No. _____

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Respondent,

v.

TIMOTHY RAY JONES,
Petitioner.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1.

Whether the Due Process Clause and the Eighth Amendment require that a jury, as the sentencer in a capital case, be told the truth about the effect of a verdict of not guilty by reason of insanity and a capital defendant allowed to voir dire potential jurors about their ability to render this verdict.

2.

Whether a roadblock conducted by two bored police officers with minimal oversight and excessive discretion violated the Fourth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Ray Jones, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina.

OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported at State v. Timothy Ray Jones, Jr., 891 S.E.2d 347 (2023). App. 1.

JURISDICTION

The Supreme Court of South Carolina issued its opinion on March 29, 2023, (App. 61) and issued a substituted opinion after granting rehearing in part and denying rehearing in part on July 19, 2023. App. 1. On September 28, 2023, the Chief Justice extended the time to file a petition for a writ of certiorari to and including November 16, 2023. App. 98. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Amendment IV, United States Constitution.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Amendment VIII, United States Constitution.

"[N]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . ." Amendment XIV, United States Constitution.

INTRODUCTION

A. Question One.

In 1994, this Court examined whether jurors should be told the consequences of a verdict of not guilty by reason of insanity ("NGRI"). *Shannon v. United States*, 512 U.S. 573 (1994). This Court has not returned to the issue since *Shannon*. *Shannon* addressed an NGRI instruction under a federal statute and "as a matter of general federal practice," not on constitutional grounds. *Id.* at 575.

Shannon also predicted the scenario presented by petitioner's case—whether a jury that has a sentencing role should be told the truth about NGRI consequences. *Id.* at 579, n.4. This Court cited *Simmons v. South Carolina*, 512 U.S. 154 (1994), the first in a series of three reversals of the South Carolina Supreme Court based on the Due Process Clause for refusing to tell capital jurors the truth about parole eligibility.[1] State and federal courts across the nation differ in how they instruct juries on NGRI consequences. Because of these differences and the importance and novelty of the constitutional question in death penalty cases, this Court should grant certiorari.

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[1] *See also Shafer v. South Carolina*, 532 U.S. 36 (2001); *Kelly v. South Carolina*, 534 U.S. 246 (2002). *Accord Lynch v. Arizona*, 578 U.S. 613 (2016) (reversing Arizona Supreme Court's refusal to give a *Simmons* instruction). Much like the two cases when South Carolina ignored the mandate of *Simmons* at the state's urging, the state supreme court here only superficially engaged with the constitutional question, ignoring Jones' Due Process argument in its first opinion and only briefly addressing it after Jones pointed out the deficiency in his petition for rehearing. *Compare* App. 71-73 (original opinion omitting mention of petitioner's Due Process claim *with* App. 11-14 (substituted opinion) *and* App. 39-40 (petition for rehearing stating that federal claim was omitted).

B. Question Two

The police in a rural Mississippi county instituted a roadblock for no real reason except boredom. The purpose was general crime control on a slow night. The county had no written policy, the officers had little supervision and too much discretion, yet the state supreme court found the roadblock did not violate the Fourth Amendment. As the trial lawyer succinctly put it, "So if this was legal, they're all legal." R. 6746. This Court has not addressed roadblocks in nearly twenty years and Jones' case provides a measuring stick for how far the police have strayed from this Court's Fourth Amendment decisions.

STATEMENT OF THE CASE

1. Petitioner Tim Jones, an information technology worker at Intel, killed his five young children and drove around the Southeast for days in August and September with their decomposing bodies in his car. App. 2-3. R. 2619. Eight days after the killings, two police officers stopped Jones at a roadblock in a rural county in Mississippi. App. 3.

Deputy Charles Johnson, one of the two officers conducting the roadblock, testified that "because things were quiet" on the night of September 6, 2014, he and another deputy asked their supervisor for permission to conduct a safety checkpoint. App. 14. Sheriff Charlie Crumpton testified the department's verbal policy required that checkpoints be approved by a supervisor and conducted at a safe location by two or more officers who wear reflective vests and stop all vehicles. *Id.* The county's safety checkpoints were intended to check for driver's licenses, seatbelt violations,

proper child restraints, and proof of insurance. *Id.* The sheriff estimated approximately ten percent of drivers are ticketed or arrested at safety checkpoints, but said that driving without a license was not a major problem and described it as a "very minor" safety issue. *Id.* R. 6634. Deputy Johnson further testified he was normally equipped with a portable device to conduct breathalyzer tests on suspected drunk drivers. App. 15.

Deputy Johnson smelled a strong odor of burnt marijuana and garbage coming from Jones' SUV as he approached the roadblock. App. 3. The officer noticed Jones' eyes were red and glassy and his speech was slurred. Jones consented to a search of his vehicle, which uncovered bleach stains on the floorboard, synthetic marijuana, drug paraphernalia, bleach, muriatic acid, charcoal fluid, and a scribbled note detailing plans to dispose of the bodies of his children. *Id.* The police arrested Jones for driving under the influence, possession of a controlled substance, and possession of drug paraphernalia. *Id.*

Jones moved pretrial to suppress all evidence stemming from the Mississippi roadblock, arguing it violated the Fourth Amendment because its primary purpose was general crime prevention. App. 15-16. The trial court denied Jones' motion. *Id.*

2. After his arrest at the roadblock, Jones gave a statement to the police admitting to the killings. App. 3. He disciplined his six-year-old son for tampering with an electrical outlet by making him perform physical exercise. App. 2. Later that night, Jones found his son dead. *Id.* Jones then strangled his other four children.

App. 3. He heard voices saying that his children would be better off in Heaven than without parents. *Id.*

Jones presented an extensive insanity defense. App. 21-25. Defense experts testified that Jones suffered from schizophrenia, depression, and organic brain damage. *Id.* Jones' mother is institutionalized because of schizophrenia and a psychiatrist testified about schizophrenia's genetic component. *Id.* At the age of fifteen, Jones was in a car accident that left him "with a brain injury and a visible indentation on his forehead." *Id.* An MRI showed an old skull fracture and a severe traumatic brain injury. *Id.* The MRI also showed physical brain characteristics associated with schizophrenia. *Id.* The State argued Jones was addicted to synthetic marijuana and was malingering. *Id.*

Before trial, Jones asked the judge to instruct jurors on the effect of an NGRI verdict and to allow voir dire of potential jurors on whether they could consider an NGRI verdict. App. 11-14. The state vigorously opposed telling the jurors about the consequences and sought to limit Jones' voir dire accordingly. R. 91-104. R. 211-29. The judge ruled in the state's favor. R. 104, 210, 229.

One juror in voir dire told the court she would need to know "the plan" in order to consider an NGRI verdict. App. 9-11. This juror pointed out that she knew the result of a life sentence, she knew the result of a death sentence, but "in the case of not guilty by insanity, you don't know the result." *Id.* The judge told her she would not know the result and the juror replied, "I don't understand." *Id.* The state had this juror struck because she needed to know the consequences of an NGRI verdict

and the trial judge prevented the defense from exploring the issue further during the remainder of jury selection. *Id.*

The judge did not instruct the jury at the end of the guilt phase on the effect of an NGRI verdict and the jury found petitioner guilty of five counts of murder. App. 2-4. At the conclusion of the sentencing phase, the jury recommended death and the trial court followed the recommendation as mandated by state law. *Id.*

3. On appeal to the South Carolina Supreme Court, Jones again argued the Due Process Clause and the Eighth Amendment's requirement for heightened reliability in capital cases required an NGRI instruction and voir dire on NGRI because of the jury's role as sentencer. App. 11-14. The state court ruled that NGRI is a verdict during the guilt phase and the jury has no sentencing role if it renders an NGRI verdict. *Id.* The court similarly distinguished *Simmons*, *Shafer*, and *Kelly* by interpreting those decisions as only dealing with instructions during the penalty phase of a capital trial. *Id.* The court acknowledged "a trend toward requiring a consequences instruction, but we decline to join that trend." *Id.* Jones' Eighth Amendment argument was dispatched by the state court in conclusory fashion, simply stating that Jones "overlooks" that the jury did not find petitioner was insane or mentally ill. *Id.*

4. The state supreme court also affirmed on the Fourth Amendment issue regarding the roadblock. App. 14-16. The court reasoned that the Mississippi roadblock "was precisely the type of checkpoint suggested by the Supreme Court" in *Delaware v. Prouse*, 440 U.S. 648 (1979) and *City of Indianapolis v. Edmond*, 531 U.S.

32 (2000). *Id.* The court held the state presented sufficient evidence to prove the primary purpose of the roadblock was highway safety, not general crime prevention. *Id.* It found that, as in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), the police "had a policy requiring that *all* vehicles passing through checkpoints be stopped in a safe, structured manner." *Id.* (emphasis in original). Lastly, the court reasoned that the "officers did not have unbridled discretion as was the case in *Prouse*; instead stops were brief and minimally intrusive." *Id.*

REASONS FOR GRANTING THE PETITION ON QUESTION ONE

As the South Carolina Supreme Court acknowledged, jurisdictions throughout the nation differ on what to tell juries about an NGRI verdict. App. 11, n.3 (cataloging the different approaches in states that allow an NGRI verdict). The outcomes fall into three categories. Some jurisdictions hold that a consequences instruction should be given in all cases. Other jurisdictions require courts to give the instruction when requested by the defendant. Finally, some states, like South Carolina, refuse to give any instruction about NGRI consequences. *See generally, Instructions in State Criminal Case in which Defendant Pleads Insanity as to Hospital Confinement in Event of Acquittal*, 81 A.L.R4th 659; Christopher J. Rauscher, Note, *"I Did Not Want a Mad Dog Released"—The Results of Imperfect Ignorance: Lack of Jury Instructions Regarding the Consequences of an Insanity Verdict in State v. Okie*, 63 Me. L. Rev. 593 (2011). While the cases use a variety of reasoning and some states have solved the problem statutorily, the recurrent theme is the tension between the jury's

traditional role as factfinder-instead-of-sentencer versus fairness to the defendant—which is Due Process.

The reasoning in many of these state and federal cases can be traced to a D.C. Circuit opinion co-authored by Judge E. Barrett Prettyman and then-Judge Warren E. Burger—*Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957). The *Lyles* approach was discussed extensively in both *Shannon* and in multiple jurisdictions struggling with NGRI consequences instructions. This petition will briefly explain the history of *Lyles* and *Shannon* and then demonstrate the split of authority that requires this Court's intervention. The public importance of this issue is seen in this Court's recent jurisprudence regarding the Eighth Amendment and mental status. Finally, the clear presentation of the issue in this high-profile capital case and South Carolina's status as a defiant outlier weigh heavily in favor of this Court granting certiorari.

I. The *Lyles* Rule and the Door Left Open by *Shannon* and *Simmons*

Lyles was not a capital case, but the opinion co-authored by Judges Prettyman and Burger held that a consequences instruction was required. *Lyles*, 254 F.2d at 728-29. The trial court in *Lyles* gave a consequences instruction, telling the jury that he would commit the defendant to a mental hospital where he would remain until he could be safely released. *Id.* The circuit court approved the instruction after first noting the "doctrine, well established and sound, that the jury has no concern with the consequences of a verdict. . . ." *Id.* "But we think that doctrine does not apply in the problem before us." *Id.*

Like the savvy juror in petitioner's case, the *Lyles* court reasoned that the outcome of guilty and not guilty verdicts were within the common knowledge of the people. *Id.* "But a verdict of not guilty by reason of insanity has no such commonly understood meaning." *Id.* "We think the jury has a right to know the meaning of this possible verdict as accurately as it knows by common knowledge the meaning of the other two possible verdicts." *Id.* The court further held that if the defendant did not want a consequences instruction, one should not be given. *Id.*

Lyles remained good law from 1957 until this Court's decision in *Shannon* in 1994. After the acquittal based on an insanity defense of John Hinckley for the shooting of President Reagan, Congress passed the Insanity Defense Reform Act ("IDRA"). *Shannon*, 512 U.S. at 575-78. *Shannon* was a non-capital case arising from Mississippi. *Id.* The district court refused the defendant's request for a consequences instruction and the Fifth Circuit affirmed. *Id.* This Court granted certiorari to consider whether the IDRA or "general federal practice" required giving a consequences instruction. *Id.*

Writing for a 7-2 majority, Justice Thomas concluded that neither the IDRA nor "general federal practice" required a consequences instruction. *Id.* The Court noted that the federal circuit courts "generally disapproved of instructing the jury concerning the post-trial consequences of an insanity acquittal." *Id.* The outlying circuit was the D.C. Circuit, where *Lyles* was still good law. *Id.*

Shannon began its legal analysis by stating, "It is well established that when a jury has no sentencing function, it should be admonished to reach its verdict

without regard to what sentence might be imposed." *Id.* at 579 (internal quotations omitted). The Court dropped a prescient footnote to this sentence which observed, "Particularly in capital trials, juries may be given sentencing responsibilities," and cited *Simmons v. South Carolina*, 512 U.S. 154 (1994). *Id.* at n.4. The *Shannon* Court then observed that the jury had no sentencing responsibility. *Id.* No Due Process argument was made in *Shannon*.

Simmons was a capital Due Process and Eighth Amendment case. This Court reversed the South Carolina Supreme Court for refusing to tell the jury the truth that the defendant would not be eligible for parole if the jury sentenced him to life instead of death. *Simmons*, 512 U.S. at 168-69. Accepting that "[i]t can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States," this Court held that Due Process required the giving of "truthful information relating to parole" to capital juries. *Id.* South Carolina's adamant refusal to accept this Court's ruling resulted in two more reversals. *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Kelly v. South Carolina*, 534 U.S. 246 (2002).

Lyles was cited by the many jurisdictions requiring a consequences instruction as will be discussed below. *Shannon* pointedly left open the question of whether a capital jury must receive a consequences instruction. The *Shannon* Court's citation of *Simmons* is a strong indication that the logic of *Simmons* would apply to an NGRI consequences instruction in a capital case.

II. The Nation is Split on Giving Jurors NGRI Consequences Instructions

A. Jurisdictions Holding that a Consequences Instruction Should be Given Upon a Defendant's Request

At least ten jurisdictions require that a consequences instruction should be given upon the defendant's request. North Carolina is a good example of this approach in a death penalty case. *State v. Hammonds*, 224 S.E.2d 595, 596 (N.C. 1976). After examining the relevant precedent from other jurisdictions, including *Lyles*, the North Carolina court mandated the giving of an instruction upon a defendant's request. *Id.* at 603-04. The court stated, "To allow a jury to speculate on the fate of an accused if found insane at the time of the crime only heightens the possibility that the jurors will fall prey to their emotions and thereby return a verdict of guilty which will insure that defendant will be incarcerated for his own safety and the safety of the community at large." *Id.* at 603.

Utah requires a consequences instruction upon the defendant's request in all cases, not just capital cases. *State v. Shickles*, 760 P.2d 291, 296-99 (Utah 1988). Utah did not expressly frame its decision as based on Due Process, but the reasoning would apply to both a Due Process and an Eighth Amendment argument. "We are convinced that the risk articulated in *Lyles* is substantial, i.e., that a jury may ignore the evidence of insanity if the jury misunderstands the consequences of a verdict of not guilty by reason of insanity and focuses instead on the fear that such a verdict will result in releasing a dangerous person to prey upon society." *Id.* The risk identified in *Shickles* and *Lyles* raises Due Process and Eighth Amendment

concerns—that a defendant will be executed on the basis of information he has no ability to refute or explain. *See Gardner v. Florida*, 430 U.S. 349, 362 (1977); *Simmons*, 512 U.S. at 161.

Other states using this approach are California, Hawaii, Indiana, Kentucky,[2] Louisiana,[3] Maryland, Massachusetts, and Missouri. *See People v. Dennis*, 215 Cal. Rptr. 750, 753 (Ct. App. 1985) (holding that instruction on consequences of NGRI verdict shall be given on defendant's request); Haw. Rev. Stat. Ann. § 704-402 ("When the defense provided for by subsection (1) is submitted to a jury, the court shall, if requested by the defendant, instruct the jury as to the consequences to the defendant of an acquittal on the ground of physical or mental disease, disorder, or defect excluding responsibility."); *Passwater v. State*, 989 N.E.2d 766, 773 (Ind. 2013) (approving a modified instruction on NGRI consequences to be given at a defendant's request); Ky. RCr 9.55 ("On request of either party in a trial by jury of the issue of absence of criminal responsibility for criminal conduct, the court shall instruct the jury at the guilt/innocence phase as to the dispositional provisions applicable to the defendant if the jury returns a verdict of not criminally responsible by reason of mental illness or retardation, or guilty but mentally ill."); *State v. Leeming*, 612 So. 2d 308, 315 (La. Ct. App. 1992) ("Instruction explaining the consequences of a verdict of not guilty by reason of insanity must be given if requested by defendant or jurors."); *Erdman v. State*, 553 A.2d 244, 250 (Md. 1989) ("The view that a jury has the need

[2] Kentucky requires the instruction upon the request of either the defendant or the state.

[3] In Louisiana, jurors can also request the instruction.

and right to know the consequences of a verdict of not criminally responsible is bottomed on possible prejudice to the defendant. Therefore, we think that the instruction is to be given only when duly requested by the defendant."); *Commonwealth v. Mutina*, 323 N.E.2d 294, 301 (Mass. 1975) ("If jurors can be entrusted with responsibility for a defendant's life and liberty in such cases as this, they are entitled to know what protection they and their fellow citizens will have if they conscientiously apply the law to the evidence and arrive at a verdict of not guilty by reason of insanity -- a verdict which necessarily requires the chilling determination that the defendant is an insane killer not legally responsible for his acts."); Mo. Ann. Stat. § 552.030 (requiring instruction when requested by defendant).

B. Jurisdictions Holding that a Consequences Instruction Must Always Be Given

At least thirteen jurisdictions require a consequences instruction even if not requested by the defendant. New Hampshire is a good example of this approach. *See Novosel v. Helgemoe*, 384 A.2d 124, 125 (N.H. 1978). Addressing a complicated statutory scheme, the New Hampshire court concluded, "The jury should be instructed about the consequences of a finding of not guilty by reason of insanity because, unlike a finding of 'not guilty,' the consequences of such a finding are not commonly known to the jury." *Id.* The court in *Novosel* cited *Lyles* and other state cases for this proposition. *Id.*

Novosel was later superseded by statute, but New Hampshire reaffirmed its approach in 1999. *State v. Blair*, 732 A.2d 448, 451 (N.H. 1999). *Blair* is interesting because it dealt with a defendant's objection to giving a consequences instruction. *Id.*

The defendant objected to the trial judge telling the jurors that the case was non-capital and also telling the jury the consequences of an NGRI verdict because it "minimized the impact a guilty verdict would have." *Id.* at 450-51. The *Blair* court reaffirmed the prior state precedent requiring a jury to be informed of NGRI consequences and rejected the defendant's arguments about the instruction. *Id.* at 451.

A Kansas statute requires a consequences instruction.[4] K.S.A. § 22-3428(f). The statute mandates instruction on the commitment and release scheme when a defendant pleads insanity. *Id.* A defendant objected to the statute's requirement of a consequences instruction, arguing it violated Due Process. *State v. Hamilton*, 534 P.2d 226, 229 (Kan. 1975). The Kansas court noted that a consequences instruction can be a two-edged sword, but eventually concluded that jurors should be told the consequences and cited *Lyles*. *Id.* at 229-31. The court also held that giving an instruction with too much detail about release procedures would be confusing, and only the gist of the statute—that the defendant would remain in a secure facility until it was safe to release him—should be charged.[5] *Id.* Kansas reaffirmed this holding in 1997. *State v. Ordway*, 934 P.2d 94, 104-06 (Kan. 1997).

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[4] This Court recently addressed a Due Process challenge to the Kansas statute's refusal to "wholly exonerate a defendant on the ground that his illness prevented him from recognizing his criminal act as morally wrong." *Kahler v. Kansas*, 589 U.S. ___, 140 S.Ct. 1021, 1024 (2020). *Kahler* held that Due Process did not require a specific insanity definition or consequence. *Id.*

[5] South Carolina faced a similar objection from a defendant when a trial judge over-emphasized the many ways a defendant might slip through the cracks and be released after an NGRI verdict. *State v. Huiett*, 246 S.E.2d 862, 864-65 (S.C. 1978). The South Carolina Supreme Court reversed because the too-detailed charge prejudiced the defendant. *Id.*

The other states requiring a consequences instruction are Alaska, Colorado, Florida, Georgia, Nevada, New Jersey, New York, Oregon, Pennsylvania, Tennessee, and West Virginia. *See* Alaska Stat. Ann. § 12.47.040 ("When the jury is instructed as to the verdicts under (a) of this section, it shall also be instructed on the dispositions available under AS 12.47.050 and 12.47.090."); *People v. Tally*, 7 P.3d 172, 184 (Colo. App. 1999) ("Jurors should be informed of the consequences of a finding that a defendant is insane, i.e., that such defendant will be committed to a mental institution until it is determined that he or she is no longer insane."); *Roberts v. State*, 335 So.2d 285, 289 (Fla. 1976) ("Freed from confusion and wonderment as to the possible practical effect of a verdict of not guilty by reason of insanity, jurors will be able to weigh the evidence relating to the factual existence of legal insanity in an atmosphere untroubled by the distracting thought that such a verdict would allow a dangerous psychopath to roam at large."); O.C.G.A. § 17-7-131(b)(3)(A) (directing the trial judge to tell the jury, "I charge you that should you find the defendant not guilty by reason of insanity at the time of the crime, the defendant will be committed to a state mental health facility until such time, if ever, that the court is satisfied that he or she should be released pursuant to law."); *Kuk v. State*, 392 P.2d 630, 634 (Nev. 1964) ("We think that the jury should know the consequences of such a verdict."); *State v. Krol*, 344 A.2d 289, 304–05 (N.J. 1975) ("The trial judge should, however, instruct the jury as to the consequences of a verdict of not guilty by reason of insanity so that the jury does not act under the mistaken impression that defendant will necessarily be freed or be indefinitely committed to a mental institution."); N.Y. Crim.

Proc. Law § 300.10. (requiring charge, "However, because of the lack of common knowledge regarding the consequences of a verdict of not responsible by reason of mental disease or defect, I charge you that if this verdict is rendered by you there will be hearings as to the defendant's present mental condition and, where appropriate, involuntary commitment proceedings."); Or. Rev. Stat. Ann. § 161.313 ("When the issue of insanity . . . is submitted to be determined by a jury in the trial court, the court shall instruct the jury in accordance with [the commitment procedure statute]"); *Commonwealth v. Mulgrew*, 380 A.2d 349, 351 (Pa. 1977) ("Today, we . . . hold that it is proper to instruct the jury concerning the possibility of commitment proceedings being initiated against the defendant if such defendant is acquitted of the criminal charge filed against him by reason of an insanity defense."); Tenn. Code Ann. § 33-7-303 ("The criminal court, in a trial before a jury in which the issue of insanity at the time of the commission of the offense is raised, shall instruct the jury before it begins deliberation as to the provisions of this section."); *State v. Daggett*, 167 W. Va. 411, 415, 280 S.E.2d 545, 549 (1981) ("We recently held that a defendant relying upon the defense of not guilty by reason of insanity was entitled to an instruction which correctly informs the jury of the consequences of a verdict of not guilty by reason of insanity.").

C. Jurisdictions Refusing to Give a Consequences Instruction

Over twenty jurisdictions refuse to give a consequences instruction. *See* 81 A.L.R4th 659, § 5 (collecting cases from jurisdictions not giving instruction). The Tenth Circuit examined a Due Process argument for a consequences instruction in a

non-capital case in *Neely v. Newton*, 149 F.3d 1074, 1083-86 (10th Cir. 1998). Like petitioner Jones, the defendant in *Neely* argued due process required the court to tell the jury about the consequences of an NGRI verdict and to allow voir dire of the jurors on whether they could consider an NGRI verdict. *Id.* The Tenth Circuit noted, "The trial court denied her request on the grounds that in a non-death penalty case, the jury is not to consider the consequences of its verdict." *Id.*

The Tenth Circuit quoted *Shannon's* observation that juries with "'no sentencing function'" should be told to reach their verdict without concern for the result. *Id.* (quoting *Shannon*, 512 U.S. at 579). The defendant argued that her jury had a sentencing function because of a mandatory minimum, but the court rejected this argument. *Id.* The *Neely* court's rejection of the defendant's argument about a sentencing function and quotation of *Shannon* shows that, had the defendant's case been a capital case, the Tenth Circuit likely would have concluded that Due Process required voir dire and a consequences instruction.[6]

The state court decision from which the Tenth Circuit's opinion in *Neely* arose also made the distinction between capital and non-capital cases for consequences instructions. *State v. Neely*, 819 P.2d 249, 256-57 (N.M. 1991). The New Mexico court noted that in death penalty cases, juries needed to be informed about the meaning of

[6] In a 2007 non-capital case dealing with a consequences instruction from the Tenth Circuit, the concurring judge, citing an unpublished state court decision, wrote that Oklahoma holds that fundamental fairness requires the instruction when juries have sentencing functions. *Diestel v. Hines*, 506 F.3d 1249, 1279-81 (10th Cir. 2007) (Henry, J., concurring). Judge Henry noted that both the ABA and the National Alliance on Mental Illness recommend giving a consequences instruction. *Id.* It does not appear that Oklahoma has addressed the issue in a published decision, but the Oklahoma Court of Criminal Appeals promulgated a consequences instruction after the unpublished decision and cited *Lyles*. *See* Okla. Uniform Jury Instr. OUJI-DR 8-33C *available at* okcca.net/ouji-cr/8-33C/.

a life sentence because of capital cases' "heightened scrutiny." *Id.* (quoting *State v. Henderson*, 789 P.2d 603 (N.M. 1990)). The state court held, "We decline to extend the holding of *Henderson* to the case at bar. This case does not require the special protection necessary when a death sentence is at issue." *Id.*

Iowa dealt with a Due Process challenge to the failure to give a consequences instruction under its state constitution, which Iowa "jealously reserve[s] the right" to develop independently of the federal constitution. *State v. Becker*, 818 N.W.2d 135, 149-63 (Iowa 2012). *Becker*, a non-capital murder case, engaged in a thorough analysis, including evaluations of *Shannon* and *Lyles*. *Id.* The Iowa court examined the split of outcomes in the states and emphasized that the majority of states do not give a consequences instruction. *Id.* The court also wrote that the states that had adopted a consequences instruction had done so on policy grounds, not specifically Due Process. *Id.* The court embraced the notion that a consequences instruction would distract the jury from its traditional role as factfinder. *Id.*

Becker agreed that many commentators and academics believed giving the instruction was the better practice. *Id.* citing 1 Wayne R. LeFave, *Substantive Criminal Law*, § 8.3(d), at 607 ("'The better view is [that the instruction should be given], for, as explained in *Lyles v. United States*, it does not make sense that a jury should be presented with three verdict choices (guilty, not guilty, and not guilty by reason of insanity) but know the consequences of the first two.'") and ABA Standards for Criminal Justice § 7–6.8, commentary (2d ed.1986). The court refused to make these policy arguments into constitutional dictates, writing, "[G]ood public policy is a

far more malleable standard than due process." *Id.* Iowa held that it would leave the decision of whether a consequences instruction was required to its legislature and rulemakers. *Id.*

Arkansas, like South Carolina, refuses to inform jurors of the result of an NGRI verdict in capital cases. *Burns v. State*, 913 S.W.2d 789, 791 (Ark. 1996). The defendant in *Burns* wanted to voir dire potential jurors about their knowledge of "what would happen" to the defendant if they gave an NGRI verdict. *Id.* Also like South Carolina, the Arkansas Supreme Court rejected the defendant's argument in summary fashion concluding that it "raises questions foreign to the jury's primary duty of determining guilt or innocence." *Id.*

Arizona also does not give a consequences instruction in capital cases. *State v. Moody*, 94 P.3d 1119, 1154-55 (Ariz. 2004). At the state's urging, the trial court denied the defense's request for a consequences instruction before the conclusion of the guilt phase. *Id.* During closing argument, the prosecutor argued that the insanity defense was an excuse and said, "Before you cut somebody loose on that kind of disorder. . ." and the judge sustained the defense objection. *Id.*

The *Moody* court criticized the prosecutor, stating that it was prosecutorial misconduct "to appeal to the jurors' fears that an [NGRI] verdict will result in a defendant's release." *Id.* "The egregiousness of the statement was magnified by the prosecutor's knowledge that the jury would not be instructed on the consequences of an [NGRI] verdict." *Id.* The court did not reverse, holding that the judge's sustaining

of the objection and the isolation of the comment did not deprive the defendant of a fair trial. *Id.*

III. The Importance of the Cleanly Presented Question

Mental culpability has been at the forefront of this Court's Eighth Amendment jurisprudence and Jones' capital case cleanly presents the NGRI question. In the last two decades, intellectually disabled persons have been ruled ineligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002); *Hall v. Florida*, 572 U.S. 701, 709 (2014). The Eighth Amendment forbids the execution of juveniles because of the lack of intellectual and moral development. *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005). This Court extended the holding of *Roper v. Simmons* to forbid the imposition of mandatory life without parole sentences on juveniles. *Miller v. Alabama*, 567 U.S. 460 (2012).

Unlike the cases cited above, Jones is not seeking to be categorically exempted from the death penalty because of his mental illness. But Jones is asking for a jury that can fairly consider an NGRI verdict. Jones' case is a perfect example of a severely mentally ill capital defendant facing a sentencing jury kept in the dark about the effect of their possible verdict. A potential juror asked the judge to explain the consequences to her so she could know "the plan." Jones could not defend the killing of his five small children unless the jury could fairly consider that he may have been insane. The jury knew from the outset that this was a capital case and that they would be the sentencer. Jones could not ask questions in voir dire to eliminate jurors who could not consider an NGRI verdict.

The state's own psychiatric expert who opined that Jones was not insane wrote an article titled "Juror Knowledge and Attitudes Regarding Mental Illness Verdicts" that was published in the Journal of the American Academy of Psychiatry and the Law. R. 8284-8341. The psychiatrist's research found 37.5% of jurors could not correctly identify the dispositional outcome of an NGRI verdict. R. 8292. Even among jurors who could correctly define NGRI, 13.5% believed defendants would go home after such a verdict. R. 8292. Eighty-four percent (84%) of jurors believed they should be told the outcome. R. 8293. Even if a judge told them to disregard the outcomes, 70.6% reported that knowing the outcomes would influence their decisions. R. 8293.

The federal issue is narrow, cleanly presented, and ripe for consideration by this Court. Justice Thomas's assessment for the Court in *Shannon* that jurors with sentencing responsibilities might need to know the consequences of an NGRI verdict has not been revisited since *Shannon* was decided in 1994. Petitioner's case sits at the confluence of the Due Process capital cases of *Simmons*, the Eighth Amendment cases concerning mental culpability of *Atkins* and *Miller*, and the almost evenly divided split between the states on whether to give a consequences instruction. South Carolina firmly stated its opposition to joining the modern trend of giving consequences instructions. This Court should grant certiorari to consider this issue of national importance.

REASONS FOR GRANTING THE PETITION ON QUESTION TWO

This Court has not addressed the constitutionality of roadblocks in almost twenty years. The most recent decision from this Court was in 2004 and concerned a roadblock seeking information from motorists about a hit-and-run. *Illinois v. Lidster*, 540 U.S. 419 (2004). Prior to *Lidster*, *Edmond* was decided in 2000 and concerned the constitutionality of roadblocks related to crime control. The opinion of the lower court upholding the spontaneous decision of two bored police officers in a rural Mississippi county to institute a roadblock conflicts with this Court's roadblock cases. South Carolina's interpretation of *Edmond* also materially conflicts with cases from other jurisdictions.

I. The Decision Below Conflicts with this Court's Decisions in *Edmond* and *Prouse*

Petitioner's trial counsel succinctly captured the essence of this Court's reasoning in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), when he said of the Smith County, Mississippi roadblock in Petitioner's case, "So if this was legal, they're all legal." R. 6746. In *Edmond*, this Court addressed the potential danger of pretextual roadblocks, stating "[i]f this were the case, however, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they include a license or sobriety check." 531 U.S. at 46.

The state supreme court erred in describing the bored officers' roadblock in this case as "precisely the type of checkpoint suggested by the Supreme Court in *Prouse* and *Edmond*." App. A16. Instead, this roadblock was exactly the type of pretextual excuse to seize motorists warned against by this Court in *Edmond*. Because "things

were quiet" on the night of Petitioner's arrest, Deputy Johnson and Deputy Thompson spontaneously decided to set up a roadblock. The officers conducted this roadblock under the pretext of general safety on the roadway. However, once the officers executed the roadblock, its real purpose became evident: to generally prevent crime and to apprehend those who may have violated the law.

The state supreme court misapprehended *Delaware v. Prouse*, 440 U.S. 648 (1979) and *Edmond*. In *Prouse*, after denouncing the use of spot checks, this Court suggested that a roadblock "with the purpose of verifying drivers' licenses and vehicle registrations would be permissible." *Edmond*, 531 U.S. at 38 (citing *Prouse*, 440 U.S. at 663). However, the Court did not authorize the government to conduct a roadblock for general crime prevention under the guise of a regulatory purpose.

The general crime prevention roadblock in *Edmond* was not saved by its secondary purpose of keeping impaired motorists off the road and verifying licenses and registrations. *Id.* at 33. And *Edmond* cannot be read to permit the inverse: a roadblock with the purpose of verifying registrations and licenses does not thereafter permit officers to transform the roadblock into one which—in practice—seeks to detect ordinary criminal activity. In other words, law enforcement may not circumvent the dictates of the Fourth Amendment by using a constitutional purpose as a foundation for the initiation of a roadblock to then later pursue an unconstitutional purpose. A contrary conclusion would render any roadblock constitutional—eroding the protection afforded by the United States Constitution.

Even assuming the proffered primary purpose of the roadblock in this case is accepted, it does not rise to the level of specificity required to survive constitutional scrutiny. In rejecting the general crime prevention roadblock in *Edmond*, this Court noted that the "high level of generality" posed constitutional concerns. *Id.* at 32. Specifically, allowing such a broad purpose to warrant a suspicionless seizure would inflate law enforcement's ability to conduct such seizures for "any conceivable law enforcement purpose." *Id.* The Sheriff of Smith County, Mississippi testified that the roadblock in this case was a "safety checkpoint." Safety is as broad of a category as crime prevention. Explaining the many different violations and regulatory requirements for which the officers checked to ensure the safety of citizens did not sanitize this pretext of its unconstitutionality—just as the government in *Edmond* could not explain what violations or requirements it checked for to ensure citizens adhered to the law.

In concluding that the state presented sufficient evidence to verify Smith County's purported primary purpose, the lower court found, "Four officers testified the checkpoint was intended to check for driver's licenses, vehicle registrations, and proof of insurance. At no point did any witness suggest a contrary purpose." App. A16. However, the state's expert witness, Molly Miller, testified that the officers "could also be looking for impaired drivers" in addition to license checks. R. 6599-6600. Miller also admitted that drug smugglers can be caught at roadblocks as well. R. 6599. Further, Deputy Johnson explained he would shine his flashlight inside the car "to make sure no safety issues [existed] and stuff like that." R. 6652. This

testimony illustrates that the proffered primary purpose of the roadblock was merely pretextual.

Moreover, the state supreme court overlooked a necessary step in evaluating the permissibility of this roadblock: balancing the interests at stake and the effectiveness of the program. *See Brown v. Texas*, 443 U.S. 47, 50-51 (1979) ("The constitutionality of a seizure turns upon a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."); see *also Edmond*, 531 U.S. at 47 ("The constitutionality of such checkpoint programs still depends on a balancing of the competing interests at stake and the effectiveness of the program."). These factors were not even considered, let alone balanced.

This Court's precedent illuminates public concerns sufficiently grave to warrant a roadblock. For example, in *United States v. Martinez-Fuerte*, in reviewing the constitutionality of checkpoints aimed at detecting illegal immigrants, this Court noted the national imperative to limit illegal immigration and the great need of law enforcement to execute these checkpoints to achieve that goal. 428 U.S. 543, 552 (1976). Additionally, in *Michigan Dep't of State Police v. Sitz*, this Court looked, in part, to the "[t]he magnitude of the drunken driving problem [and] the States' interest in eradicating it[]" to determine that the suspiciousness seizure was constitutional. 496 U.S. 444, 451 (1990).

The alleged purpose in this case, even if accepted as sincere, pales in comparison to the unique needs posed in *Sitz* and *Martinez-Fuerte*. Although the

state has an interest in ensuring only safe motorists are on its roadways, the state failed to provide evidence establishing the need for this particular "safety checkpoint" to check for licenses, registrations, proof of insurance, and the use of car seats. Driving without a license was not a major problem in Smith County. Sheriff Crumpton described it as a "very minor" safety issue. R. 6634. Deputy Johnson reiterated those statistics. R. 6678. Johnson indicated that at most roadblocks, no tickets were issued. R. 6678. The record lacks any evidence establishing a particular or acute need to conduct this roadblock. Indeed, a quiet night—not an imminent or grave concern—prompted the roadblock. This pretextual, unnecessary, and ineffective roadblock cannot serve as a basis upon which law enforcement may infringe on Americans' privacy interests.

Martinez-Fuerte and *Sitz* also show that the efficacy of challenged roadblocks is constitutionally relevant. Not only did the roadblocks in those cases aim to address imminent or grave law enforcement concerns but they also yielded results to establish their efficacy. The record in both cases provided the Court with a "complete picture" of the effectiveness of each roadblock. *See Martinez-Fuerte*, 428 U.S. at 554 and *Sitz*, 496 U.S. at 455. Additionally, in *Prouse*, while reviewing a roadblock aimed at apprehending unlicensed drivers and unsafe vehicles, the Court "[o]bserved that no empirical evidence indicated that such stops would be an effective means of promoting roadway safety" and opined, "[i]t seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed

operator will be large indeed." 440 U.S. at 659-60. Likewise, the record here is devoid of evidence suggesting this roadblock yielded a meaningful number of drivers without licenses, registration, proof of insurance, or required car seats. Instead, the roadblock was only effective in detecting general criminal activity.

The inquiry does not end after determining a constitutionally permissible purpose. But that is where the state supreme court ended its analysis.

The analysis set forth in *Brown v. Texas* serves to ensure that "[a]n individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." 443 U.S. at 50-51. In reaching its decision regarding the execution of the roadblock, the state supreme court stated,

> As in *Sitz*, the Smith County Sheriff's Department had a policy requiring that all vehicles passing through checkpoints be stopped in a safe, structured manner. Officers did not have unbridled discretion as was the case in *Prouse*; instead, stops were brief and minimally intrusive.

App. 16. Curtailing an officer's discretion so as to render a roadblock constitutional is not sufficiently achieved by a roadblock that requires all passing vehicles to stop in a safe and structured manner alone. Rather, the Fourth Amendment commands that roadblocks are executed pursuant to a plan that limits the discretion of the officers conducting the stops. *See Sitz*, 496 U.S. 444; *see also Martinez-Fuerte*, 428 U.S. 543.

Absent from the analysis is a consideration of any "plan" that limited the discretion of the officers conducting the stops. Rather, the roadblock was spontaneously initiated as a result of two officers' boredom on a quiet evening. What is more, the officers executed the stop pursuant to a verbal policy solely requiring the presence of two officers and the receipt of verbal approval from their supervisor. This can be hardly

described as a plan—let alone one that sufficiently curtails an officer's otherwise unfettered discretion in the decision and mechanisms to conduct roadblocks. This verbal policy with such minimal threshold requirements does not provide constitutionally sufficient guidelines tailored to effectuate the roadblock's purported purpose without undue discretion. Without such, nothing prevents officers from executing a roadblock, under the guise of a permissible purpose, for alternative—unconstitutional—purposes. The roadblock here is indistinguishable from the suspicionless spot check condemned in *Prouse*.

II. The Decision Below Conflicts with other Jurisdictions' Interpretation of the Fourth Amendment

Georgia examined a roadblock that was more organized and planned than the one in petitioner's case and found it violated the Fourth Amendment. *Williams v. State*, 750 S.E.2d 355 (Ga. 2013). Unlike the roadblock in Mississippi in petitioner's case, the roadblock in Georgia was conducted in reliance on a written policy. *Id.*, 750 S.E.2d at 884. A supervising officer verbally delegated his authority to a lower-ranking officer to implement checkpoints. *Id.* Other than instructing the officer not to set up roadblocks on the interstate or during rush hour, no other limitations existed on the officer's authority. *Id.* The instigating officer "decided at the beginning of his shift" to conduct a "sobriety and license checkpoint." *Id.* at 885.

The Supreme Court of Georgia found the roadblock ran afoul of *Edmond* because the state failed to prove its checkpoint program had a primary purpose other than general crime control. *Id.* at 888. The court acknowledged that the Fourth

Amendment does not require written policies for roadblocks, but criticized the spare "two-sentence" policy in the police manual that authorized unlimited roadblocks for "legitimate law enforcement purposes." *Id.* at 892. The police did not make any "formal record" of the many roadblocks the officer "had implemented each week for at least a year." *Id.* The court ultimately concluded that the state failed to meet its burden that the checkpoint was not for crime control "at the programmatic level." *Id.* at 892-93.

Florida ruled a checkpoint violated the Fourth Amendment based on *Edmond* in *Davis v. State*, 788 So.2d 1064 (Fla. Dist. Ct. App. 2001). The officer who set up the roadblock said he was part of "Operation Safe Streets" and a component was a driver's license checkpoint that stopped every fifth car. *Davis*, 788 So.2d at 1065-66. The officer was asked whether the checkpoint was to target illegal drugs and he responded, "'No, it was to target people without licenses. If you get drugs, that's fine too, but basically it's a driver's license checkpoint.'" *Id.* at 1066. The officer did not testify that checking for licenses was "for the purpose of improving highway safety." *Id.*

The Florida court examined the written plan for "Operation Safe Streets." *Id.* The plan stated its objective was "to take back the neighborhood" and "target illegal drug activity." *Id.* Seeing through the officer's pretext, the court quoted *Edmond* and found its primary purpose was "'to detect evidence of ordinary criminal wrongdoing.'" *Id.* quoting *Edmond*, 531 U.S. at 38.

The checkpoints invalidated in Florida and Georgia had as much or more planning and supervision than the roadblock in Jones' case. Both had written polices. But the factor these two courts recognized was that the purpose of the roadblocks violated *Edmond*. South Carolina failed to recognize this purpose in *Jones*. The *Jones* decision puts South Carolina in conflict with the states recognizing that *Edmonds* places limits on roadblocks.

III. The Legal Issue is of National Importance and is Timely

Americans should not be subject to random stops and demands to "show their papers." Allowing this Mississippi roadblock to stand defeats the Fourth Amendment's original purpose of putting an end to the "reviled 'general warrant.'" *See Riley v. California*, 573 U.S. 373, 403 (2014).

After *Edmond*, police responded with ways to bypass the Fourth Amendment. Police are setting up "ruse checkpoints" that advise drivers that a nonexistent (and unconstitutional) narcotics checkpoint is ahead and then seize motorists who pull off at the next exit at a real checkpoint. *See* Nadia B. Soree, *Thank You All the Same, But I'd Rather Not Be Seized Today: The Constitutionality of Ruse Checkpoints Under the Fourth Amendment*, 66 Buff. L. Rev. 385, 389-92 (2018).

In the District of Columbia, police seeking to stem a spike in violent crime in the Trinidad neighborhood established eleven checkpoints around the neighborhood's perimeter. *See* Jason Fiebig, Comment, *Police Checkpoints: Lack of Guidance Contributes to Disregard of Civil Liberties in the District of Columbia*, 100 J. Crim. L. & Criminology 599, 601-02. Attempts to enjoin the checkpoints were refused in the

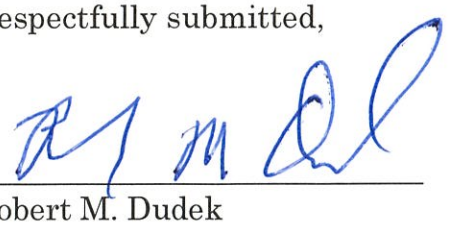
district court, but the D.C. Circuit ultimately ruled they were unconstitutional under *Edmond*. *Mills v. District of Columbia*, 571 F.3d 1304, 1311-12 (D.C. 2009).

As *Edmond* recedes into memory, police (and some courts) stray further from constitutional requirements when setting up roadblocks. *See, e.g.,* Conner Harris, Note, *Check Yes for Checkpoints: Suspicionless Stops and Ramifications for Missouri Motorists*, 82 Mo. L. Rev. 905, (Summer 2017) (arguing that a Missouri appellate decision approved a checkpoint with "unbridled police discretion in almost every facet of its operation); *State v. Biggerstaff*, 496 S.W.3d 513 (Mo. Ct. App. 2016). Jones' case demonstrates how far afield from *Edmonds* and the Fourth Amendment police and state courts are venturing. If checkpoints like the one in this case are allowed, then Americans will have little protection from suspicionless stops and police intrusion into their daily lives.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Supervised by Counsel of Record

Attorneys for Petitioner

This 16th day of November, 2023.

No. _____

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Respondent,

v.

TIMOTHY RAY JONES,
Petitioner.

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

CERTIFICATE OF SERVICE

I certify that a copy of the petition for writ of certiorari and appendix in this case has been served upon opposing counsel for Respondent, the State of South Carolina, Melody J. Brown, Esquire, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 16th day of November, 2023.

Robert M. Dudek
Counsel of Record for Petitioner

SUBSCRIBED AND SWORN TO before me

this 16th day of November, 2023.

Della K. White (L.S.)
Notary Public for South Carolina

My Commission Expires: March 10, 2025

NOTARY PUBLIC SOUTH CAROLINA