No. 22-5513

IN THE

Supreme Court of the United States

JEROME JENKINS, JR.,
Petitioner,

-vs.-

STATE OF SOUTH CAROLINA,
Respondent.

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

REPLY BRIEF

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ARGUMENT IN REPLY

The Attorney General's reliance on waiver cases from this Court and from the South Carolina Supreme Court is misplaced since Petitioner Jenkins had no choice of alternatives to waive. See Brief in Opposition at 13: "`[I]f appropriate waivers are procured, States may continue to offer judicial fact finding as a matter of course to all defendants who plead guilty.' Blakely v. Washington, 543 U.S. 396, 310 (2004)." It continued: "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.' See also Hurst, 577 U.S. at 100. (`Blakely . . . was a decision applying Apprendi[1] to facts admitted in a guilty plea, in which the defendant necessarily waived his right to a jury trial...'" Brief in Opposition at 14.

Finally, "[r]espondent notes that the Court has stated that 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 by a jury.' Duncan v. Louisiana, 391 U.S. 145, 257-58 (1968)." Brief of Opposition at 16, n.4.

This case is truly unique because the trial judge improperly told Petitioner Jenkins that he would sentence him to death if he pled guilty. Thus, Petitioner Jenkins had no choice under South Carolina's death penalty statutory complex to plead guilty and obtain judge only sentencing, or to plead not guilty and accept jury sentencing. Even though Petitioner Jenkins wanted to plead guilty and accept

[1] Apprendi v. New Jersey, 530 U.S. 466 (2000).

responsibility for his crimes he could not do so. While states are free to have capital sentencing alternatives, Petitioner Jenkins had a due process right for the State of South Carolina to not treat him in this uniquely arbitrary manner which foreclosed his choice of pleading guilty and accepting responsibility for his crimes.

The Attorney General also argued Petitioner Jenkins was not prejudiced by his inability to plead guilty because his trial counsel informed the jurors that "Jenkins was admitting guilt to the crimes charged." Brief in Opposition at 24. However, juries in South Carolina are instructed that what the attorneys tell them is just argument. That occurred in this case where the trial judge instructed the jury during the guilty phase: "Some of the things you have heard during the trial are not evidence and you must not consider them as evidence in deciding in deciding the facts of this case: Number one, the statements and arguments of the attorneys." R. 1653, ll. 21-25.

Experience likewise teaches that capital juries consider death penalty defense attorneys "hired guns" who will attempt or say anything to save their clients from a death sentence. For example, in State v. McWee, 222 S.C. 387, 472 S.E.2d 235 (1996), defense counsel James Huff dramatically told the jurors in his penalty phase closing argument that if they sentenced McWee to life imprisonment rather than death that McWee would die in prison. After deliberating just two minutes the sentencing jury returned to ask the court: "Under current South Carolina law is there a minimum number of years that must be served before eligibility for parole." See State v. McWee, R. at 2727, l. 17 – 2779, l. 11.

The statements of trial counsel are no substitute for a formal judicial acceptance of a plea of guilty.

The Attorney General also attempted to isolate the judge's improper remarks on sentencing Petitioner Jenkins to death if he pled guilty as purely a matter of state law and to urge that the state supreme court's imposition of a procedural bar in not granting relief on the basis of the judge's improper remark should be respected by this Court because: "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." Brief in Opposition at 20. "Thus, while the trial judge's remarks may have violated state law, they are non-prejudicial and do not violate the Constitution and the Court lacks jurisdiction to correct them." Brief in Opposition at 24.

The Attorney General's argument in this regard is incorrect because as Petitioner Jenkins asserted in his Petition for Writ of Certiorari in all prior similar capital cases in which the trial judge made such improper procedural remarks - - albeit none as egregious as in this case - - the South Carolina Supreme Court vacated the defendant's death sentence. See State v. Pierce, 289 S.C. 430, 434, 346 S.E.2d 707, 710 (1986)[2]; State v. Crisp, 362 S.C. 412, 415-16, 608 S.E.2d 429, 432 (2005); State v. Owens, 362 S.C. 175, 178, 607 S.E.2d 78, 80 (2004). In each of these cases defense counsel did not contemporaneously object to the judge's improper procedural

[2] Overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

remarks to the judge, and yet in each case the South Carolina Supreme Court granted relief by vacating the death sentence. It was only in this case, the worst of them, in which the South Carolina Supreme Court chose to impose a procedural bar for the failure of defense counsel to contemporaneously object to the judge's improper remark. Therefore, there is no "consistently applied rule in South Carolina" that this Court needs to respect as a matter of state procedural law.

Finally, the Attorney General urges that despite the trial judge telling Petitioner Jenkins that he would sentence him to death if he pled guilty, there was no prejudice because it was "[i]nconceivable 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." Brief in Opposition at 23. To the contrary, what is inconceivable would be any experienced capital trial lawyer, as former prosecutor Ralph Wilson was in this case, not taking the judge at his word when he said he would sentence Petitioner Jenkins to death if he pled guilty, and instead urging his client that the judge did not mean what he said and that the judge would be fair when he imposed sentence.

Petitioner Jenkins sought to exercise his right to plead guilty under the South Carolina statute as he was also challenging the constitutionality of South Carolina's death penalty statute which did not allow him to plead guilty and have jury sentencing. Petitioner Jenkins was denied his "choice" of pleading guilty based on

the trial judge's remarks that he would sentence him to death if he plead guilty. That was not a "waiver" of one mode of trial -- judge or jury trial -- for the other.

The Attorney General's waiver analysis is misplaced, as is its state law procedural bar argument, and its lack of prejudice assertions. This Court should respectfully address the legal argument of Petitioner Jenkins raised in his petition for writ of certiorari that South Carolina's death penalty statute is unconstitutional given this Court's holding in Hurst v. Florida, 577 U.S. 92 (2016).

CONCLUSION

By reason of the arguments in the petition for writ of certiorari, and in this reply brief, a writ of certiorari should be issued to allow full briefing on these issues.

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This 17th day of October, 2022.