IN THE
SUPREME COURT OF SOUTH CAROLINA

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S.C. SUPREME COURT

ORIGINAL JURISDICTION

Appellate Case No. 2020-001519

RICHARD BERNARD MOORE, ... PETITIONER

v.

BRYAN P. STIRLING, COMMISSIONER
South Carolina Department of Corrections,.....RESPONDENT.

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

In its January 28, 2021 Order, this Court directed the parties to brief the following issues:

I. Was Petitioner's death sentence disproportionate to the penalty imposed in similar cases?

II. In determining the proportionality of the death sentence, should similar cases in which the death penalty was not imposed be considered?

INTRODUCTION

Petitioner, Richard Bernard Moore, murdered James Mahoney during the commission of an armed robbery at Nikki's Speedy Mart, early in the morning of September 16, 1999. In 2001, a jury determined that he should be sentenced to death. After twenty plus years of litigation in nine courts and having received no relief on the merits of any of the various claims raised in both his state and federal actions, he turns to this Court seeking to overturn the sentence.

This Court has asked the parties to address whether the sentence is disproportionate and whether this Court, contrary to its precedent, should expand the pool of cases to consult in making that decision. These questions as they relate to Moore cannot be fairly addressed unless the procedural route to this point is considered. The question of this Court's determination on proportionality is in the history of this case. When procedure and substance are considered together, it becomes clear that Moore is not entitled to the relief he seeks in this extraordinary action.

Moore's arguments are telling. He disagrees with the facts as determined by the jury, see Brief of Petitioner, pp. 3-6, and he most certainly doesn't agree with the sentence as determined by the jury. Moore has assessed his case as one that does not deserve death. Brief of Petitioner, p. 37. He asks this Court not only to set aside the jury's determination, tested time again in collateral actions, but also to set aside the Court's own prior evaluation of the sentence proportionality and conduct another in a different manner. To do so, he must convince this Court to take a dramatic departure from established law in multiple ways.

First, he must convince the Court to conduct another evaluation. Moore must concede as fact that this Court already conducted the required review in Moore's direct appeal review. This Court conducted that review consistent with the standards announced in its precedent. Principles

of finality caution against revisiting the review and for good reason. Serial review with evolving data and arguments utterly extinguishes the finality essential to the law. Moore can offer no argument against finality apart from urging this Court to simply to make an exception in this case.

Second, Moore must convince the Court that jurisdiction is proper. Moore candidly admits his question is one of statutory origin, not constitutional requirement. Original jurisdiction habeas is venerable and important, but it is not unlimited. It is reserved for matters of constitutional law. Moore does not fall within this required subject matter. Again, Moore can offer no argument that he has presented a proper question apart from urging this Court to make an exception in this case.

Third, Moore asks this Court to modify South Carolina precedent to adopt a type of proportionality review (any type really, he has not settled on one preference) that would allow the Court to assess the correctness, or perhaps even the wisdom, of either imposing or seeking a death sentence. A legislative safeguard should not supplant the constitutional system. At any rate, he cannot show some fundamental error in the way this Court conducts proportionality review. Since the addition of the legislative proportionality provision in the modern death penalty era, this Court has consistently kept the balance true between legislative safeguard and constitutional process. The constitutional process is the trial. This Court has historically declined to act as a super-jury which would dilute the trial process. The method to keep this balance was chosen for good and sound reasons: to avoid freefall into "intolerable speculation" resting on "arbitrary device" to upset the fact-finder's duly imposed, and individualized sentence. *State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 74 (1982), *cert. denied*, 460 U.S. 1103(1983), and *cert. denied*, 463 U.S. 1214 (1983). Simply, "a meaningful sample lies ready at hand in those cases where the jury has spoken unequivocally." *Id*. Further, the proportionality method chosen by the Court does not stand in isolation; rather, other death-penalty jurisdictions similarly apply their proportionality review in

the same manner. Respondent readily admits that other jurisdictions conduct the additional layer of review differently (though it is not clear that others would allow continual re-evaluation that appears endemic to Moore's argument); yet, that simply proves the point of its state law origin, unmoored to constitutional necessity. Moreover, this variety in application shows there is no "superior" method for conducting the additional layer of review. Again, Moore simply urges this Court to try again in hopes that another path may possibly afford relief. That should not be enough to undermine a duly imposed, legal sentence carefully tested and challenged over two decades in the judicial system.

As this brief will set out in detail, Moore is not entitled to any relief, procedurally or substantively. His petition should be dismissed in its entirety.

STATEMENT OF THE CASE[1]

Moore received a jury trial on October 16-22, 2001 on charges of murder, armed robbery, possession of a firearm during the commission of a violent crime, and assault with intent to kill (AWIK). The jury convicted Moore as charged. ***JA 9-418***. Following a separate capital sentencing proceeding, the same jury sentenced him to death, finding beyond a reasonable doubt the following statutory aggravating circumstances: the murder was committed while in the commission of robbery while armed with a deadly weapon; that Moore, by his act of murder, had knowingly created a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and that Moore had committed the murder for the purpose of receiving money or a thing of monetary value. S.C. Code Ann. § 16-3-20(C)(a)(1)(e) & (3)-(4) (Supp. 2020). The jury also was directed to consider the

[1] A more complete Procedural History is set forth on pp. 3-17 of the Return to Petition for Writ of Habeas Corpus that Respondent filed on November 23, 2020.

statutory mitigating circumstances found in § 16-3-20(C)(b)(2), & (6)-(7). ***JA 426-577***. R. Keith Kelly, Michael David Morin, and Jennifer Johnson, Esquires, represented him at trial.

This Court affirmed Moore's convictions and death sentence in a published decision filed on March 1, 2004. *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). The Court performed the required proportionality review at that time. *See* ***JA 639-45***. Moore then pursued Post-Conviction Relief, where he was represented by counsel. His primary claims in PCR were that trial counsel were ineffective for not adequately investigating and preparing to rebut the State's physical evidence, and that counsel were ineffective for not adequately investigating and presenting an adequate case in mitigation. *See* ***JA 646-63***.[2] The PCR judge denied both claims on the merits, finding neither deficient performance nor prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). ***JA 1065-1165***.

Moore appealed, and raised these claims, but this Court denied his petition for a writ of certiorari on September 11, 2014. This Court also denied his petition for rehearing on October 24, 2014. Moore subsequently presented both claims in a Petition for Writ of Certiorari filed in the United States Supreme Court, which denied certiorari on June 29, 2015. *Moore v. South Carolina*, 135 S.Ct. 2892 (2015).

Moore filed his Petition for Writ of Habeas Corpus, through counsel, on August 14, 2015. *Richard Bernard Moore v. Bryan P. Stirling, Commissioner, South Carolina Department of*

[2] Moore testified on his own behalf at the hearing, and he presented testimony from Anthony Mabry; George Gibson; Pete Skidmore; Wilbert Casey; Charles R. "Rusty" Clevenger; James Aiken; Stephen L. Denton; Paul Dorman; Dr. Sandra E. Conradi; and Michael Morin Esquire. Moore also introduced the depositions of family members Harold Harrington, Dorothy J. Hooper, Cecil J. Hooper, Arma Nell Hadley, Maurice Moore and James A. Moore. Respondent presented testimony from Susan Porter, Esquire; R. Keith Kelly, Esquire; and the Hon. Donnie Willingham.

Corrections, et al., C/A No. 4:14-cv-4691-MGL-TER [***ECF #43***].[3] The magistrate judge filed a Report and Recommendation, recommending denial of relief. The district court agreed and adopted the report and recommendation, granted in part and denied in part Respondents' motion to strike, granted Respondents' summary judgment motion and denied Moore's motions for an evidentiary hearing and for a stay. ***JA 1166-93***.

Moore appealed, and filed his Opening Brief of Petitioner-Appellant on October 22, 2018. ***JA 1194-1262***. Respondents filed their Brief of Appellees-Respondents on February 6, 2019 (***JA 1263-1334***), and Moore subsequently filed a Reply Brief. ***JA 1335-52***. The Fourth Circuit filed an opinion affirming denial of relief on March 3, 2020. *Moore v. Stirling*, 952 F.3d 174 (4th Cir. 2020), *cert. denied,* No. 20-5570, 2020 WL 6385899 (U.S.S.Ct., Nov. 2, 2020). ***JA 1353-74***. It denied a timely rehearing petition on March 27, 2020.

Moore then filed a Petition for Writ of Certiorari in the United States Supreme Court on August 27, 2020, raising a claim pertaining to his habeas review. Respondents filed their Brief in Opposition on September 28, 2020. Moore filed his Reply to Brief in Opposition on October 16, 2020. The United States Supreme Court denied certiorari on November 2, 2020. *Moore v. Stirling*, 141 S.Ct. 680 (2020).

THE STANDARD FOR ORIGINAL JURISDICTION HABEAS CORPUS REVIEW

"Habeas relief" in this Court's original jurisdiction "will be granted only for a *constitutional* claim," so great that "in the setting," it "constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Green v. Maynard*, 349 S.C. 535, 564 S.E.2d 83 (2002)

[3] While he did not raise the present issue in federal court, he did assert that counsel were ineffective for failing to challenge the State's decision to seek the death penalty as arbitrary and disproportionate to the crime with which he was charged. The federal courts found that the issue was procedurally defaulted.

(emphasis added) (citing *Gibson v. State*, 329 S.C. 37, 39, 495 S.E.2d 426, 428 (1998) (citing *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990)). *See also Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008) (original jurisdiction relief "reserved for the very gravest of constitutional violations").

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. This Court should deny habeas corpus relief because (1) this Court has already conducted the statutorily-required comparative proportionality review and determined that the death sentence imposed on Moore is not disproportionate, and (2) the relief sought is beyond the scope of this Court's habeas corpus review because comparative proportionality review of a death sentence is not constitutionally required. Also, the record supports the Court's previous finding that Moore's death sentence is not disproportionate and Moore has failed to show any argument bearing on the fairness of the jury proceedings.

Moore cannot meet the standard for relief in the Court's original jurisdiction as set out in *Butler v. State* because (1) this Court has already conducted the statutorily-required proportionality review and determined that the death sentence imposed on Moore is not disproportionate, and (2) comparative proportionality review of a death sentence is not required by the United States Constitution.[4] A review of matters where this extraordinary remedy was granted is instructive.

In *Butler*, the Court granted relief where there was a "grave constitutional error" in what the Court identified as "unique and compelling circumstances." 302 S.C. at 467-68, 397 S.E.2d at 87-88. Specifically, the Court considered prejudicial improper judicial comments affecting the decision to waive the right to testify when that decision was made by a defendant later determined

[4] The United States Supreme Court explained in *Pulley v. Harris*, 465 U.S. 37 (1984), that comparative proportionality review differs from Eighth Amendment proportionality analysis, which is the "abstract evaluation of the appropriateness of a sentence for a particular crime" and "presumes that the death sentence is not disproportionate to the crime in the traditional sense" but … inquire[s] instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime." *Id*. at 43.

to be mentally retarded. *Id.* This Court's conclusion in *Butler* expresses the vast difference between *Butler* and this setting where there clearly is no constitutional violation:

> The great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention." *Walker v. Wainwright*, 390 U.S. 335, 88 S.Ct. 962, 19 L.Ed.2d 1215 (1968). Here, petitioner seeks to take advantage of constitutional principles recognized after his trial, appeal, and exhaustion of state post conviction relief proceedings. We caution that not every intervening decision, nor every constitutional error at trial will justify issuance of the writ. Rather, the writ will issue only under circumstances where there has been a "violation, which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." *State v. Miller*, 16 N.J.Super. 251, 84 A.2d 459 (1951) (emphasis added); see also *Uveges v. Commonwealth of Pennsylvania*, 335 U.S. 437, 69 S.Ct. 184, 93 L.Ed. 127 (1948). Although we do not condone the delay in calling this grave constitutional error to our attention, under the unique and compelling circumstances of this case we grant petitioner relief.

Butler, 302 S.C. at 468, 397 S.E.2d at 88.

In *Tucker v. Catoe,* 346 S.C. 483, 552 S.E.2d 712 (2001), this Court also found extraordinary relief was necessary noting that the trial court committed more than one error in handling of a deadlocked jury:

> We find the combination of withholding pertinent information from the parties, thereby depriving them of the facts necessary to make informed decisions; failing to instruct the jury to omit from its future communication any reference to the nature of its division; and giving an unconstitutionally coercive *Allen* charge, with its emphasis on a collective result, shocking to the universal sense of justice. We emphasize that it is the combination of factors, in the setting, which compel us to grant petitioner a writ of habeas corpus and to order a new sentencing proceeding.

346 S.C. at 495, 552 S.E.2d at 718.

Moore fails not only to show an allegation of constitutional error, he fails to show like circumstances affecting the fundamental fairness of the trial, or even an "intervening decision" on sentence review supporting error. While true this is a capital case, this Court has denied relief to death-sentenced inmates who failed to meet the *Butler* heightened standard – even when those inmates presented an argument premised on an allegation of a constitutional claim. *Williams,* 380

S.C. at 479, 671 S.E.2d at 603 ("Petitioner failed to show that, in the setting, the solicitor's remarks constituted a denial of fundamental fairness shocking to the universal sense of justice."); *McWee v. State*, 357 S.C. 403, 407, 593 S.E.2d 456, 458 (2004) (failure to charge the jury that petitioner was parole eligible is not shocking to the universal sense of justice). Again, this Court should deny this petition for failure to present a constitutional issue at all. Moore has presented an issue not properly before the court for habeas review.

Additionally, the record supports this Court did not err in its previous finding that Moore's death sentence is not disproportionate.

A. It is the law of the case and res judicata that Moore's sentence is not disproportionate, and the relief sought is beyond the scope of this Court's habeas corpus review because comparative proportionality review is not constitutionally required.

On appeal of cases in which the appellant received a death sentence, S.C. Code Ann. § 16-3-25(C) (Supp. 2020) requires this Court to determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 16-3-20, and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"In conducting a proportionality review, [this Court will] search for similar cases in which the sentence of death has been upheld." *State v. Motts*, 391 S.C. 635, 649, 707 S.E.2d 804, 811 (2011) (citing *State v. Wise*, 359 S.C. 14, 28, 596 S.E.2d 475, 482 (2004)). *See also Copeland*, 278 S.C. at 591, 300 S.E.2d at 74 ("In our view, the search for 'similar cases' can only begin with an actual conviction and sentence of death rendered by a trier of fact in accordance with § 16–3–20 of the Code. We consider such findings by the trial court to be a threshold requirement for

comparative study and indeed the only foundation of 'similarity' consonant with our role as an appellate court"). The Court performed this task on direct appeal in Moore's case and found that:

> The death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of aggravating circumstances is supported by the evidence. Further, the death penalty is not excessive or disproportionate to the penalty imposed in similar capital cases. *See State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57, *cert. denied*, 520 U.S. 1277, 117 S.Ct. 2460, 138 L.Ed.2d 217 (1997); *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996), *cert. denied*, 520 U.S. 1123, 117 S.Ct. 1261, 137 L.Ed.2d 340 (1997); *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991), *cert. denied,* 502 U.S. 1103, 112 S.Ct. 1193, 117 L.Ed.2d 434 (1992); *State v. Patterson,* 285 S.C. 5, 327 S.E.2d 650 (1984), *cert. denied*, 471 U.S. 1036, 105 S.Ct. 2056, 85 L.Ed.2d 329 (1985).

Moore, 357 S.C. at 465, 593 S.E.2d at 612.

1. Law of the Case/Res Judicata.

In *Greenwood County v. Watkins*, 196 S.C. 51, 12 S.E.2d 545(1940), the Court stated that it was well settled in South Carolina that the rulings in a case become the law of the case. The doctrine of "the law of the case" prohibits issues which have been decided in a prior appeal from being re-litigated in the trial court in the same case. 5 Am.Jur.2d *Appellate Review* § 605 (1995); *Sheppard v. State*, 357 S.C. 646, 662, 594 S.E.2d 462, 471 (2004) (holding when a ruling goes unchallenged, right or wrong, it becomes the law of the case). The law of the case applies both to those issues explicitly decided and to those issues that were necessarily decided in the former case. *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957) (where Court granted a new trial in first appeal for errors in the charge, it logically determined trial court had not erred in refusing defendant's motion for a directed verdict "for if there had been error in this respect it would have been unnecessary to consider any other questions"); *see also Warren v. Raymond*, 17 S.C. 163 (1882) (all points decided by the Court on appeal, or necessarily involved in what was decided, are res judicata and cannot be considered again in the cause); *Ross v. Medical University of South Carolina*, 328 S.C. 51, 62, 492 S.E.2d 62,

68 (1997); *Johnson v. Board of Com'rs of Police Ins. & Annuity Fund of State*, 68 S.E.2d 629, 633 (1952) ("[T]he rulings in a case even though admittedly wrong become the law of the case and res judicata between the parties); *Jenkins v. Southern R. Co.*, 145 S.C. 161, 143 S.E. 13 (1927) (application for an injunction was refused on the ground that the initial decision in the first appeal was "not only res adjudicata as between the parties, but is the law of the case,' right or wrong," even though earlier decision was overruled).[5]

Therefore, Moore cannot meet his burden to demonstrate the very gravest of constitutional violations "which, in the setting, constitute[ ] a denial of fundamental fairness shocking to the universal sense of justice," *Green*, 349 S.C. at 538, 564 S.E.2d at 84, where the present claim is barred by the law of the case doctrine and principles of res judicata. *Id*. *See also State v. Gilbert*, 277 S.C. 53, 58, 283 S.E.2d 179, 181 (1981), *cert. denied*, 456 U.S. 984 (1982) ("Appellants' allegations that their confessions should have been suppressed have been considered by this Court and resolved adversely to the appellants. These matters are therefore res judicata"); *State v. Creech*, 132 Idaho 1, 966 P.2d 1 (1998) (law of the case doctrine barred defendant from arguing on appeal that state trial court erred reversibly, on remand of capital murder case for resentencing after federal habeas corpus proceeding, in not striking certain portions of the presentence investigation report, where the state Supreme Court had previously upheld admissibility of a nearly identical presentence report); *Isley v. State*, 652 So. 2d 409, 410 (Fla. Dist. Ct. App. 1995) ("res judicata and the law of the case, bar Isley's repetitive arguments concerning withdrawing his pleas and ineffective assistance of trial counsel. They have been heard, considered and rejected. To raise

[5] 21 C.J.S. Courts § 143 (1990) ("An adjudication on any point within the issues presented by the case cannot be considered a dictum, and *this rule applies as to all pertinent questions*, although only incidentally involved, *which are presented and decided in the regular course of the consideration of the case, and lead up to the final conclusion*, and to any statement in the opinion as to a matter on which the decision is predicated.") (Emphasis added).

them again is an abuse of process"); *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975) (" 'The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.' …. The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings"). *Cf. Foxworth v. State*, 275 S.C. 615, 618, 274 S.E.2d 415, 416 (1981).

Additionally, the relief sought by Moore is beyond the settled limitations of the Court's habeas corpus review. Because comparative proportionality review is not required by the Eighth Amendment, Moore does not present a constitutional claim.

2. Comparative Proportionality Review Does Not Rest on a Constitutional Requirement.

In *Furman v. Georgia*, 408 U.S. 238 (1972). the United States Supreme Court held that Georgia's capital scheme violated the Eighth Amendment's prohibition against cruel and unusual punishment because it, like others throughout the Country, permitted the jury "unguided and unrestrained discretion" regarding the imposition of the death penalty." *See Lockett v. Ohio*, 438 U.S. 586, 598 (1978); *see also Furman*, 408 U.S. at 306 (Stewart, J. concurring). Under these circumstances, a death sentence was unconstitutional because "wantonly and ... freakishly imposed" and cruel and unusual "in the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).

The United States Supreme Court reviewed the amended Georgia capital sentencing statutes in *Gregg v. Georgia*, 428 U.S. 153 (1976). The majority concluded that "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary and capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition, these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the

information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Id*. at 195.

Both the majority and three concurring Justices found that that the Georgia system "adequately directed and limited the jury's discretion. The bifurcated proceedings, the limited number of capital crimes, the requirement that at least one aggravating circumstance be present, and the consideration of mitigating circumstances minimized the risk of wholly arbitrary, capricious, or freakish sentences." *See Pulley*, 465 U.S. at 45 (citing *Gregg*, 428 U.S. at 197-98 and 428 U.S. at 222 (White, J., concurring)). "Both opinions made much of the statutorily-required comparative proportionality review." *Id*. at 45.

In response to *Gregg*, the South Carolina General Assembly enacted S.C. Code Ann. § 16-3-25(C) (1977) (1977 Act No. 177, § 2, eff. June 8, 1977).[6] This Court has previously found § 16-3-25(C) "bears a strong resemblance to" the Georgia statute upheld in *Gregg* although it "does not specify the 'universe' of similar cases," unlike the Georgia statute. *See Copeland*, 278 S.C. at 589, 300 S.E.2d at 73 (1982). *See also State v. Shaw*, 273 S.C. 194, 203, 255 S.E.2d 799, 803-04 (1979), *cert*. *denied*, 444 U.S. 957 (1979), and *cert*. *denied*, 444 U.S. 1027 (1980) (finding South Carolina's death penalty statute is "constitutionally indistinguishable" from the Georgia statute upheld in *Gregg*).

Subsequent to passage of § 16-3-25(C), the United States Supreme Court held "There is ... no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it. Indeed, to so hold would effectively overrule [*Jurek v. Texas*, 428 U.S. 262 (1976)] and would substantially

[6] South Carolina had adopted a mandatory death penalty scheme after *Furman*, but this was found to be unconstitutional in light of *Woodson v. North Carolina*, 428 U.S 280 (1976). *See State v. Rumsey*, 267 S.C. 236, 239, 226 S.E.2d 894, 895 (1976).

depart from the sense of *Gregg* and [*Proffitt v. v. Florida*, 428 U.S. 242 (1976)]. We are not persuaded that the Eighth Amendment requires us to take that course." *Pulley*, 465 U.S. at 50-51. *See also McCleskey v. v. Kemp*, 481 U.S. 279, 306 (1987) ("where the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required").

After discussing *Furman* and several post-*Furman* cases, the Court in *Pulley* explained that while the Court "emphasiz[ed] the importance of mandatory appellate review" in upholding the Georgia capital sentencing scheme in *Zant v. Stephens*, 462 U.S. 862 (1983), "we did not hold that without comparative proportionality review the statute would be unconstitutional." *Pulley*, 465 U.S. at 50. Rather, "the emphasis was on the constitutionally necessary narrowing function of statutory aggravating circumstances. Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required." *Id*. (emphasis added). *See also Gregg*, 428 U.S. at 206 (stating that proportionality review is "a check against the random or arbitrary imposition of the death penalty … [and] substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury"); *Shaw*, 273 S.C. at 211, 255 S.E.2d at 807 (finding that proportionality review is "an additional check against the random imposition of the death penalty"); *Shaw v. Martin*. 733 F.2d 304, 317 (4th Cir. 1984), *cert*. *denied*, 469 U.S. 873 (1984), *reh*. *denied*, 469 U.S. 1067 (1984) ("Although a comparative proportionality review may be a safeguard against arbitrarily imposed death sentences, it is not required under the Constitution") (citing *Pulley*).

Although not constitutionally required, this Court has held that proportionality review cannot be waived by a capital appellant because "it is this Court's *statutorily-imposed* duty to

conduct [this review]." *See Motts*, 391 S.C. at 649, 707 S.E.2d at 649 (emphasis added).[7] The Court has already performed that function in Moore's case.

So, Respondent submits that the Court should deny relief either because it has already performed the requisite proportionality review and found the sentence was not disproportionate or because the matter is beyond the proper scope of this Court's habeas corpus review. Procedurally, Moore's challenge should not be allowed.

B. The present action frustrates the need for finality in criminal cases.

Further, revisiting the proportionality of his sentence seventeen years after the Court found it was not disproportionate would undermine the much needed finality of litigation. "[T]he principle of finality ... is essential to the operation of our criminal justice system" because "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). *Teague* added, "[t]he fact that life and liberty are at stake in criminal prosecutions 'shows only that 'conventional notions of finality' should not have as much place in criminal as in civil litigation, not that they should have none.' " *Id*. (Citation omitted). *See also Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). In observing the balance of equities disfavors last-minute delay, the Supreme Court continues to recognize: "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1133 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). And, this Court stated in *Williams v. Ozmint*, 380 S.C. 473, 480, 671 S.E.2d 600, 603 (2008), that:

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[7] *But see State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013), *overruled on other grds*, *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) (affirming death sentence although opinion does not discuss proportionality review).

> Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. [*Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991). At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. *Id*.

It is evident that the balance does not tilt in favor of Moore in this latest request. Moore murdered James Mahoney early in the morning of September 16, 1999, over twenty-one years ago. He was convicted and sentenced to death in October of 2001. In the nineteen years that have followed, Moore has received review at nine different levels of appeals in the State and federal system. His death sentence – a sentence that a jury of his peers determined was the appropriate sentence in this case – has been upheld. In ruling on the current Petition, the Court must remember that " '[c]orresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial.' " *Gilbert*, 277 S.C. at 59, 283 S.E.2d at 182 (quoting *United States v. Tateo*, 377 U.S. 463, 466 (1964)). *See also Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (" '[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true' ") (quoting *Snyder v. Mass.*, 291 U.S. 97, 122 (1934)); *Stein v. New York*, 346 U.S. 156, 197 (1953) ("The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law"); *State v. Stewart*, 283 S.C. 104, 110, 320 S.E.2d 447, 451 (1984) (*Stewart I*).[8]

[8] The need for finality of this case raises a constitutional element that Moore's issue cannot. The Victim's Bill of Rights, S.C. CONST. art. I, § 2(A)(11), provides "victims of crime have the right to … a reasonable disposition and prompt and final conclusion of the case." (Emphasis added).

C. Moore's death sentence is not disproportionate and none of his arguments should cause the Court to re-visit this issue.

Respondent submits that the Court's factual summary on direct appeal, *Moore*, 357 S.C. at 460-61, 593 S.E.2d at 609-10, reflects that the Court properly found that his death sentence was not disproportionate and none of his present arguments warrant re-visiting the issue.[9] The thrust of Moore's argument is that there are other cases in which the facts were supposedly "more aggravated" and he suggests that this Court has gone away from earlier decisions indicating that death sentences were reserved for cases involving "ruthless criminality," *State v. Woomer*, 278 S.C. 468, 475, 299 S.E.2d 317, 321 (1982), *cert. denied,* 463 U.S. 1229 (1983), or those where "the wrongful killing is such as to shake the conscience of the community." *State v. Adams*, 279 S.C. 228, 241, 306 S.E.2d 208, 215 (1983), *cert. denied*, 464 U.S. 1023 (1983). *E.g.*, Brief of Petitioner, pp. 17-18; 24-25. This assertion demonstrates a fundamental misunderstanding of South Carolina's capital sentencing scheme.

South Carolina is not a weighing state. Accordingly "[a] jury should not be instructed to 'weigh' the aggravating circumstances against the mitigating circumstances. …. The jury should be instructed to "consider" any mitigating circumstances as well as any aggravating circumstances. *See* S.C.Code Ann. § 16-3-20(C) (1976)." *State v. Bellamy*, 293 S.C. 103, 107, 359 S.E.2d 63, 65 (1987).[10] It is the jurors' finding that the State has proven a "constitutionally necessary" statutory

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[9] Respondent set forth a more detailed account of the crimes on pp. 19-24 of the Return to Petition for Writ of Habeas Corpus.

[10] The Court more fully discussed the reason jurors do not weigh aggravating and mitigating circumstances in *Jones v. State*, 332 S.C. 329, 333 n. 1, 504 S.E.2d 822, 824 n. 1 (1998), *cert. denied,* 526 U.S. 1021 (1999), *reh. denied*, 526 U.S. 1128 (1999):

> A review of case law reveals why juries are not instructed to weigh aggravating and mitigating circumstances. In [*Shaw*, 273 S.C. at 205, 255 S.E.2d at 804] we rejected the defendants' contention that the death penalty "statutory complex is

aggravating circumstance beyond a reasonable doubt (and here there were three), together with this Court's mandatory review on direct appeal, that ensures that a death sentence accords with the Eighth Amendment and only the worst offenders receive death sentences. *See Pulley*, 465 U.S. at 49-50; *accord Copeland*, 278 S.C. 577, 590, 300 S.E.2d at 74 ("It is thus apparent that the Eighth Amendment to the U.S. Constitution does not mandate any mode of appellate review, or even appellate review as such, but only an outcome. That outcome, again, is a penalty imposed on a meaningful basis which can be sustained as neither excessive nor disproportionate in light of the crime and the defendant"); *Adams*, 279 S.C. at 241, 306 S.E.2d at 215.

Further, Moore's assertion that his murder was supposedly less aggravated conveniently and necessarily disregards a number of extremely important facts adduced at trial. Specifically, the prosecution's evidence clearly demonstrated that he went into Nikki's Speedy Mart with the intent to rob it, in order to get money to buy crack from Gibson. *See State v. Yates*, 280 S.C. 29, 43-45, 310 S.E.2d 805, 813-14 (1982), *cert. denied*, 462 U.S. 1124 (1983) (finding death sentence not disproportionate for murder committed while in the commission of armed robbery where appellant ad co-defendant "found a solitary, apparently unarmed victim" to rob, even though this victim's mother was the murder victim); *State v. Hyman*, 276 S.C. 559, 570-71, 281 S.E.2d 209, 215 (1981),

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constitutionally defective because it does not assign numerical values to the aggravating and mitigating circumstances so that the sentencing authority can determine when the mitigating circumstances outweigh the aggravating circumstances." Based on this reasoning, *State v. Plath*, 281 S.C. 1, 19, 313 S.E.2d 619, 629, *cert. denied*, 467 U.S. 1265, 104 S.Ct. 3560, 82 L.Ed.2d 862 (1984) declared that "Additional aggravating circumstances do not, under our statute, contribute to the actual selection of the death penalty because juries in this State are not instructed to 'weigh' circumstances of aggravation against circumstances of mitigation." Thus, the type of "weighing" we have disapproved of is that which requires a jury to determine life or death on the basis of the numerical weight of the aggravating and mitigating circumstances. The "weighing" that is permissible is the considering of any mitigating and aggravating circumstances. *See Bellamy*, 293 S.C. at 107, 359 S.E.2d at 65.

overruled on other grds, *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), and *abrogated on other grds*, *Morgan v. Illinois*, 504 U.S. 719 (1992) (finding death sentence not disproportionate for murder committed while in the commission of armed robbery where the "record clearly reflect[ed] appellant planned, prepared and committed a brutal crime for the purpose of obtaining money"); *Gilbert*, 277 S.C. at 60, 283 S.E.2d at 182 (finding death penalty for murder not disproportionate for murder committed while in the commission of armed robbery where the two defendants spent a morning searching for a target to rob).

Although Moore did not have a gun on him when he entered the store,[11] the sentencing jury heard evidence of his escalating history of violent robberies against persons who were physically unable to defend themselves against his violent assaults. *See* ***JA 465-87***. Obviously, Mr. Mahoney appeared to be a suitable target for another strong arm robbery: he was slightly built, he had bad eyesight, and his hands were ravaged by arthritis. Even when Moore's attempted strong

[11] It was undisputed at trial and throughout subsequent appeals that both of the guns involved in the shootout were initially within victim's control, and that Moore did not bring either gun to the store. Also, Moore refers to the affidavits he attached to his habeas Petition that were in support of his claim that counsel were ineffective because they failed to adequately investigate and prepare to confront and rebut the State's physical evidence. However, the Court has not granted him permission to revisit that claim, which is subject to the bar of res judicata and law of the case, since it was denied in both PCR and federal habeas corpus proceedings. *See* ***JA 1081-93*** (the PCR court)***; 1179-81*** (District Court); ***1354-60, 1365-71*** (Fourth Circuit). Likewise, Moore discusses his own account which he gave in PCR. However, he did not testify at trial, which is the correct focus for the Court's proportionality review. Further, the record supports the PCR judge's finding that Moore's testimony as to the events that night was not credible. ***JA 1085-86***.

Indeed, it would be preposterous to accept as credible Moore's claims that: (1) the victim would have gotten into an argument with him over less than a quarter that would lead to a shooting; (2) the victim used a racial slur during this supposed argument, but had gone out of his way to accommodate another African American customer earlier that morning; (3) he was not using crack that night and did not tell anyone he had done so; (4) his blood was not drawn that night; and, (5) instead of traveling the short distance to the hospital after the shooting, he went in the opposite direction to Gibson's house, supposedly to seek treatment for his wound, from a crack dealer with no medical training.

arm robbery was interrupted by the victim brandishing a .45 caliber pistol in self-defense, Moore's desire for crack cocaine drove him to wrestle this weapon from the victim. He then immediately turned and attempted to murder the only other possible eyewitness to his crimes (Hadden) before engaging in a shootout with the victim.[12] Following the exchange of gunfire in which Moore fired the .45 several times and killed the victim, he stole over $1,400.00. He left his blood on the victim's clothing and on the money as he did so.[13]

Notwithstanding Moore's complaint, the prosecution's evidence supported the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; that Moore, by his act of murder, had knowingly created a risk

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[12] Moore's assertions that "[t]he State never explained how the confrontation began" and that "it was unclear if he initially intended to rob the store" necessarily ignore, as they must, the significance of Gibson's testimony, which provided a clear motive for robbery of the store by the unemployed Moore, since there was no "work" for him to go to and obtain money. His motive was to obtain drugs. This theory of motive is underscored by the fact a seriously wounded Moore drove to Gibson's house and asked for crack immediately after murdering the victim.

[13] To the extent Moore suggests the murder was not committed during an armed robbery, his claim is contrary to well-settled State law. *See State v. Damon*, 285 S.C. 125, 129, 328 S.E.2d 628, 631 (1985) (holding the State need not show the aggravating circumstance came before the murder for it to be an aggravating circumstance); *State v. Keith*, 283 S.C. 597, 598-99, 325 S.E.2d 325, 326 (1985) ("we hold that when a defendant commits robbery without a deadly weapon, but becomes armed with a deadly weapon before asportation of the victim's property, a conviction for armed robbery will stand"). *See also id*. (" '[T]he crime of robbery is not completed the moment the stolen property is in the possession of the robbers, but may be deemed to continue during their attempt to escape.' ") (citations omitted).

Any claim that Moore did not enter the store with the intent to kill is a fallacious argument because the crime of murder in South Carolina does not require premeditation. *See* S.C. Code Ann. § 16-3-10 (2020) (defining murder as "the killing of any person with malice aforethought, either express or implied"). *See also State v. Judge*, 208 S.C. 497, 505-06, 38 S.E.2d 715, 719-20 (1946) (malice "signifies … a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief; in other words, a malicious killing is where the act is done without legal justification, excuse, or extenuation, and malice has been frequently, substantially so defined as consisting of the intentional doing of a wrongful act toward another without legal justification or excuse"). Unquestionably, Moore's murder of James Mahoney was malicious.

of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and that Moore had committed the murder for the purpose of receiving money or a thing of monetary value, see § 16-3-20(C)(a)(1)(e) & (3)-(4), and each juror affirmed this finding when polled. ***JA 573-77***.

The sentencing jury heard his case in mitigation. ***JA 508-20***. The trial judge's instructions directed the jury to consider the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), & (6)-(7). Also, the trial judge instructed jurors that in reaching their decision, they should consider "whether the existence of any other nonstatutory mitigating circumstance was supported by the evidence; and, third, whether for any reason you can think of or for no reason at all the defendant should be sentenced to life imprisonment." *See* ***JA 560-65***.

Obviously, the jury found that nothing it heard was sufficient to mitigate the malicious and brutal murder that Moore committed to obtain money with which to buy crack, and that Moore was not deserving of a life sentence even as an act of mercy. *Cf. State v. Bland*, 958 S.W.2d 651, 670 (Tenn. 1997), *cert. denied*, 523 U.S. 1083 (1998) ("In our view, jurors are better equipped to decide, in the first instance, whether a particular defendant should receive the death penalty"). Further, the trial judge found "as an affirmative fact that the evidence of the case warrants the imposition of the death penalty, and its imposition is not the result of prejudice, passion or any other arbitrary factor***." JA 578, ll. 10-16***. *See also* ***JA 589-92*** (Report of the trial judge). *See Copeland*, 278 S.C. at 591, 300 S.E.2d at 74 (recognizing a trial judge's factual findings "provide a fundamental line of demarcation well recognized in and even exalted by our legal tradition. The decisive importance of such findings is evidenced by the language of Article V, section 5, South Carolina Constitution, which limits our review to 'correction of errors at law' in all but equity

cases"). This Court made similar findings when it conducted the appellate review mandated by § 16-3-25(C). *See Moore*, 357 S.C. at 465, 593 S.E.2d at 612.

Given the above facts, there cannot be any serious contention that imposition of the death penalty violated the Eighth Amendment, as applied in this case. Even if the Court finds that it has reviewed and affirmed the death penalty in cases involving more atrocious killings than the present crime, this fact does not invalidate as disproportionate the penalty imposed in this case. *See McCleskey*, 481 U.S. at 306 (a petitioner "cannot base a constitutional claim on an argument that his case differs from other cases in which defendants did receive the death penalty. On automatic appeal, the Georgia Supreme Court found that McCleskey's death sentence was not disproportionate to other death sentences imposed in the State. The court supported this conclusion with an appendix containing citations to 13 cases involving generally similar murders. Moreover, where the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required") (citations omitted and emphasis added). *See also Yates*, 280 S.C. at 41, 310 S.E.2d at 812 (recognizing that because "no two defendants and no two crimes are exactly alike," proportionality review is a "difficult" but "not an unsurmountable chore"). Because each case and defendant are unique, "[a] reviewing court can always draw factual distinctions when comparing cases." *State v. Pruitt*, 415 S.W.3d 180, 220-21 & n. 27 (Tenn. 2013), *cert*. *denied*, 573 U.S. 949 (2014).

Moore's claim that "[o]f the 155 people sentenced to death prior to 2004, fifty-two were sentenced for killing more than one victim, unlike Moore" cavalierly ignores that Hadden (the AWIK victim) only escaped the plight that befell Mr. Mahoney because he played dead and Moore thought that he was dead. So, if Moore's statement is true in this regard, it certainly was not because he did not try to kill more than one person. Further, this Court has previously and quite

correctly recognized that "[t]here is no requirement the sentence be proportional to any particular case." *State v. Wood*, 362 S.C. 135, 144, 607 S.E.2d 57, 62 (2004); *McCleskey*, 481 U.S. at 306. *See also Copeland*, 278 S.C. at 595, 300 S.E.2d at 77 ("It is our conclusion that no 'similar' case exists that would permit meaningful comparative review of these death sentences. In view of the facts set forth above, however, we are satisfied that the sentence of death imposed on each of these appellants was appropriate and neither excessive nor disproportionate in light of their crimes and their respective characters").

Similarly, his use of statistics is misplaced because South Carolina does not follow a statistical analysis. Rather, this Court searches "for similar cases in which the sentence of death has been upheld." *Motts*, 391 S.C. at 649, 707 S.E.2d at 811 (citing *Wise*, 359 S.C. at 28, 596 S.E.2d at 482). *See also Copeland*, 278 S.C. at 591, 300 S.E.2d at 74.[14] Nor is Respondent aware of any state that applies a purely statistical analysis in conducting comparative proportionality review, such as Moore seems to propose. *See Bland*, 958 S.W.2d at 664 & n. 12.

Moore's suggestion that the sentence imposed in this case was disproportionate because three of the four defendants in the cases this Court cited in its proportionality review received relief in PCR and later received a life sentence misses the mark and proves nothing. This Court's proportionality review is not impacted by the fact three of the defendants obtained a life sentence following PCR hearings.[15] Section § 16–3–25(C)(3) requires the Court to determine *on direct*

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[14] Moore's proposed Supplemental Appendix, which this Court properly refused to accept, also demonstrates beyond cavil that much of the data relied upon by him for some points he has raised simply is not objectively reliable, since it consists primarily of newspaper articles and law review articles written by one of his current attorneys.

[15] Sims is still under a death sentence. One defendant, Ricky George, was resentenced to life imprisonment because he could not receive a death sentence after his PCR hearing, since the PCR judge granted relief pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), which made him ineligible for a death sentence. Simpson received relief because the State violated *Brady v. Maryland*, 373

appeal "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar [capital] cases considering both the crime and defendant." It does not require the Court to re-visit that determination almost two decades later. Once again, Moore's position runs counter to the need for finality of litigation.

Moore also argues his murder was less aggravated than other "murder/armed robbery cases" in which a death sentence was not imposed, either because a death notice was filed but the defendant was ultimately allowed to plead guilty and avoid the death penalty, jurors did not return a death sentence, or because the State never sought the death penalty. His assertion that these other cases are relevant to determining the constitutionality of the death sentence in his case underscores the fallacy of his claim because each of these other cases would have to be litigated in his trial, and considered in the appeal, in order to prove that he is correct. Yet, this is not constitutionally required. *See McCleskey*, 481 U.S. at 307 n. 28 ("The Constitution is not offended by inconsistency in results based on the objective circumstances of the crime. Numerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt. If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the responsible law enforcement agency can vary widely. Also, the strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor's decision to offer a plea bargain or to go to trial. Witness availability, credibility, and memory also influence the results of prosecutions. Finally, sentencing

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U.S. 83, 87 (1963), by not informing "the defense that a bag of money was found behind the counter," since this "prejudiced Simpson's case in the penalty phase." *Simpson v. Moore*, 367 S.C. 587, 600, 627 S.E.2d 701, 708 (2006), *abrogated on other grds*, *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). It is also important to note that neither George nor Simpson received relief based upon a judicial determination that the finding by the defendant's jury of a statutory aggravating circumstance(s) was unsupported by the trial record or, if found, was somehow insufficient to support a death sentence.

in state courts is generally discretionary, so a defendant's ultimate sentence necessarily will vary according to the judgment of the sentencing authority. The foregoing factors necessarily exist in varying degrees throughout our criminal justice system"). *See also Copeland*, 278 S.C. at 591, 300 S.E.2d at 74 ("This Court would enter a realm of pure conjecture if it attempted to compare and contrast such verdicts with an actual sentence of death"). Also, "absent a showing that the [South Carolina] capital punishment system operates in an arbitrary and capricious manner, [Moore] cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty." *McCleskey*, 481 U.S. at 306-07.

Indeed, Moore's various arguments misunderstand the purposes of proportionality review. Comparative proportionality review was intended to serve "as a check against the random or arbitrary imposition of the death penalty … [and] substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury." *Gregg*, 428 U.S. at 206. *See also Copeland*, 278 S.C. at 587, 300 S.E.2d at 72) (stating that "[t]he avoidance of an arbitrary and capricious pronouncement of the death sentence has now been declared a constitutional mandate"); *State v. Bryant*, 390 S.C. 638, 643, 704 S.E.2d 344, 346 (2011) ("We have conducted the proportionality review required by … § 16-3-25(C) … and find the capital sentence imposed here is not the result of passion, prejudice, or other arbitrary factor. Further, we find the sentence here is neither arbitrary nor capricious"); *State v. Webb*, 680 A.2d 147, 204 (Conn. 1996) (discussing *Gregg* and finding that "[i]n the Supreme Court's view … the appellate inquiry under proportionality review was whether the death penalty imposed in a particular case was aberrational, within the particular jurisdiction involved, with respect to similar cases); *State v. Kandies*, 342 N.C. 419, ___, 467 S.E.2d 67, 86 (1996). Because *Pulley* established that it is not constitutionally required, it serves today as "an additional protection for capital defendants."

Walker v. Georgia, 555 U.S. 979, 129 S.Ct. 481, 482-83 (2008) (Thomas, J., concurring in denial of certiorari) (citing *Pulley*, 465 U.S. at 45).

In performing proportionality review, the Court's function is not to act as a "super jury" or to "second-guess the jury's decision." *State v. Godsey*, 60 S.W.3d 759, 782 (Tenn. 2001). Likewise, the Court does not "search for proof that a defendant's sentence is perfectly symmetrical with the penalty imposed in all other similar cases*." State v. Addison*, 116 A.3d 551, 558 (N.H. 2015) (*Addison II*). *See also Webb*, 680 A.2d at 211 (same); *State v. Bey*, 645 A.2d 685, 692 (N.J. 1994) (same)); *Pruitt*, 415 S.W.3d at 221 (same); *Wood,* 362 S.C. at 144, 607 S.E.2d at 62 ("[t]here is no requirement the sentence be proportional to any particular case"). Nor is the Court's function to search for a disproportionate or aberrant life sentence.

This is clear from the Court's statement in *Gregg* that:

> Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the [death] penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

Gregg, 428 U.S. at 203. *See also Webb*, 680 A.2d at 203; *Pruitt*, 415 S.W.3d at 213 n. 20 ("The [proportionality] statute does not require this Court to determine whether a death penalty is proportionate to the sentences imposed in all first degree murder cases in Tennessee. …. By focusing on whether a death sentence is 'disproportionate' or 'aberrant,' the *Bland* analysis is true to the statutory language"); *Bland*, 958 S.W.2d at 668 ("The appellate task under [proportionality review] is to compare similar cases, not to gauge, in isolation, the culpability of a specific defendant or the heinousness of a particular crime"). *Accord Copeland*, 278 S.C. at 591, 300 S.E.2d at 74.

The Tennessee Supreme Court aptly explained that:

> If the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed, the sentence of death in the case being reviewed is disproportionate. *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993). Even if a defendant receives a death sentence when the circumstances of the offense are similar to those of an offense for which a defendant has received a life sentence, the death sentence is not disproportionate where the Court can discern some basis for the lesser sentence. *See State v. Carter,* 714 S.W.2d 241, 251 (Tenn.1986). Moreover, where there is no discernible basis for the difference in sentencing, the death sentence is not necessarily disproportionate. This Court is not required to determine that a sentence less than death was never imposed in a case with similar characteristics. On the contrary, our duty under the similarity standard is to assure that no abberant death sentence is affirmed. *Webb,* 680 A.2d at 203.

Bland, 958 S.W.2d at 665 (footnote omitted).

Further, Moore's argument ignores the discretion given to Solicitors in handling cases they prosecute. "In South Carolina, the solicitor is charged with the responsibility of prosecuting criminal charges, including procurement of the proper indictment from the grand jury. *See* S.C. CONST. art. V, § 24; S.C.Code Ann. §§ 1-7-320 (1986), 14-9-210 (1977)." *State v. Fletcher*, 322 S.C. 256, 261, 471 S.E.2d 702, 705 (Ct. App. 1996). "The South Carolina Constitution, South Carolina statutes and case law place the unfettered discretion to prosecute solely in the prosecutor's hands*." In re Richland Cnty. Magistrate's Court*, 389 S.C. 408, 411, 699 S.E.2d 161, 163 (2010). "In carrying out his duty, the prosecutor independently decides whether to prosecute, decides what evidence to submit to the court, and negotiates the State's position in plea bargaining." *Id*.

The United States Supreme Court made clear in *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) that:

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."

(Footnote omitted). *See also United States v. Goodwin*, 457 U.S. 368, 382 (1982) ("A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution"). Contrary to Moore's argument, "[p]roportionality review is not, and was never intended to be, a vehicle for reviewing the exercise of prosecutorial discretion." *Godsey*, 60 S.W.3d at 784.

When the issue of whether Moore's death sentence is disproportionate is properly viewed, as this Court did on direct appeal, it is only confirms that each of his current arguments must be rejected because this Court properly determined Moore's was not an aberrant death sentence. *See Moore*, 357 S.C. at 465, 593 S.E.2d at 612. Having failed to show error in either phase of his trial, he seeks to have this Court turn away from the damning evidence presented against him and, instead, focus upon generalities, innuendo and speculation. It is not, and indeed should not, be enough to revisit the question of proportionality of his death sentence.

Therefore, Moore's death sentence is not disproportionate and the Court should not re-visit the question.

II. This Court should not abandon the measured and reasonable approach to proportionality review set forth in *Copeland* by expanding the pool of cases for its comparative proportionality review to include "similar cases in which the death penalty was not imposed."

Respondent understands that the Court has expressed some theoretical concern over the review mandated by §16-3-25(C). *See*, *e.g.*, *State v. Dickerson*, 395 S.C. 101, 125 n. 8, 716 S.E.2d 908 n. 8 (2011), *cert*. *denied*, 566 U.S. 694 (2012). However, Respondent submits that there is no sound reason for this Court to abandon the measured and reasonable approach to proportionality review set forth in *Copeland* by expanding the pool of cases for its comparative proportionality review to include "similar cases in which the death penalty was not imposed" because (1) 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; (2) the courts in at least three states with the same pool of cases have repeatedly declined to expand their pool of cases beyond cases in which a death sentence was imposed; (3) the General Assembly, which is presumptively aware of the Court's interpretation of § 16-3-25(C)(3), has not amended the relevant pool of cases for proportionality review over the course of almost four decades. This indicates that *Copeland*'s construction was correct; (4) the Court's expressed concern in *Dickerson* is misplaced because the absence of a death sentence being overturned as 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*, 129 S.Ct. 481 (2008) (Stevens, J., statement), should cause this Court to re-visit the relevant pool of cases for proportionality review; (5) Moore misunderstands the purpose of proportionality review; (6) the proffered Supplemental Appendix that the Court refused to accept makes clear that any other approach would require the Court to engage in "intolerable speculation" as to why a death sentence was not imposed; and (7) Moore's approach would needlessly interfere with and may chill the exercise of prosecutorial discretion.

Copeland was the first case in which this Court gave a detailed explanation of the rationale underlying the manner in which the Court conducts proportionality review.[16] In *Copeland*, this

[16] *Shaw* was the first case to address constitutional challenges to the state's present death penalty scheme. In conducting proportionality review under §16-3-25(C)(3), the Court noted, "As an additional check against the random imposition of the death penalty," the Court was "directed to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Shaw*, 273 S.C. at 211, 255 S.E.2d at 807. The Court found that there were "no similar cases against which the proportionality of the sentences imposed upon appellants can be measured." *Id*. Still, the Court still found their sentences were not disproportionate:

Court initially noted that the General Assembly "plainly and properly left to this Court" the responsibility of defining " 'similar cases' " under §16-3-25(C)(3). *Copeland*, 278 S.C. at 587, 300 S.E.2d at 72. The Court stated that it had taken "careful note" of *Furman* and the United States Supreme Court's cases "touching on proportionality review" that followed it. After discussing these cases, the Court correctly found that the Supreme Court had "implicitly recognized this tension in that it has carefully avoided imposing any model of appellate review upon the states." *Id*. at 588, 300 S.E.2d at 72. *See also Pulley*, 465 U.S. at 45 ("We take statutes as we find them. To endorse the statute as a whole is not to say anything different is unacceptable"). This Court added, "It is thus apparent that the Eighth Amendment to the U.S. Constitution does not mandate any mode of appellate review, or even appellate review as such, but only an outcome. That outcome, again, is a penalty imposed on a meaningful basis which can be sustained as neither

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> The inability of this Court to compare this case with any other similar cases does not require, however, that appellants' sentences be set aside. Any system of review that requires a comparison of each case with all similar prior cases must have a beginning. There will be a first case for each type or category of capital case that may appear and that first case necessarily cannot be compared to any other similar cases. The first case must stand alone, otherwise comparative sentence review would be forever impossible.
>
> The current death penalty statutes comply with the guidelines set out by the United States Supreme Court in *Gregg*. We have considered and overruled each assignment of error by appellants and have completed the statutorily mandated sentence review. Additionally, we have searched the record In favorem vitae for any prejudicial error and have found none.

Id. In the other post-*Furman* capital cases preceding *Copeland*, the Court relied upon other cases in which the defendants had been sentenced to death in conducting its proportionality review but did not discuss the reasons why it had selected this as the relevant pool of cases. *See*, *e.g*., *Hyman* and *Gilbert*, *supra*; *Thompson v. State*, 278 S.C. 1, 292 S.E.2d 581 (1982), *cert*. *denied*, 456 U.S. 938 (1982), *reh*. *denied*, 457 U.S. 1112 (1982); *State v. Butler*, 277 S.C. 452, 290 S.E.2d 1 (1982), *cert*. *denied*, 459 U.S. 932 (1982).

excessive nor disproportionate in light of the crime and the defendant." 278 S.C. at 590, 300 S.E.2d at 74.

The Court then found that:

> §16-3-25(C)(3) … represents an act of legislative grace by the General Assembly which we are required to interpret in accordance with sound rules of statutory construction.
>
> In our view, the search for "similar cases" can only begin with an actual conviction and sentence of death rendered by a trier of fact in accordance with § 16-3-20 of the Code. We consider such findings by the trial court to be a threshold requirement for comparative study and indeed the only foundation of "similarity" consonant with our role as an appellate court.
>
> We recognize that in some jurisdictions and commentaries it is felt that the reviewing court should compare a given death sentence with a "universe" of cases which includes sentences of life imprisonment, acquittals, reversals and even mere indictments and arrests. Under such a regime, the reviewing court could only determine the size of its sample or "universe" by some arbitrary device. *Fact findings of the trial court*, by contrast, *provide a fundamental line of demarcation* well recognized in and even *exalted by our legal tradition*. *The decisive importance of such findings is evidenced by the language of Article V, section 5, South Carolina Constitution, which limits our review to "correction of errors at law" in all but equity cases*.
>
> To expand the notion of a "universe" would also entail *intolerable speculation* by this Court. Under the South Carolina statute, a jury is not required to state its reasons for failing to recommend a sentence of death. In a given case, the alleged aggravating circumstance may not have been proven to the satisfaction of the jury, while in another "similar case" (expansively defined) the statutory mitigating circumstances or some mitigating factor "otherwise authorized or allowed by law" may have deterred imposition of the death sentence.
>
> This Court would enter a realm of *pure conjecture* if it attempted to compare and contrast such verdicts with an actual sentence of death. They represent acts of mercy which have not yet been held to offend the United States Constitution. Moreover, they reflect the emphasis upon individualized sentencing mandated by the United States Supreme Court. We will not subject these verdicts to scrutiny in pursuit of phantom "similar cases," when a meaningful sample lies ready at hand in those cases where the jury has spoken unequivocally.

Id. at 590-91, 300 S.E.2d at 74 (emphasis added).

The Court reasoned that death sentences that were "infected by prejudicial trial error [were] a nullity which must be categorically rejected from any comparative review of properly imposed death sentences." Accordingly, the Court excluded prior cases in which the Court vacated and remanded death sentences for retrial from the relevant cases for its proportionality review. *Id*. at 592, 300 S.E.2d at 75. After finding the appellants' sentences were not disproportionate, the Court stated, "Without hazarding a prediction, we can imagine that the 'universe' of similar cases will gradually expand in the fullness of time. …. As dissimilar circumstances may lead to affirmed sentences of death, new 'classes' or types of capital cases will be added to the existing 'pool.' " *Id*. at 596, 300 S.E.2d at 77.

The Court concluded its discussion of proportionality as follows:

> In the foregoing construction of § 16–3–25(C) of the Code, this Court has paid particular attention to the reasoning adopted by three members of the U.S. Supreme Court, speaking through Justice White, in *Gregg v. Georgia*, *supra*. As he understood the proportionality function, it was to serve as a mechanism to monitor imposition of death sentences within "classes" or "types" of crimes, those "classes" and "types" being determined by the statutory aggravating circumstances in a given state scheme. 428 U.S. at 223–224, 96 S.Ct. at 2948–2949. In a concluding passage, Justice White in essence stated the philosophy underlying our definition of "similarity" as he answered complaints that the Georgia statute permitted unconstitutional acts of discretion:
>
> > Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment, a lesser penalty, or are acquitted or never charged, seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder.

Copeland, 278 S.C. at 596-97, S.E.2d at77-78.

Notwithstanding Moore's arguments to the contrary, Respondent submits *Copeland* provides a measured and reasonable approach to proportionality review that is consistent with the legislative intent behind enactment of § 16-3-25-(C)(3). Moore suggests that "meaningful review is stifled by this Court's prior rulings limiting review to only cases in which a defendant was sentenced to death." However, South Carolina's method of conducting comparative proportionality review is hardly unique, since six other states use the same pool of relevant cases – those cases in which a defendant was actually sentenced to death – in conducting proportionality review.[17] Granted the states may have procedures for conducting this review that differ from South

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[17] Twenty-seven states presently have the death penalty: Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming. California, Oregon, and Pennsylvania have gubernatorial moratoriums in place. *See* Death Penalty Information Center, State by State, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited April 7, 2021). In addition, the New Hampshire legislature voted to abolish the death penalty in 2019. However, the repeal was not retroactive, and one person remains on death row. *See State v. Addison*, 116 A.3d 551 (N.H. 2015) (*Addison II*).

Of these states, fourteen still conduct comparative proportionality review. Seven states, including South Carolina, limit the pool of relevant cases to those in which a death sentence has actually been imposed. *See*, *e.g.*, **S.C.:** *Copeland*, 278 S.C. at 586-97, 300 S.E.2d at 71-78; **Ala.:** *Gissendanner v. State*, 949 So.2d 956, 975 (Ala.Crim.App. 2006), *cert. denied*, 549 U.S. 1222 (2007); *Beck v. State*, 396 So.2d 645, 664 (Ala. 1980); **Ga.:** *Willis v. State*, 820 S.E.2d 640, 668 (Ga. 2018), *reconsideration denied* (Nov 15, 2018); *Walker v. State*, 282 Ga. 774, 653 S.E.2d 439 (2007), *cert. denied*, 555 U.S. 979 (2008), *overruled on other grds*, *Ledford v. State*, 289 Ga. 70, 85(14), 709 S.E.2d 239 (2011); **Ky.:** *Gall v. Commonwealth*, 607 S.W.2d 97 (Ky. 1980); *Thompson v. Parker*, 867 F.3d 641, 652-53 (6th Cir. 2017) (upholding challenges to Kentucky statute); **Miss.:** *Garcia v. State*, 300 So.3d 945, 982 (Miss. 2020); **Neb.:** *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706, 733 (1986); **OH.:** *State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383, 395 (1987); *Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 852-54 (6th Cir. 2017) (upholding Ohio's statute). Six states include in their relevant pool consider cases in which a capital sentencing hearing actually was held and death was a sentencing option, regardless of the sentence actually imposed. *See* **Mo.:** *State v. Whitfield*, 837 S.W.2d 503, 515 (Mo. 1992) (en banc); **Mont.:** *State v. Smith*, 280 Mont. 158, 931 P.2d 1272, 1285 (1996); *State v. Sattler*, 956 P.2d 54, 72-73 (Mont. 1998); **N.H.:** *State v. Addison*, 7 A.3d 1225, 1243-44 (N.H. 2010) (*Addison I*); **N.C.:**

Carolina's, but the number of states limiting their pool of cases to those where a sentence of death was imposed constitute half of the states that still conduct proportionality review. *Id*.

Also, the state supreme courts in at least three of the states that limit the pool of cases for proportionality review to cases where the defendants received a death sentence - Mississippi, Nebraska and Oklahoma - have repeatedly declined to expand their pool of cases beyond cases in which a death sentence was imposed. *See Lester v. State*, 692 So.2d 755, 801-02 (Miss. 1997), *overruled on other grds*, *Weatherspoon v. State*, 732 So.2d 158 (Miss. 1999) (Court rejecting the argument that Mississippi's proportionality review statute was unconstitutional because it did not include "all cases in which the death penalty could be imposed … including those in which the death penalty is not actually imposed," and holding that "the current guidelines are sufficiently specific, and we find no reason to undertake the overwhelming task of considering all death eligible cases in our review"); *Evans v. State*, 226 So. 3d 1, 40 (Miss. 2017) (rejecting capital appellant's argument that "in conducting proportionality review, th[e] Court must consider not only cases in which the death sentence was imposed, but also cases in which it was not imposed," noting that it

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State v. Williams, 308 N.C. 47, 301 S.E.2d 335, 355 (1983); **S.D.:** *State v. Rhines*, 548 N.W.2d 415, 455 (S.D. 1996); **Tenn.:** *Pruitt*, 415 S.W.3d at 208-16.

Utah "will review generally to prevent disproportionality… [but] will not … conduct a case-by-case review." *State v. Lafferty*, 20 P.3d 342, 374 (Utah 2001). Louisiana includes in its pool all death-eligible homicide convictions. *State v. Martin*, 376 So.2d 300, 312-13 (La. 1979); *State v. Thompson*, 516 So. 2d 349, 357 (La. 1987). Many other states, such as Florida, Arizona, and Oklahoma do not conduct proportionality review. *See*, *e.g.*, *Ceja v. Stewart*, 97 F.3d 1246, 1252 (9th Cir. 1996) ("Arizona's application of an adequately narrowed aggravating circumstance insured that Ceja's substantive right to be free from a disproportionate sentence was not violated."); *Lawrence v. State*, 308 So.3d 544, 552 (Fla. 2020) (abandoning the "requirement to review death sentences for comparative proportionality and thus eliminate[d] comparative proportionality review from the scope of our appellate review set forth in rule 9.142(a)(5)"); *Foster v. State*, 714 P.2d 1031, 1041 (Okla. Crim.App. 1986) (emphasizing that "to additionally require a proportionality review on appeal is superfluous" and that "the appellant is not denied a substantial protection in the absence of a proportionality review, nor is his situation altered to his disadvantage").

had previously rejected this argument in *Lester* and finding no disproportionality); *State v. Gales*, 269 Neb. 443, 494, 694 N.W.2d 124, 168 (2005) ("In *State v. Palmer*, *supra*, we … determined that a literal reading of the statutes would effectively repeal the death penalty, which we understood to be against the Legislature's intent. In order to effectuate the Legislature's intent, within the constitutional limitations identified in [*State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982)], we concluded that our proportionality review should include only those cases in which the death penalty was imposed"); *State v. Jordan*, 804 N.E.2d 1, 17 (OH. 2004) (rejecting argument that the current "pool" or "universe" of cases for that Court's proportionality review should be expanded to "include all those cases in which a capital specification has been charged," and holding that "proportionality review need entail only those cases in which the death sentence has been imposed."). *See also State v. Esparza*, 529 N.E.2d 192, 198 (OH. 1988).

Further, in determining that the relevant pool of cases for comparison is those where the defendant had been sentenced to death, the Court in *Copeland* interpreted § 16-3-25(C)(3) "in accordance with sound rules of statutory construction." *See* 278 S.C. at 590-91, 300 S.E.2d at 74. *See also Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993) ("The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature"). The General Assembly is presumptively aware that the Court made this interpretation of § 16-3-25(C)(3). Yet, the General Assembly has not chosen to amend the relevant pool of cases for proportionality review in the thirty-seven years since the Court's opinion in *Copeland*. The General Assembly's failure to amend the statute to change the relevant pool "is evidence the Court's interpretation is correct." *See State v. Sawyer*, 409 S.C. 475, 481, 763 S.E.2d 183, 186 (2014) ("The General Assembly is presumed to be aware of this Court's interpretation of a statute, and where that statute has been amended, but no change has been made that affects the

Court's interpretation, the legislature's inaction is evidence that our interpretation is correct"); *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) ("When the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation").

Additionally, Respondent respectfully submits that the Court's expressed concern in *Dickerson*, "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," 395 S.C. at 125 n. 8, 716 S.E.2d at 908 n. 8, is misplaced. The Court's concern appears to be premised, at least in part, on Justice Stevens' statement on denial of certiorari in *Walker v. Georgia*, 555 U.S. 979, 129 S.Ct. at 453-57. However, Justice Stevens' statement has no precedential value, whatsoever. *See Teague*, 489 U.S. at 296 (holding "opinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits"); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366, n. 1 (1973) (denials of writs of certiorari have no precedential value). *See also Fults v. Upton*, No. 3:09-CV-86-TWT, 2012 WL 884766, *18 (N.D. Ga. Mar. 14, 2012), *aff'd sub nom. Fults v. GDCP Warden*, 764 F.3d 1311 (11th Cir. 2014), *cert. denied*, 577 U.S. 835(2015) ("The Court in *Walker* … denied the petitioner a writ of certiorari after finding that his proportionality claim had been procedurally defaulted. Indeed, Justice Stevens' accompanying statement is not precedent").

Also, often overlooked is that Justice Thomas wrote a statement concurring in the denial of certiorari in *Walker*, in which he opined, "There is nothing constitutionally defective about the Georgia Supreme Court's determination" where the Georgia Supreme Court "examined 21 cases in which a defendant received the death penalty for a 'deliberate plan to kill and killing for the

purpose of receiving something of monetary value' " and "concluded that petitioner's death sentence was proportional to other death sentences imposed in Georgia." *See Walker*, 555 U.S. 979, 129 S.Ct. at 482 (Thomas, J., concurring). *See also Leonard*, 846 F.3d at 853-54. In *Leonard*, the Sixth Circuit concluded that petitioner's claim Ohio's scheme for performing proportionality review was unconstitutional because it only compared a death sentence to other cases in which defendants were sentenced to death would fail even absent AEDPA's deferential review, and stated that "[t[his Court has upheld the constitutionality of the Ohio proportionality review system on numerous occasions. …. In fact, we explicitly stated that in 'limiting proportionality review to other cases already decided by the reviewing court in which the death penalty has been imposed, Ohio has properly acted within the wide latitude it is allowed' ") (citations omitted). *Id*. And, as Justice Pleicones observed in his concurrence in *Dickerson*, "[w]hile perhaps Justice Stevens would find our practice of reviewing only other capital cases violative of the Eighth Amendment, the fact remains that proportionality review is a requirement only of state law, not the Constitution." *Dickerson*, 395 S.C. at 127 n. 9, 716 S.E.2d at 909 n. 9 (citing *Pulley*) (Pleicones, J., concurring).

Moreover, the fact this Court has not previously found any death sentence was disproportionate should not cause the Court concern. Rather, this demonstrates that South Carolina's "capital sentencing scheme is functioning properly." *See Godsey*, 60 S.W.3d at 783 ("The fact that no death sentence has previously been invalidated as disproportionate in Tennessee is an indication that our capital sentencing scheme is functioning properly. …. Comparative proportionality review is simply a final safeguard in the initial appellate process to ensure that no aberrant death sentence is affirmed"). *See also State v. Cobb*, 743 A.2d 1, 125 (Conn.1999) (noting that disproportionate sentences will be unlikely where the sentencing authority is correctly

instructed and appropriately follows the statute); *State v. Holliday*, 2017-01921, **95, 2020 WL 500475, *49 (La. S.Ct., Jan. 29, 2020) (observing, in a "**weighing state**" that only one death sentence had been set aside in Louisiana as disproportionate since 1976 and "finding in that one case … a sufficiently 'large number of persuasive mitigating factors' "), *cert. denied*, 141 S.Ct. 1271 (2021).

As discussed in Argument I, Moore misunderstands the purpose of proportionality review. The Court's function is not to act as a "super jury" or to "second-guess" the jury's decision, and the Court neither searches for proof that a defendant's sentence is perfectly symmetrical with the penalty imposed in all other similar cases, nor searches for a disproportionate or aberrant life sentence. Instead, comparative proportionality review was intended to serve "as a check against the random or arbitrary imposition of the death penalty … [and] substantially eliminate[] the possibility that a person will be sentenced to die by the action of an aberrant jury." *Gregg,* 428 U.S. at 206. *See also Copeland*, 278 S.C. at 587, 300 S.E.2d at 72. Because *Pulley* established that it is not constitutionally required, it serves today as "an additional protection for capital defendants." *Walker v. Georgia*, 555 U.S. 979, 129 S.Ct. at 482-83 (Thomas, J., concurring in denial of certiorari) (citing *Pulley*, 465 U.S. at 45).

Moore's brief and the proffered Supplemental Appendix that the Court refused to accept likewise make clear that any other approach than the one presently followed would require the Court to engage in "intolerable speculation" and needless "conjecture" as to why a death sentence was not imposed. These fears were another significant reason the Court limited the relevant pool of cases for proportionality review in *Shaw* and *Copeland* to those where the defendant had received a sentence of death. *E.g.*, *Copeland*, 278 S.C. at 591, 300 S.E.2d at 74. *See also Dickerson*, 395 S.C. at 127, 716 S.E.2d at 909 (Pleicones, J., concurring) (As *Copeland* explains, to include

in our review cases where a capital sentence was sought but not imposed requires us to speculate on, among other things, the solicitor's decision-making process, the strength of the State's case, and/or upon the jurors' or trial judge's decision to exercise mercy. Moreover, our reference for proportionality extends only to cases which are appealed, and thus is not truly representative of all cases where the death penalty was or could have been sought. Experience teaches that many of these cases where a lesser sentence is imposed are never appealed").

Moore asserts the Court should include in the relevant pool of cases those in which the State entered into a plea bargain or otherwise failed to seek the death penalty, either by never serving notice of intent to seek death or by withdrawing the notice after it had been served. However, "in a case in which no penalty phase hearing was held, there was of necessity no searching inquiry by a fact finder—jury or trial court—charged with the responsibility of determining whether there was a statutory aggravating factor established by the state or a mitigating factor established by the defendant. Yet it is the presence or absence of just those factors, as found by a fact finder charged with that awesome responsibility, that is wholly determinative of whether the sentence for a conviction of capital felony shall be death or life without the possibility of release." *Webb*, 680 A.2d at 211.

Also, the "consideration of cases in which the State, for whatever reasons, did not seek the death penalty would necessarily require [the Court] to scrutinize what is ultimately a discretionary prosecutorial decision." *Godsey*, 60 S.W.3d at 784 (citing *Webb*, 680 A.2d at 211-12). *See also Pruitt*, 415 S.W.3d at 216 ("We continue to find it difficult to make a meaningful comparison between a death penalty case on appeal and other cases in which the death penalty was never sought"). Similarly, if the Court considered cases in which the State never sought the death penalty, the Court "would in effect be using a prior decision of the state not to do so as a basis for

invalidating a death penalty in an unrelated case. …[S]uch a course would carry an impermissible risk of discouraging the state from exercising its discretion not to seek the death penalty—either unilaterally or by virtue of engaging in plea bargaining with a defendant charged." *Webb*, 680 A.2d at 212. "Proportionality review is not, and was never intended to be, a vehicle for reviewing the exercise of prosecutorial discretion." *Godsey*, 60 S.W.3d at 784.[18]

Of course, there is no guarantee that capital defendants will be satisfied even should the Court decide to expand the relevant pool of cases for proportionality review to include, for example, those cases in which the State sought the death penalty, there was a separate sentencing proceeding and the jury returned a verdict of either death or life imprisonment. The Tennessee Supreme Court adopted such a pool in *Bland*, 958 S.W.2d at 666-67. Yet, capital defendants have repeatedly but unsuccessfully asked the Court to further expand the pool. *See Godsey* and *Pruitt*, *supra*. *See also State v. Clayton*, 535 S.W.3d 829, 852 (Tenn. 2017), *cert. denied*, 138 S.Ct. 1991 (2018); *State v. Hawkins*, 519 S.W.3d 1, 50-51 (Tenn. 2017), *cert. denied*, 138 S.Ct. 388 (2017), *reh. denied*, 138 S.Ct. 729 (2018).

Finally, Respondent submits that:

> Egregiousness is a moral judgment susceptible of few hard-and-fast rules. More importantly, egregiousness of the crime is only one of several factors that render a punishment condign—culpability, rehabilitative potential, and the need for deterrence also are relevant. That is why this Court has required an individualized

[18] Respondent submits that Moore attempts to turn back the clock by claiming that amendments to South Carolina's capital punishment scheme look more and more like the mandatory death penalty plan condemned in *Furman*. His argument is disingenuous. *See Pulley*, 465 U.S. at 54 ("Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in *Furman*. As we have acknowledged in the past, "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death' "). His contention that more individuals are eligible for a possible death sentence today than when this Court decided *Copeland*, ignores that he is not one of those individuals because all three aggravating circumstances found in his case in 2001 have been part of 16-3-20(C)(a) since 1977. *See Shaw*, 273 S.C. at 213, 255 S.E.2d at 808 (Appendix A).

> consideration of all mitigating circumstances, rather than formulaic application of some egregiousness test.
>
> It is because these questions are contextual and admit of no easy answers that we rely on juries to make judgments about the people and crimes before them. The fact that these judgments may vary across cases is an inevitable consequence of the jury trial, that cornerstone of Anglo–American judicial procedure. But when a punishment is authorized by law—if you kill you are subject to death—the fact that some defendants receive mercy from their jury no more renders the underlying punishment "cruel" than does the fact that some guilty individuals are never apprehended, are never tried, are acquitted, or are pardoned.

Glossip v. Gross, 576 U.S. 863, 896 (2015) (Scalia, J., concurring).

CONCLUSION

Based on the foregoing, Respondent submits the petition should be denied in its entirety. Moore is not entitled to any relief procedurally or substantively. This Court should decline Moore's invitation to alter the established proportionality review parameters historically accepted and applied in this jurisdiction.

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