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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

Appellate Case No. 2020-001519

RICHARD BERNARD MOORE,

Petitioner,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections,

Respondent.

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Page(s)

STATUTES AND RULES

TABLE OF AUTHORITIES (continued)

Page(s)

CONSTITUTIONAL PROVISIONS

OTHER SOURCES

TABLE OF AUTHORITIES (continued)

Page(s)

ARGUMENT IN REPLY

Respondent presents a myopic view of this Court's habeas corpus authority and misrepresents the facts surrounding Richard Moore's conviction in an attempt to persuade the Court that it cannot, and should not, remedy the fundamental unfairness that would result from Moore's execution. Respondent's arguments are contrary to the Court's legal authority and practice in habeas proceedings to review death sentences and grant relief necessary to avoid a "result[] shocking to the universal sense of justice." *Tucker v. Catoe*, 346 S.C. 483, 495, 552 S.E.2d 712, 718 (2001).

I. HABEAS RELIEF IS WARRANTED IN THIS CASE.

Contrary to Respondent's assertion, the basis of Moore's claim for relief is a constitutional violation. Moore's death sentence violates the state and federal constitutions because it is disproportionate. U.S. Const. amend. VIII; S.C. Const. Art. I, sec. 5. While Respondent is correct that the Constitution does not require a specific method of proportionality review, there is no question death sentences must be proportionate to the offense and the offender and may not be imposed in an arbitrary and capricious manner. *See Gregg v. Georgia*, 428 U.S. 153, 187–88 (1976); *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). The Court has, therefore, barred imposition of death sentences where "the petitioner's crime did not reflect 'a consciousness materially more "depraved" than that of any person guilty of murder'" regardless of the statutory scheme. *Atkins*, 536 U.S. at 319 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)).

Based on these constitutional principles, Moore seeks habeas relief from his disproportionate death sentence. Moore's discussion of this Court's statutory proportionality review, S.C. Code Ann. § 16-3-25(C)(3), does not transform his claim into one with merely a

statutory basis. Instead, Moore's habeas petition discussed the Court's mandatory statutory review as the procedural mechanism whose failure is most significantly responsible for allowing the constitutional violation to go unchecked in this case. *See Pulley v. Harris*, 465 U.S. 37, 50 (1984) ("Proportionality review [is] considered to be an additional safeguard against arbitrarily imposed death sentences.").

Nevertheless, this Court's habeas jurisdiction is not strictly limited to constitutional claims as Respondent suggests, and the Court is free to address statutory and constitutional issues in this case. Nothing in the South Carolina Constitution or statutory authority for this Court's original jurisdiction limits habeas corpus review to constitutional violations. *See* S.C. Const. Art. V, sec. 5 ("The Supreme Court shall have the power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs."); S.C. Code Ann. § 14-3-310 (same); *see also State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (recognizing habeas corpus review as a mechanism for "provid[ing] relief to those who have, *for whatever reason*, been utterly failed by our criminal justice system" (emphasis added)).

This Court has used its original habeas corpus jurisdiction to address non-constitutional claims and to address questions relevant to capital litigation outside the single case in which it is presented. In *Johnson v. Catoe*, for example, this Court accepted a petition for habeas relief in the Court's original jurisdiction to address whether one of its rulings—*Whetsell v. State*, 276 S.C. 295, 277 S.E.2d 891 (1981)[1]—created a procedural bar to collateral review of a capital defendant's guilt

[1] *Whetsel*, an appeal from a grant of post-conviction relief in a non-capital case, held that a defendant waives the right to assert a claim of ineffective assistance of trial counsel by accepting a guilty plea. *Id.* In the course of denying Johnson federal habeas relief, the Fourth Circuit characterized *Whetsell* as standing for the general proposition that a habeas petitioner's "admission of guilt procedurally default[s] his assertions of trial error." *Johnson v. Moore*, 164 F.3d 624, 1998

phase issues. 336 S.C. 354, 355–56, 520 S.E.2d 617, 618 (1999). The Court addressed the substantive grounds for relief (i.e., whether Johnson's claims merited relief from his death sentence) and also "consider[ed] the *Whetsell* issue because it is an important one in statewide capital litigation." *Id.* at 357, 520 S.E.2d at 618. Accordingly, there is precedent in this Court's habeas jurisprudence for addressing both the substantive question of whether Moore's death sentence is unconstitutionally disproportionate and whether this Court's capital case proportionality review should be altered to better protect against arbitrary and capricious application of the death penalty in this State.[2]

II. MOORE'S DEATH SENTENCE IS DISPROPORTIONATE.

A. Respondent ignores undisputed facts that make Moore's case not deserving of death.

Respondent fails to grapple with the undisputed evidence at trial. Moore did not bring a gun into the store; rather, he was confronted by multiple guns that James Mahoney had in his possession behind the sales counter.[3] Without a gun, Moore at worst entered the store with the

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WL 708691, at *7 (4th Cir. Sept. 24, 1998) (mem. op.). This Court made clear that the Fourth Circuit was wrong and no such procedural bar existed.

[2] Respondent's law of the case and res judicata arguments also do not bar relief, as the Court tacitly acknowledged in accepting jurisdiction in this case where all parties and the Court were clearly aware Moore previously received proportionality review on direct appeal. Further, the standard of review in state habeas is whether "there has been a violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (quotation omitted). On habeas review, therefore, the Court elevates substance over technical procedural rules to remedy denials of fundamental fairness. *E.g.*, *id.* at 468, 397 S.E.2d at 88 (granting habeas relief where the petitioner delayed in calling the error to the Court's attention); *Tucker*, 346 S.C. 483, 552 S.E.2d 712 (granting habeas relief on claims that would have been deemed procedurally defaulted in other forms of appellate review).

[3] Respondent does not dispute that Moore did not bring a gun into the store but does not address how that fact reduces Moore's culpability and premeditation. Br. of Resp't at 19. Instead, Respondent asserts that "Mahoney appeared to be a suitable target for another strong arm robbery." *Id.* This confuses the issue and improperly attempts to equate intent to commit an unarmed robbery

intent to commit a strong arm robbery in which he had no expectation that someone would be mortally wounded. Respondent further ignores the evidence that Mahoney pulled two guns during the confrontation, meaning the threat from Mahoney did not dissipate once Moore was able to obtain possession of the first gun. In fact, Mahoney shot Moore and struck him in the left arm. Contrary to Respondent's characterization of Moore's actions as a "malicious and brutal murder," Br. of Resp't at 21, the evidence demonstrates Moore reacted to a threat from a man armed with multiple firearms.

As set forth in detail in Moore's opening brief, this is not the kind of case that results in the death penalty in South Carolina. Br. of Pet'r at 16–33. Additionally, other states have found the death penalty disproportionate in similar cases. *E.g.*, *Scott v. State*, 66 So. 3d 923, 937 (Fla. 2011) (per curiam) (vacating the death sentence in a robbery-gone-bad case because the "murder could be viewed as a reactive action in response to the victim's resistance to the robbery"); *State v. Benson*, 372 S.E.2d 517, 523 (N.C. 1988) (vacating a death sentence after noting the vast majority of robbery-murders end with life sentences and of those that end with death sentences, the vast majority involve multiple victims), *abrogated on other grounds by State v. Hooper*, 591 S.E.2d 514 (N.C. 2004).[4]

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with the culpability of an offender who enters a business with a weapon with intent to commit an armed robbery, thereby knowing the consequences of his actions may include killing someone with that weapon.

[4] Respondent overstates the evidence supporting a finding that Moore intended to commit a robbery upon entering the store, *see* Br. of Resp't at 18, ignoring that even the solicitor acknowledged that the trial evidence did not reveal how the confrontation began. *See* JA 359 (stating Hadden did not hear the beginning of the conversation between Moore and Mahoney), JA 358 (stating there was no video recording, so they did not have every piece of the puzzle). The prosecution relied on Moore's possible motivation to commit a robbery, but contradictory circumstantial evidence indicates Moore could have merely entered the store to make a purchase, including that he went to the coolers upon entering the store, JA 22, and that investigators found two cans of beer in a brown paper sack on the sales container, JA 126. This uncertainty about

Respondent next attempts to remove this case from the category of single victim homicides by asserting Hadden "only escaped the plight that befell Mr. Mahoney because he played dead and Moore thought that he was dead."[5] Br. of Resp't at 22. This ignores the vast difference between a case with an uninjured witness and one with a second deceased victim.[6] Respondent also ignores

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Moore's intent when he entered the store further removes it from the realm of cases that this Court has characterized as "atrocious" with "virtually undebatable" facts that "shake the conscience of the community," thereby warranting death. *See State v. Adams*, 279 S.C. 228, 241–42, 306 S.E.2d 208, 216 (1983).

[5] There is no evidence in the record or cited by Respondent to support the assertion that Moore thought Hadden was dead.

[6] Even a multiple victim armed robbery-murder case does not necessarily mean the death penalty is appropriate. Review of South Carolina cases of that type reveals numerous cases that did not result in a death sentence, for example:

- **Alfred Tyrone Walker** - Walker shot and killed two teens when robbing a Sonic at closing time with a co-defendant who was 15 years old (Wallace Priester). The teens were employees, and a third employee was injured but survived. A death notice was issued in his case and then withdrawn. *Death penalty trial begins this week in Barnwell shooting*, The Times & Democrat, Mar. 1, 2005, at 4A.

- **Joseph Davis** – Davis was charged with killing and robbing a man in his own his convenience store. Davis was also one of several men charged with a gang-related murder of a black man. A death notice was issued in his case and then withdrawn. *Two men found not guilty in Hampton County murder*, Live 5 News, Aug. 5, 2010, https://www.live5news.com/story/12929888/two-men-found-not-guilty-in-hampton-county-murder/; Sarita Chourey, *More arrests in suspected gang-related murder*, Savannah Morning News, Sept. 10, 2008, https://www.savannahnow.com/article/20080910/news/309109857; *Joseph Davis sentenced to life in prison*, WTOC, June 30, 2011, https://www.wtoc.com/story/15001662/joseph-davis-sentenced-to-life-in-prison/.

- **Jeffrey Eady** – Eady shot and killed his 77-year-old neighbor, then shot and killed a 65-year-old at a recycling center and stole her car. He held up a convenience store, and when the clerk gave him cash, he shot and killed the clerk, stole lottery tickets and cigarettes, and fled to Florida. A death notice was issued in his case and then withdrawn. Andrew Knapp, *In pleading guilty, triple murderer says he's 'truly sorry' for Charleston County slaying and calls for better treatment of mentally ill*, June 22, 2017, https://www.postandcourier.com/news/in-pleading-guilty-triple-murderer-says-hes-truly-

the substantial reasons to doubt the accuracy of Hadden's testimony that Moore turned and fired at him, including that Hadden could only see out of one eye, JA 11, and that he changed his story of what happened (regarding whether Moore held Mahoney's hands down, what Moore said, and how many shots were fired), JA 32, 41. Additionally, while Moore recognizes that he must challenge his sentence within the confines of the evidence presented at trial, there is more to the story that trial counsel failed to present—expert testimony, based on a thorough review of the physical evidence, that the bullet found near Hadden was most likely discharged at random while Moore and Mahoney struggled over a gun. *See* Exs. A & B, Pet. for a Writ of Habeas Corpus (Nov. 19, 2020).

B. Moore's case is an outlier and Respondent has not offered any evidence that it is not.

Respondent argues that Moore's comparison cases do not show his sentence is disproportionate. Br. of Resp't at 22–28. Yet, Respondent fails to offer a single comparison case resulting in a death sentence involving circumstances like Moore's, where the defendant entered a conflict without the knowledge that mortal injury was possible or likely.[7]

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sorry-for-charleston-county-slaying-and-calls/article_8bde5862-5763-11e7-81ee-df185138d41c.html.

[7] Respondent offers three possible comparison cases based on the assertion that Moore entered Nikki's with the intent to rob it. Br. of Resp't at 18–19 (citing *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982); *State v. Hyman*, 276 S.C. 559, 281 S.E.2d 209 (1981); *State v. Gilbert*, 277 S.C. 53, 283 S.E.2d 179 (1981)). However, in each of those cases, the defendant brought a weapon with him to carry out the robbery (Yates borrowed a gun to bring to the robbery; Hyman brought a gun to a home invasion, and Gilbert/Gleaton brought a gun and a knife) and one was a home invasion robbery. *See Yates*, 280 S.C. at 32, 310 S.E.2d at 807; *Hyman v. Aiken*, 824 F.2d 1405, 1407 (4th Cir. 1987); *Gilbert v. Moore*, 134 F.3d 642, 645 (4th Cir. 1998). Additionally, two of those cases (Yates and Hyman) were reversed and resulted in a sentence of less than death. None of the cases demonstrate that Moore's death sentence is proportionate.

Respondent's assertion that "cases involving more atrocious killings" resulting in the death penalty do "not invalidate as disproportionate the penalty imposed in his case," Br. of Resp't at 22, ignores that Moore has done more than just identify more atrocious killings.[8] Moore's review of death sentenced cases demonstrates that *all* death sentenced cases involved "more atrocious killings." Br. of Pet'r at 21–25. Moore's case falls below the level of aggravation in all other death cases, and even below cases that did not ultimately receive the death penalty. *Id.* at 25–32. This case is not one in which a death sentence can be deemed proportionate.

Ultimately, Moore has demonstrated that by any comparison—to other death sentenced cases, to other death noticed cases, to cases in which death was never sought—his death sentence is disproportionate. Carrying out his death sentence would be "shocking to the universal sense of justice," and this Court should use its habeas authority to remedy the injustice.

III. To Prevent Disproportionate Death Sentences, Like Moore's, from Proceeding to Execution, This Court Should Change the Pool It Uses to Conduct Statutory Proportionality Review.

As this Court acknowledged in its order for additional briefing and argument, the question of the scope of the comparison pool for proportionality review warrants reconsideration in light of Moore's case. There are at least four workable options for expanding the pool of comparison cases, detailed in Moore's opening brief: (1) all homicides; (2) all death-noticed cases; (3) all cases that proceeded to trial as capital cases, including those in which the judge or jury returned a life verdict; or, (4) maintain the current pool but allow capital defendants to supplement the record with additional data relevant to proportionality review. Each expanded pool would give this Court

[8] Respondent does not argue that Moore's assessment of comparison cases relied on by this Court on direct appeal is incorrect, only that Moore should not be able to rely on the fact that later decision-makers determined three of the four cases did not warrant a death sentence.

greater ability to ensure death sentences in the state comply with constitutional requirements and the statutorily mandated proportionality review. Respondent does not address the merits of any pool over the other, but rather resists any expanded review of cases for proportionality purposes.

Respondent gives seven reasons why this Court should not expand its proportionality pool, and in doing so, mischaracterizes the landscape of proportionality review in this country. First, Respondent argues "the Court's present method of only comparing a death sentence to other defendants who have been sentenced to death is consistent with half of the states still conducting proportionality review." Br. of Resp't at 28–29. Currently, fourteen states automatically conduct proportionality review,[9] but South Carolina is one of six (not seven) states to limit their pools to death-only cases.[10] Respondent mistakenly lists Georgia as a death-only state. *See Stephens v. State*, 227 S.E.2d 261, 263 (Ga. 1976) (explaining Georgia uses "for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed"); *see also Gregg*, 428 U.S. at 204 n.56 (noting that the Georgia Supreme Court "does consider appealed murder cases where a life sentence has been imposed"). This leaves South Carolina in the minority of states performing proportionality review with such a limited pool.

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[9] The states are: Alabama, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Carolina, Ohio, South Carolina, South Dakota, Tennessee, and Utah. Br. of Resp't at 33 n.17. Utah does not use a pool of cases. *State v. Gardner*, 789 P.2d 273, 287 (Utah 1989) (conducting proportionately review by focusing on the "individual defendant and his acts" and not on a "comparison with other criminals and their crimes"). Although Respondent does not include California in its count, California also conducts proportionately review, but only at the defendant's request. *People v. Wallace*, 189 P.3d 911, 958–59 (Cal. 2008).

[10] The six states are Alabama, Kentucky, Mississippi, Nebraska, Ohio, and South Carolina.

Respondent also fails to consider the eleven states since Moore's trial that have abolished the death penalty.[11] Of the eleven states, ten conducted proportionality review at one point, and all ten considered life sentences in their review.[12] The numbers have improved for Respondent because states have abolished the death penalty, not because states favor more limited comparison pools. Indeed, thirty-three states have or had proportionality review since *Gregg* endorsed the practice.[13] Of the thirty-three states, only seven used death-only pools.[14] The consensus is against death-only pools, and it always has been.

Second, Respondent contends that "the courts in at least three states with the same pool of cases [as South Carolina] have repeatedly declined to expand their pool of cases beyond cases in which a death sentence was imposed." Br. of Resp't at 29. The three states to which Respondent cites for this proposition are Mississippi, Nebraska, and Ohio. *Id.* at 34. However, while Mississippi has declined to expand its pool, it also has overturned death sentences as

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[11] The States are: Colorado, Connecticut, Delaware, Illinois, Maryland, New Hampshire, New Jersey, New Mexico, New York, Virginia, and Washington. *States without the Death Penalty*, DEATH PENALTY INFORMATION CENTER (visited on April 24, 2021), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

[12] Connecticut, *State v. Ross*, 624 A.2d 886, 887 (Conn. 1993); Delaware, *Lawrie v. State*, 643 A.2d 1336, 1344–45 (Del. 1994); Illinois, *People v. Jimerson*, 535 N.E.2d 889, 907–08 (Ill. 1989); Maryland, *Tichnell v. State*, 468 A.2d 1, 17 (Md. 1983); New Hampshire, *State v. Addison*, 116 A.3d 551, 553 (N.H. 2015); New Jersey, *State v. Loftin*, 724 A.2d 129, 164 (N.J. 1999); New Mexico, *Fry v. Lopez*, 447 P.3d 1086, 1111 (N.M. 2019); New York, N.Y. Crim. Proc. § 470.30.3(b) (1995); Virginia, *Lawlor v. Commonwealth*, 738 S.E.2d 847, 895 (Va. 2013); Washington, Wash. Rev. Code § 10.95.130(b) (2010). Colorado did not conduct proportionality review.

[13] Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After* Gregg*: Only "The Appearance of Justice"?*, 87 J. Crim. L. & Criminology 130, Appendix A (1996).

[14] The seven states include the six that currently do so plus Arkansas, which eliminated proportionality review. *See Sheridan v. State*, 852 S.W.2d 772, 780 (Ark. 1993); *Willett v. State*, 911 S.W.2d 937, 946 (Ark. 1995).

disproportionate, indicating that it employs a more probing proportionality review than South Carolina. *E.g.*, *Coleman v. State*, 378 So. 2d 640, 650 (Miss. 1979); *Bullock v. State*, 525 So. 2d 764, 770 (Miss. 1987). Nebraska also has refused to expand its pool, but it has executed only four people since 1976 and only twelve people currently sit on its death row. *Nebraska*, DEATH PENALTY INFORMATION CENTER (visited on April 25, 2021), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska. And although Ohio has also declined to expand its pool, it has not done so without objection. Just last year, Justice Donnelly criticized the court's "woefully superficial and perfunctory" proportionality review as a "charade" and a "one-sentence review." *State v. Graham*, No. 2016-1882, 2020 WL 7391565, at *34–36 (Ohio Dec. 17, 2020) (Donnelly, J., concurring).

Next, Respondent argues that "*Copeland*'s construction was correct" because the General Assembly has not amended § 16-3-25(C)(3). Br. of Resp't at 29. Although that assertion is accurate, the General Assembly's silence does not necessarily indicate approval. After all, section 16-3-25(C)(3) "bears a strong resemblance" to the Georgia statute in *Gregg*, *State v. Copeland*, 278 S.C. 572, 589, 300 S.E.2d 63, 73 (1982), and the Supreme Court of the United States made clear that the Georgia Supreme Court "does consider appealed murder cases where a life sentence has been imposed," *Gregg*, 428 U.S. at 204 n.56. So, when the General Assembly copied Georgia's statute, it did so because the statute had the United States Supreme Court's approval. Presumably, the General Assembly expected its statute to be interpreted similarly.

Fourth, Respondent contends that "the Court's expressed concern in *Dickerson* is misplaced because the absence of a finding that any death sentence is disproportionate reflects that South Carolina's capital sentencing scheme is functioning properly and nothing in Justice Stevens' statement on denial of certiorari in *Walker v. Georgia*, 555 U.S. 979 (2008) (Stevens, J., statement),

should cause this Court to re-visit the relevant pool of cases for proportionality review." Br. of Resp't at 29. Regardless of Justice Stevens's statement, the fact that no death sentence has been overturned in South Carolina as disproportionate suggests that this Court's proportionality review has been "perfunctory."[15] Justice Stevens's statement simply highlighted the concern, shared by the *Dickerson* Court, that "restricting our statutorily-mandated proportionality review to only similar cases where death was actually imposed is largely a self-fulfilling prophecy as simply examining similar cases where the defendant was sentenced to death will almost always lead to the conclusion that the death sentence under review is proportional." *State v. Dickerson*, 395 S.C. 101, 125 n.8, 716 S.E.2d 895, 908 n.8 (2011).[16] This concern about confirmation bias has borne out: four of the six states that currently use death-only pools have never found a death sentence disproportionate (Kentucky, Nebraska, Ohio, and South Carolina).[17] In contrast, many states conducting proportionality review based on a broader pool have found at least one or more death sentences to be disproportionate.[18]

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[15] Bienen, *The Proportionality Review of Capital Cases*, 87 J. Crim. L. & Criminology at 253.

[16] Justice Stevens also made the point that "there is a special risk of arbitrariness in cases that involve black defendants and white victims." *Walker*, 555 U.S. at 981. "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986). This concern is fully on display in this case, where a jury with no members of the defendant's race convicted a black defendant of killing a white victim based on a death notice issued by a solicitor with a history of "disparate treatment based on the race of the victim." *See* Amicus Br. of the NAACP Legal Defense & Educational Fund, Inc., Supporting Pet'r at 13.

[17] *See Fixing a Broken System*, KENTUCKY BAR ASSOCIATION 26 (June 21, 2017) (Kentucky); Br. of Appellant, *Nebraska v. Schroeder*, 941 N.W.2d 445 (Neb. 2020), 2019 WL 2165872, at *76 (Nebraska); *Graham*, 2020 WL 7391565, at *34 (Donnelly, J., concurring) (Ohio).

[18] *E.g.*, Georgia, *Ward v. State*, 236 S.E.2d 365 (Ga. 1977); Louisiana, *State v. Weiland*, 505 So. 2d 702 (La. 1987); Missouri, *State v. Chaney*, 967 S.W.2d 47 (Mo. 1998); North Carolina, *State v. Kemmerlin*, 573 S.E.2d 870 (N.C. 2002); Tennessee, *State v. Godsey*, 60 S.W.3d 759 (Tenn. 2001); and Utah, *Gardner*, 947 P.2d 630.

Respondent also cites to a decision by the Tennessee Supreme Court in support of the notion that South Carolina never finding a sentence disproportionate is proof that its "capital sentencing scheme is functioning properly." Br. of Resp't at 37 (citing *Godsey*, 60 S.W.3d at 783). However, Respondent fails to mention that the death sentence in that *exact case* was held disproportionate. *Godsey*, 60 S.W.3d at 793 ("[T]he sentence of death imposed in this case is disproportionate to the penalty imposed in similar cases."); *see also State v. Thompson*, No. E2005-01790-CCA-R3-DD, 2007 WL 1217233, at *36 (Tenn. Ct. App. April 25, 2007) ([W]e conclude that the death penalty imposed in the present case is excessive and disproportionate to the penalty imposed in the other cases."). Additionally, Justices Koch and Lee have chastised the Tennessee Supreme Court's use of such a narrow pool. *E.g.*, *State v. Pruitt*, 415 S.W.3d 180, 229 (Tenn. 2013) (Koch, J. & Lee, J., concurring in part and dissenting in part) (reasoning that a pool of only cases resulting in death "'undercut[s]' the purpose" of proportionality review"); *State v. Rimmer*, No. W2017-00504-SC-DDT-DD, slip op. at 1–2, 2021 WL 1515451, at *51 (Tenn. April 16, 2021) (Lee, J., concurring) (urging the court to adopt a more probing proportionality review).

Respondent's fifth argument is that "Moore misunderstands the purpose of proportionality review," describing proportionality review as "a check against the random or arbitrary imposition of the death penalty." Br. of Resp't at 38 (quoting *Gregg*, 428 U.S. at 206). But Respondent does little to explain why Moore's death sentence is not random or arbitrary or to explain how Moore's understanding of proportionality review is incorrect. Instead, Respondent cites *Pulley* for the uncontroversial observation that proportionality review is not always constitutionally mandated. *Id.* But this misses the point. An arbitrary or disproportionate death sentence is unconstitutional, and *Pulley* itself acknowledged that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative

proportionality review." 465 U.S. at 51. It follows that a more probing proportionality review may be required when a capital sentencing scheme or the practical outcomes of it result in an arbitrary death sentence. Moore explained in his opening brief why this is the case in South Carolina, and especially so with his own sentence.

Finally, Respondent's last two arguments suggest that expanding the comparison pool requires the Court to engage in "intolerable speculation" and needless "conjecture" and would "needlessly interfere with and may chill the exercise of prosecutorial discretion." Br. of Resp't at 29, 39. Not only is this simply not true, Respondent ignores that many courts have historically used a more expansive pool.[19] Additionally, the Supreme Court of the United States endorsed a

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[19] *E.g.*, Arizona, *State v. Ortiz*, 639 P.2d 1020, 1032 (Ariz. 1981) (including in its comparison pool cases "where the death penalty could be imposed."); Connecticut, *Ross*, 624 A.2d at 887 (including "all convictions of a capital felony after October 1, 1973"); Delaware, *Lawrie*, 643 A.2d at 1344 (including "all first degree murder cases which have included a death penalty hearing"); Florida, *Rembert v. State*, 445 So. 2d 337, 340 (Fla. 1984) (including "other first-degree murder cases"); Georgia, *Stephens*, 227 S.E.2d 261, 263 (Ga. 1976) (including "not only similar cases in which death was imposed, but similar cases in which death was not imposed"); Idaho, *State v. Wells*, 864 P.2d 1123, 1125 (Idaho 1993) (including "cases where the death penalty was imposed as well as cases in which the death penalty was not imposed"); Louisiana, *State v. Welcome*, 458 So. 2d 1235, 1253 (1983) (including "persons who committed first degree murder under similar circumstances"); Maryland, *Tichnell*, 468 A.2d at 17 (including "first degree murder cases in which the State sought the death penalty under § 413, whether it was imposed or not"); Massachusetts, Mass. Gen. Laws Ann. ch. 279, § 71 (1982) (including "cases in which a sentence of life imprisonment was imposed"); Missouri, *State v. McFadden*, 391 S.W.3d 408, 428 (Mo. 2013) (including "those resulting in a sentence of life imprisonment without the possibility of probation or parole"); Montana, *State v. Johnson*, 969 P.2d 925, 936 (Mont. 1998) (including "those cases in which the death penalty was sought and a record exists concerning aggravating and mitigating circumstances"); Nevada, *Harvey v. State*, 682 P.2d 1384, 1385 (Nev. 1984) (including "appealed murder cases in which the death penalty was sought but not imposed"); New Hampshire, *Addison*, 116 A.3d at 553 (including cases "in which the defendant committed the same kind of capital murder; a separate sentencing hearing occurred; the jury found predicate aggravating factors; and the penalty imposed was either death or life imprisonment without possibility of parole"); New Mexico, *Fry*, 447 P.3d at 1103 (including "cases in which the death penalty was sought and which resulted in a sentence of death or life imprisonment that was affirmed on appeal"); North Carolina, *State v. Watts*, 584 S.E.2d 740, 750–51 (N.C. 2003) (including "those cases where [the] Court has determined that the sentence of death was disproportionate"); Pennsylvania, *Commonwealth v. Frey*, 475 A.2d 700, 707 (Penn. 1984) (including "all cases of

more expansive pool in *Gregg*. 428 U.S. at 204–06. Other states have been able to engage in more robust proportionality review without any negative impact on their capital punishment systems. If they can do it, so can this Court. Justice, especially justice for Richard Moore, demands it.

CONCLUSION

For the reasons stated above and in Moore's opening brief, this Court should remedy the fundamental unfairness stemming from his disproportionate death sentence. It should further expand its comparison pool for future proportionality review to avoid a situation like this one occurring again in the future.

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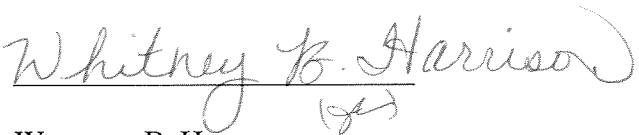
murder of the first degree convictions which were prosecuted or could have been prosecuted"); South Dakota, *State v. Robert*, 820 N.W.2d 136, 145 (S.D. 2012) (including "cases in which a capital sentencing proceeding was actually conducted, whether the sentence imposed was life or death"); Virginia, *Lawlor*, 738 S.E.2d at 895 (Va. 2013) (including "capital murder cases in which a sentence of life imprisonment was imposed"); Wash. Rev. Code § 10.95.130(b) (2010) (including cases "in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed"); Wyoming, *Engberg v. State*, 686 P.2d 541, 554–55 (Wyo. 1984) (including "the sentences imposed on other criminals in this jurisdiction and the sentences imposed for commission of the same crime in other jurisdictions").

Respectfully submitted,



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