Jenkins was "under the influence" of Daniels. The court also noted that this statement referenced "the second Sunhouse

robbery and murder … and, thus, only indirectly [related] to Dr. Maddox's opinion McKinley 'influenced' Jenkins during the first Sunhouse robbery and murder on January 2." App. 15a-16a.

The court also found that these facts lessened the prejudicial effect resulting from exclusion of the statement, that presentation of this evidence would have contradicted Jenkins' statements to investigators and would have "supported the State's sentencing phase argument that the death penalty is warranted against Jenkins because he committed the second Sunhouse robbery and murder." So, the court found "the jury's use of McKinley's statement for its truth would have been only minimally prejudicial to the State." App. 16a. Although acknowledging that "[w]hether the trial court erred in excluding the statement McKinley made to Dr. Maddox is a close question," the court ultimately found that there was no abuse of discretion. App. 16a-17a. Finally, the court rejected Jenkins' claim that *Green* required admission of the statement as follows:

> Jenkins also argues the statement should have been admitted based on *Green v. Georgia*, [*supra*]. We reject this argument. *See State v. Blackwell*, 420 S.C. 127, 160-61, 801 S.E.2d 713, 731 (2017) (discussing the "limited" applicability of *Green*); 420 S.C. at 161 n.29, 801 S.E.2d at 731 n.29 (noting the trial court's "application of our state's hearsay rules" was by no means "rote"). As did the trial court in *Blackwell*, the trial court in this case engaged in a thorough analysis.

App. 17a n. 16.

C. *Green* did not require admission of Daniels' statement.

Jenkins' reliance on *Green* is misplaced because *Green* is readily distinguishable. The petitioner in *Green* wanted to prove in the sentencing phase that

although convicted of murder, "he was not present when the victim was killed and had not participated in her murder." *Id.* at 96. To support this defense, he sought to introduce a statement by a witness who had testified at the co-defendant's trial that the co-defendant admitted to the witness he shot the murder victim twice. The trial judge excluded this statement as hearsay under Georgia law. *Id*. This Court granted certiorari, vacated the sentence, and remanded the case.

The Court held that:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see *Lockett v. Ohio*, 438 U.S. 586, 604-605, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978) (plurality opinion); *id*., at 613–616, 98 S.Ct., at 2969–2970 (opinion of BLACKMUN, J.), and substantial reasons existed to assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it. In these unique circumstances, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973). Because the exclusion of Pasby's testimony denied petitioner a fair trial on the issue of punishment, the sentence is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Green, 442 U.S. at 97 (footnotes omitted).

The Court thus limited its holding to the facts of *Green* because it found that that this mitigating evidence, in the form of sworn testimony in another trial, was sufficiently reliable and highly relevant to a "critical issue" even though it violated

state evidentiary rules against hearsay. *Id*. Contrary to Jenkins' assertion that the circumstances in this case supported the reliability of Daniels' statement to Dr. Maddox and that there was no reason to believe he had an ulterior motive in making it, none of the circumstantial guarantees of trustworthiness surrounding the statement in G*reen* are present in Daniels' statement.

Daniels was not under oath when he made the statement. Instead, his statement was made to Dr. Maddox, a defense expert, shortly before Jenkins' capital trial and with the intent to assist in preparation for the trial. Also, 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. Further, he was found to be intellectually disabled at his trial. *See* Brief of Appellant, p. 4 n. 1. Accordingly, this declaration 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.

Unlike the facts presented in *Green*, Daniels' statement to Dr. Maddox related to what happened in the second armed robbery and murder and was relevant "only indirectly to Dr. Maddox's opinion McKinley 'influenced' Jenkins during the first Sunhouse robbery and murder on January 2." App. 15a-16a. And, as the Supreme Court of South Carolina observed, Dr. Maddox's opinion did not specifically address

the statutory mitigating circumstance in § 16-3-20(C)(b)(5). See App. 15a.

Additionally, her opinion of Jenkins being under the influence of Daniels was not the only evidence that he was vulnerable to being under the influence of others. Although her approach was from a different perspective, her opinion was generally cumulative to Arlene Andrews, the defense social worker. Ms. Andrews testified that she had done a social history assessment on Jenkins. She was specifically "asked to do a social history assessment up until the time just before this crime and to look specifically at whether there were factors in Mr. Jenkins' life history that might have affected his vulnerability to be influenced by other people." R. 2075-78.

Of significance to this claim, she found "a very unusual number of … negative childhood events that happened in his life," and that his life history made him vulnerable to the influence of others. He was very immature; he had "significant developmental delays" in his childhood; "the extraordinary stress he … [and] his family had to face;" and he had been exposed to violence, drug abuse and the "imminent threat of harm, that started at a very young age and [which was] pretty persistent." She opined "[t]hat affected his ability to cope with the kinds of stressors he was faced with as trying to become a young man and dependent on others. He never really achieved independence and skilled with independent living." R. 2081-82.

After explaining, at length, the evidence in Jenkins' background supporting her conclusions (R. 2082-2136), Ms. Andrews opined that "there is a lot of evidence that he was vulnerable to both positive and negative influences." She also testified that if there had been "a strong, positive mentor available to him, he probably would

have responded well." However, he did not receive much individualized attention. R. 2136. She further testified that:

> Throughout his whole life though, he was exposed to people who were making money in legitimate and illegitimate ways. He was really desperate for money about the time that this all happened and was finding it very hard to be self-reliant even though[ ] he wanted to think of himself as a good man and a good provider. He was very vulnerable to people introducing him to making money in illegal ways.
>
> His attachment needs make him really need to belong and to be respected by others and to be seen as brave and tough, and so he would be vulnerable to being around other men who might be seen as strong. He was having difficulty in coping, but that makes you vulnerable to others because you want to try to find a way to feel safe and protected.

R. 2136-37. In light of the testimony of both experts, the trial judge submitted the statutory mitigating circumstance in § 16-3-20 (C)(b)(5), that "the defendant acted under duress or under the dominion of another person." R. 2333, lines 17-18.

Also, unlike the petitioner in *Green*, Jenkins could have presented the jury with Daniels' statement. Because Daniels was under a defense subpoena and present at the trial, Jenkins could have called him as a witness but apparently decided not to do so for strategic reasons. *See State v. Riddle*, 353 S.E.2d 138, 140 (S.C. 1987) (even under *in favorem vitae* review, Court was "not required … to review the strategic decisions of defense counsel"). Similarly, Jenkins was available and could have testified. See *State v. Terry*, 529 S.E.2d 276, 277 (S.C. 2000) (defendant cannot create his own unavailability by exercising his right not to testify). "While no inference of guilt can be drawn from [Jenkins] 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 a violation of *Green* is the trial judge twice stated that if Jenkins wanted to tell the jury in his closing statement the same thing that he had told Dr. Maddox, he could do so and he would not be subject to cross-examination. See R. 2170-71; 2178.[8] Thus, *Green* did not require admission of Daniels' hearsay statement and certiorari should be denied because Jenkins real complaint is merely that the trial judge abused his discretion in applying state evidentiary law.

D. Any error is harmless beyond a reasonable doubt.

Finally, any supposed error in excluding Daniels' hearsay statement is harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 24 (1967), since it is clear beyond any reasonable doubt the error complained of did not contribute to the death sentence. First, Dr. Maddox was able to give her opinion that Jenkins was under the influence of Daniels. Second, the excluded statement, as well as Dr. Maddox's opinion, was generally cumulative to the opinion of Ms. Andrews, the social worker. *Cf. Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (one factor in determining whether a Confrontation Clause violation is harmless under *Chapman* "depends on … whether the testimony was cumulative"). Third, the statement to Dr. Maddox referred "the second Sunhouse robbery and murder" for which he was not being tried and did not serve as a statutory aggravating circumstance. App. 15a-16a. It related only "indirectly to Jenkins' mental state at the

[8] Although this would not constitute proper argument under § 16-3-28, *see State v. Moore*, 593 S.E.2d 608, 610-11 (S.C. 2004), the State did not object when the trial judge told Jenkins he could say this in his argument and Jenkins 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.

time of the Sunhouse robbery and murder on January 2," for which he was sentenced to death (see App. 16a), whereas the opinion of Ms. Andrews applied more broadly to him and would include his mental state at the time of the offenses of January 2.

Fourth, presentation of Daniels' statement would have "supported the State's sentencing phase argument that the death penalty is warranted against Jenkins because he committed the second Sunhouse robbery and murder." App. 16a. Fifth, despite the trial judge's ruling, either Jenkins or his co-defendant could have testified to the excluded statement, or he could have discussed it in his personal sentencing phase closing argument. And sixth, there was overwhelming proof of Jenkins' guilt of murder and the statutory aggravating circumstances. See "Statement of the Case," part A. So, any alleged error was harmless.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Sr. Assist. Deputy Attorney General

*WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

By: s/ William Edgars Salter, III
WILLIAM EDGAR SALTER, III

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

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Attorneys for Respondent