

**IN THE
SUPREME COURT OF THE UNITED STATES**

No. 05-

SHAWN PAUL HUMPHRIES,
Petitioner,

versus

STATE OF SOUTH CAROLINA,
Respondent.

***APPLICATION FOR A STAY OF EXECUTION
PENDING THE FILING AND DISPOSITION OF
A PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT***

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CAPITAL CASE

QUESTION TO BE PRESENTED

Do the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who killed during a felony murder only because they feared for their own life when faced with an armed victim and the sole aggravating circumstance is the underlying felony included in the felony murder?

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PETITIONER’S EXECUTION IS SET FOR DECEMBER 2, 2005, AT 6:00 P.M.

To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit:

Petitioner, Shawn Paul Humphries, is a condemned prisoner in the state of South Carolina and is scheduled to be executed on Friday, December 2, 2005. For the reasons set forth below, a stay of execution is required to permit this Court an opportunity to fully consider the substantial constitutional issue to be presented in this case. In support of his Application, Humphries submits the following facts and argument.

Statement of the Case

During the evening of New Year’s Eve and the early morning of January 1, 1994, Shawn Paul Humphries, age 22, and Eddie Blackwell, age 19, were out riding around in Humphries’

grandfather's car drinking beer. They stole a weapon during that time and hatched the plan to commit a robbery. *See* Attachment 1 (Humphries' Statement). Humphries' intent was only to commit a robbery. He had no intent to kill anyone.

Shortly after 7:00 a.m. on January 1, they entered the Max-Saver convenience store in Fountain Inn, South Carolina, which was operated by Mendal "Dickie" Smith. When they entered the store, their "plan" was so poorly hatched that it apparently still took them some time to figure out what they were going to do, as evidenced by the other store clerk's testimony that they talked and Humphries' kept saying "shit." Even when Humphries approached the counter, he did not take the gun out of the waistband of his pants. Instead, he only "flashed the stolen gun," *Humphries*, 479 S.E.2d at 53, until he saw Smith reach for a weapon.¹ Humphries then pulled out his gun and fired a single "shot in Smith's direction and fled from the store. The bullet fired by Humphries struck Smith in the head, killing him. Meanwhile, Blackwell [Humphries' companion] slumped to the ground in the store. The police arrested Blackwell at the scene and apprehended Humphries later that day." *Humphries*, 479 S.E.2d at 53. Humphries "immediately confessed his crime," *id.*, and "remained cooperative throughout the arrest," *id.* n.2.

On August 5, 1994, Humphries was found guilty of attempted armed robbery, possession of a firearm during the commission of a violent crime, criminal conspiracy, and murder. In sentencing, the State's aggravation evidence focused on victim impact testimony and presenting documentary evidence concerning Humphries' prior juvenile and adult criminal record, which included a juvenile

¹A crime scene photo showed the butt of a gun under the victim's leg or hip. There were also three hand guns directly under the check-out counter on a shelf in close proximity to the victim's body."

adjudication in 1985 for two breaking and enterings, 1989 convictions in Anderson County, South Carolina; for burglary and larceny,² and a 1990 larceny conviction in Alabama.

On August 9, 1994, Humphries was sentenced to death for murder based on the sole aggravating factor of attempted armed robbery. *Humphries*, 479 S.E.2d at 54-55. On December 9, 1996, the South Carolina Supreme Court affirmed Humphries' convictions and death sentence. A petition for rehearing was denied on January 10, 1997. This Court denied certiorari on June 9, 1997. *Humphries v. South Carolina*, 520 U.S. 1268 (1997).

Humphries pursued state post-conviction relief and a writ of habeas corpus from the federal courts based primarily on an allegation that his trial counsel were ineffective in sentencing “for failing to timely object to the solicitor’s closing argument,” *Humphries v. State*, 570 S.E.2d 160, 166 (S.C. 2002), that “compared the lives of Smith and [Humphries],” 570 S.E.2d at 167. A divided panel of the Fourth Circuit held that “the failure of Humphries’ counsel to object to the State’s extensive and egregious use of comparative worth arguments amounted to ineffective assistance of counsel,” *Humphries v. Ozmint*, 366 F.3d 266, 278 (4th Cir. 2004), but the Court granted rehearing and the divided en banc court (in a 10 to 4 vote) affirmed the District Court’s denial of habeas corpus, *Humphries v. Ozmint*, 397 F.3d 206 (4th Cir. 2005) (en banc). Humphries’ timely petition for writ of certiorari to this Court was denied on October 3, 2005. *Humphries v. Ozmint*, 126 S. Ct. 128 (2005).

²These convictions were the result of Petitioner “breaking into a church, apparently looking for food because he had been living on the street for a week.” *Humphries v. Ozmint*, 397 F.3d 206, 211 (4th Cir. 2005) (en banc).

On October 5, 2005, Humphries filed a Petition for Writ of Habeas Corpus in the Original Jurisdiction of the South Carolina Supreme Court asserting that his death sentence is excessive under the Eighth and Fourteenth Amendments of the United States Constitution. In a summary order, the court denied the petition on November 4, 2005. Attachment 2.

Argument

The principles that govern the exercise of this Court's power to grant a stay of execution are well established. A petitioner must show: (1) irreparable injury if no stay is granted; (2) a "reasonable probability that four members of this Court will consider the issue [presented] sufficiently meritorious to grant certiorari," *Graves v. Barnes*, 405 U.S. 1201 (1972) (Powell, Circuit Justice); and, (3) a likelihood of success on the merits, *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Cf. Zant v. Stephens*, 462 U.S. 862, 885 (1983) ("the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error").

If a stay is not granted, Humphries will suffer the most irreparable injury known to the law; he will be executed by the State of South Carolina on December 2, 2005. He is entitled to a stay because a "reasonable probability" exists that four members of this Court will accept the case for review; and there is a likelihood of success on the merits.

Humphries intends to present an important question of whether, in light of the unpremeditated nature of the crime, the presence of only one aggravating circumstance in the form of an "attempt" crime, and the factual circumstances under which Humphries fired the gun, a death sentence is excessive and, therefore, "cruel and unusual punishment" prohibited by the Eighth Amendment. Due to time constraints, Humphries does not have the ability to submit this question in detail, but the essence of the argument is included here.

This Court has long recognized that the death penalty is “an extreme sanction, suitable to the most extreme of crimes.” *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.). This Court has, therefore, allowed imposition of the death penalty under capital sentencing schemes that encompass “twin objectives”: to be “at once consistent and principled but also humane and sensible to the uniqueness of the individual.” *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). In order to be consistent and principled, the jury’s “discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” *Gregg*, 428 U.S. at 189. *See also Gardner v. Florida*, 430 U.S. 349, 358 (1977) (“It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion”).

For the most part, the jury’s discretion is “directed and limited” by statutory aggravating circumstances, which must “genuinely narrow the class of death-eligible persons” in a way that reasonably “justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Zant v. Stephens*, 462 U.S. at 877. In other words—and on a more practical level—the death penalty is not permitted for any and all murders. *See Clemons v. Mississippi*, 494 U.S. 738, 758 (1990) (a statutory aggravating circumstance must provide a “principled way to distinguish the case in which the death penalty is imposed, from the many cases in which it was not”).

South Carolina’s capital sentencing scheme is patterned after Georgia’s scheme as approved in *Gregg*. *State v. Shaw*, 255 S.E.2d 799, 801 (S.C. 1979). The South Carolina statutes thus define murder only as the “killing of any person with malice aforethought, either express or implied.” S.C. Code § 16-3-10. If a person kills another during the commission of a felony or by use of a deadly

weapon, malice may be inferred. *See, e.g., State v. Norris*, 328 S.E.2d 339 (S.C. 1985); *State v. Campbell*, 339 S.E.2d 109 (S.C. 1985). Here, malice was inferred.

The narrowing of the class of defendants eligible for the death penalty from the larger class of defendants who are convicted of murder occurs at the penalty phase, when the state is required to prove beyond a reasonable doubt one or more statutory aggravating circumstances in order for the defendant to be eligible for the death penalty. S.C. Code § 16-3-20. The only statutory aggravating circumstance presented in this case was that “the murder was committed while in the commission of . . . robbery while armed with a deadly weapon.” S.C. Code § 16-3-20(C)(a)(1)(d). On direct appeal in this case, the state court held that it is sufficient if the defendant was engaged in an “attempt” to commit the robbery. *Humphries*, 479 S.E.2d at 54.

While each state is given discretion to determine whether the death penalty is appropriate and what category of offenses and offenders will be death eligible, the Eighth Amendment provides structure that places constitutional prohibitions on execution of some offenders because “it is a precept of justice that punishment for crime should be graduated and proportioned” to the offense. *Weems v. United States*, 217 U.S. 349, 367 (1910). In short, the Eighth Amendment prohibits “cruel and unusual punishments.”

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . [T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

This Court has held that the Eighth Amendment bars punishments that “are ‘excessive’ in relation to the crime committed.” *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

[A] punishment is “excessive” and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.

Id. In analyzing these grounds, this Court has held that “attention must be given to the public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.” *Id.*

In the United States, there are twelve states that prohibit imposition of the death penalty under any circumstance. Of the thirty-eight states that do have capital punishment, fifteen do not allow imposition of a death sentence solely on the basis of a felony murder with the single aggravating circumstance being the same as the underlying felony.³ These states require some additional aggravating or special circumstances.

Twenty-three states, at least in the language of their statutes, do allow a death sentence based solely on a felony murder with the sole aggravating circumstance being duplicative of the underlying

³These jurisdictions are Arizona, Arkansas, Colorado, Connecticut, Kansas, Montana, Nebraska, New Hampshire, New Mexico, Oklahoma, Oregon, South Dakota, Texas, Virginia, and Washington. *See* Ariz. Rev. Stat. Ann. §§ 13-703 & 13-1105; Ark. Code Ann. §§ 5-4-604 & 5-10-101; Colo. Rev. Stat. §§ 18-1.3-1201 & 18-3-102; Conn. Gen. Stat. §§ 53a-46a & 53a-54b; Kan. Stat. Ann. §§ 21-3401 & 21-4625; Mont. Code Ann. §§ 45-5-102 & 46-18-303; Neb. Rev. Stat. § 29-2523; N.H. Rev. Stat. Ann. § 630:1-a (Murder); N.H. Rev. Stat. Ann. § 630:5; N.M. Stat. §§ 30-2-1 & 31-20A-5; Okla. Stat. tit. 21, §§ 701.7 & 701.12; Or. Rev. Stat. §§ 163.095 & 163.115; S.D. Codified Laws §§ 22-16-4 & 23A-27A-1; Tex. Penal Code Ann. § 19.02 (Murder); Tex. Code Crim. Proc. Ann. § 37.071; Va. Code Ann. §§ 18.2-31 & 19.2-64.2; Wash. Rev. Code §§ 9A.32.030 & 10.95.020. *See also* 18 U.S.C. §§ 1111 & 3592.

felony.⁴ At least three of these states have judicially held, however, that if the murder conviction is based on felony murder, the underlying felony may not be submitted to the jury as an aggravating circumstance. *McConnell v. State*, 102 P.3d 606 (Nev. 2004); *State v. Cherry*, 257 S.E.2d 551 (N.C. 1979); *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991). These states have reasoned that a death sentence allowed solely on the basis of felony murder and not for a deliberate murder, not accompanied by another felony, “is highly incongruous, particularly in light of the fact that the felony murder may have been unintentional, whereas, a premeditated murder is, by definition, intentional and preconceived.” *Cherry*, 257 S.E.2d at 567.

The Florida Supreme Court has also held that, “[a]s a general rule, ‘death is not indicated in a single-aggravator case where there is substantial mitigation.’” *Almeida v. State*, 748 So. 2d 922, 933 (Fla. 1999). *See also Jones v. State*, 705 So. 2d 1364, 1367 (Fla. 1998) (“[u]nder Florida’s capital sentencing scheme, death is not indicated in a single-aggravator case where there is substantial mitigation”); *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996) (death disproportionate, even when there was “not a great deal of mitigation,” because the evidence “support[ed] the theory that this was a ‘robbery gone bad’” and, thus, “this homicide, though deplorable, does not place it

⁴In addition to South Carolina, these jurisdictions are Alabama, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New York (although death penalty statutes found unconstitutional and have not yet been reinstated), North Carolina, Ohio, Pennsylvania, Tennessee, Utah, and Wyoming. *See* Ala. Code §§ 13A-5-49 & 13A-6-2; Cal. Penal Code §§ 189 & 190.2; Del. Code Ann. tit. 11, §§ 636 & 4209; Fla. Stat. §§ 782.04 & 921.141; Ga. Code Ann. § 17-10-30; Idaho Code Ann. § 19-2515; 720 Ill. Comp. Stat. 5/9-1; Ind. Code § 35-50-2-9; Ky. Rev. Stat. Ann. § 532.025; La. Rev. Stat. Ann. §§ 9:05 & 14:30; Md. Code Ann., Crim. Law §§ 2-201 & 2-205; Miss. Code Ann. §§ 97-3-19 & 99-19-101; Mo. Rev. Stat. § 565.032; Nev. Rev. State. § 200.033; N.J. State. Ann. § 2C:11.3; N.Y. Penal Law § 125.127; N.C. Gen. State. §§ 14-17 & 15A-2000; Ohio Rev. Code Ann. §§ 2903.01 & 2929.04; 42 Pa. Cons. Stat. § 9711; Tenn. Code Ann. § 39-13-204; Utah Code Ann. § 76-5-202; Wyo. Stat. Ann. § 6-2-102. *See also* 10 U.S.C. § 918(4); Rule for Courts-Martial 1004(c).

in the category of the most aggravated and least mitigated for which the death penalty is appropriate”).

Only nineteen states do not prohibit death sentences for only a felony murder with no additional statutory aggravating circumstances or special circumstance findings by the jury in sentencing. Within these states, of course, capital punishment is prohibited by the Eighth and Fourteenth Amendments “for one who neither took life, attempted to take life, nor intended to take life,” *Enmund v. Florida*, 458 U.S. 782, 787 (1982), except where the defendant’s participation was major and the defendant’s mental state was “one of reckless indifference to the value of human life,” *Tison v. Arizona*, 481 U.S. 137, 152 (1987).

Humphries submits that the Eighth and Fourteenth Amendments also prohibit capital punishment for felony murder defendants, who actually killed, but did so only because they feared for their own life when faced with an armed victim and no other aggravating circumstance is present. While the statutes and case law of nineteen states allow imposition of a death penalty under these circumstances, Humphries submits that a death sentence in circumstances such as these is excessive when “[l]ooking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions.” *Pulley v. Harris*, 465 U.S. 37, 43 (1984). In other words, a death sentence is “inherently disproportionate, and therefore cruel and unusual, when imposed” on the basis of a single statutory aggravating circumstance (which was also the underlying felony for the felony murder conviction) for an offender such as Humphries, who killed only because he was in immediate fear of losing his own life.

While this Court has not previously held that the Eighth Amendment prohibits capital punishment in these circumstances, Humphries submits that this Court should do so in this case

based on “the objective evidence of the country’s present judgment concerning the acceptability of death as a penalty” in these circumstances. *Coker*, 433 U.S. at 593. As addressed previously, the statutes of twenty-three states allow a death sentence in circumstances such as these, but five states, since the statutes were enacted, have held that a sentence of death is inappropriate in these circumstances. As this Court recognized in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 125 S. Ct. 1183 (2005), “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change,” *Atkins*, 536 U.S. at 315, *Simmons*, 125 S. Ct. at 1193.

Aside from legislative judgments and state court prohibitions, it is “important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried.” *Coker*, 433 U.S. at 596. Here, as in *Enmund*, “[t]he evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner’s.” 458 U.S. at 794. Indeed, of the almost 1,000 prisoners executed since 1977, very few have been executed in circumstances such as these where the defendant was engaged in an armed robbery (or burglary) and killed the victim only because of fear for his own safety.

In the states that do not require any additional statutory aggravating circumstances or special findings in sentencing, the undersigned counsel have been able to find only three cases where defendants were executed based on similar circumstances.⁵ See, e.g., *(John Louis) Evans v. State*, 361 So. 2d 654 (Ala. Crim. App. 1977) (while the victim reached for a gun, prior to being shot, the defendant testified that this robbery was only one in a “spree” and asked the jury to sentence him to

⁵A chart summarizing the cases of those executed in these states is attached at Attachment 3.

death); (*Anthony Keith*) *Johnson v. State*, 521 So. 2d 1006 (Ala. Crim. App. 1986) (where a gun battle ensued during the robbery/burglary, the jury recommended a sentence of life imprisonment without parole, but, the trial court, as authorized by state law, overrode the jury's recommendation and sentenced the defendant to death); (*Bobby Joe*) *Fields v. State*, 923 P.2d 624 (Okla. 1996) (although the defendant had been surprised by the victim's presence during a burglary and the victim's possession of a gun, the defendant was apparently able to take possession of the weapon before shooting the victim behind her ear).

Even considering the states that require additional aggravating or special circumstances before death is permissible for a felony murder, the undersigned counsel have been able to identify only three additional executions for crimes similar to Petitioner's.⁶ *See, e.g., (Billy) Vickers v. Cockrell*, 72 Fed. Appx. 40 (5th Cir. 2003) (while the victim died during a gun battle that ensued from an attempted armed robbery, the defendant in that case had prior convictions for burglary, arson, and aggravated assault with a deadly weapon); (*Charles*) *Rumbaugh v. State*, 629 S.W.2d 747 (Tex. 1982) (while the defendant allegedly killed only because the victim grabbed a weapon during the armed robbery, the defendant had previously committed armed robbery, threatened to shoot a police officer, and escaped from jail while pending capital trial); (*Carl*) *Johnson v. State*, 629 S.W.2d 731 (Tex. 1981) (the defendant shot a 75-year-old security guard five times during an armed robbery after the guard allegedly fired first).

Due to the time constraints of his pending execution case and the lack of published opinions in many cases, it is impossible for Petitioner to examine each case resulting in a death sentence in

⁶A chart summarizing the cases of those executed in these states is attached at Attachment 4.

the country, where executions, have not been carried out. Research reveals, however, that very few people are given a death sentence for crimes such as Petitioner's. *See, e.g., State v. Benson*, 372 S.E.2d 517, 523 (N.C. 1988) (observing that the "overwhelming percentage of robbery murder/cases, especially those not involving multiple murders or additional aggravating circumstances . . . [do] not result in a death sentence"); *State v. Stokes*, 352 S.E.2d 653, 666 (N.C. 1987) (observing that "[i]n robbery murder cases where conviction rests solely on a felony murder theory, juries in [North Carolina] almost invariably have recommended life imprisonment rather than death"). "The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it." *Atkins*, 536 U.S. at 316.

Petitioner, therefore, submits the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who killed during a felony murder only because they feared for their own life when faced with an armed victim and no other aggravating circumstance is present.

Conclusion

For the foregoing reasons, the Court should stay Petitioner's execution pending the filing and disposition of his petition for a writ of certiorari raising this important constitutional question.

Respectfully submitted,

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November 21, 2005.

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CERTIFICATE OF SERVICE

I certify that I have served upon the attorney for Respondent a copy of the Motion to Proceed *In Forma Pauperis* and an Application for a Stay of Execution Pending the Filing and Disposition of a Petition for Writ of Certiorari to the South Carolina Supreme Court in this action. Service was made by email and by U.S. mail, first class, postage prepaid, to Donald J. Zelenka, Esq., Assistant Deputy Attorney General of South Carolina. This the 21st day of November, 2005, in Columbia, South Carolina.

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