THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION

Appellate Case No. 2020-001519

Richard Bernard Moore,

Petitioner,

v.

Bryan P. Stirling, Commissioner, South Carolina Department of Corrections,

Respondent.

PROPOSED AMICUS BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., SUPPORTING PETITIONER RICHARD MOORE

Mark C. McLawhorn, Bar No. 78408
MCLAWHORN LEGAL, LLC
1201 Main Street, Ste. 1980
Columbia, SC 29201
(803) 740-5075
mark@mclawhornlegal.com

Mahogane D. Reed*
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
700 14th Street NW, Suite 600
Washington, DC 20005
(202) 682-1300
mreed@naacpldf.org

*_Pro Hac Vice_ Application Pending

Attorneys for *Amicus Curiae*

INTEREST OF AMICUS CURIAE

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans and to break down barriers that deny Black people their most basic civil and human rights. LDF has long challenged the unconstitutional imposition of the death penalty, including its racially discriminatory application against Black people and disproportionally in crimes involving white victims. *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238 (1972); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Buck v. Davis*, 137 S. Ct. 759 (2017).

LDF thus has a strong interest in Petitioner Richard Moore's case and the questions it raises about the proportionality of Mr. Moore's death sentence and the adequacy of this Court's comparative proportionality review in remedying racial discrimination in the imposition of the death penalty.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

TABLE OF AUTHORITIES
(CONTINUED)

PAGE(S)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(CONTINUED)

PAGE(S)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(CONTINUED)

PAGE(S)

OTHER AUTHORITIES

QUESTIONS PRESENTED

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

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

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Our constitutional democracy must strive toward a fair, equitable, and impartial application of the law. Disparate treatment based on race in the criminal justice system is fundamentally incompatible with these principles, and indeed places the rule of law itself in jeopardy. For these reasons, the Supreme Court has long condemned racial discrimination in all aspects of the administration of justice, and it has recognized that allowing race to affect the imposition of criminal sanctions threatens the legitimacy of the criminal justice system writ large. *See Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) ("Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process.") (quoting *David v. Ayala*, 576 U.S. 257, 285 (2015)).

Racial discrimination in the imposition of capital punishment is "especially serious." *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion). Because of the complete finality of a death sentence, the Court has recognized that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). The Supreme Court has thus required that capital punishment laws contain safeguards to ensure that death sentences do not reflect the influence of arbitrary factors unrelated to the defendant's moral culpability. *See McCleskey v. Kemp*, 481 U.S. 279, 309, 313 (1987); *Gregg v. Georgia*, 428 U.S. 153 (1976). Race is the quintessential arbitrary factor that infects the administration of justice in this country; it is therefore essential that courts "engage[] in 'unceasing efforts' to eradicate racial prejudice from

our criminal justice system" generally, and in the administration of the capital punishment specifically. *McCleskey*, 481 U.S. at 309 (citation omitted).

Diligence is necessary because race-based discrimination has for centuries been a core feature of criminal justice and capital punishment systems across the country. Antebellum criminal codes expressly mandated death sentences for even minor offenses committed by enslaved Black people against white people but imposed lesser or no punishment for similar crimes committed against Black people. Post-Civil War criminal codes similarly punished Black people by death for crimes that incurred lesser punishments for white offenders. Even after states were forced to abandon facially discriminatory criminal statutes, prosecutors and jurors discriminatorily exercised their discretion to disproportionately seek and impose death sentences against Black men accused of killing white people.

It was, in part, this repugnant influence of race on capital punishment that led the Supreme Court to invalidate death penalty statutes in Georgia, Texas, and 37 other states in 1972. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). And it was the perceived assurance that guided-discretion death-penalty statutes—designed to limit the unbridled charging and sentencing discretion previously enjoyed by prosecutors and juries—would remedy the arbitrary administration of death sentences that led the Court to subsequently sanction Georgia's death penalty scheme, *Gregg*, 428 U.S. 153, upon which South Carolina modeled its own death penalty statute.

But any hope that states' revamped death sentencing schemes would remedy race-based discrimination in the administration of death has proven illusory. Dozens of post-*Gregg* studies across multiple states have demonstrated that a defendant's likelihood of receiving a sentence of death continues to turn in large part on whether the victim was white and whether the defendant is

Black. South Carolina is no exception. Localized studies and recent statistics confirm that the odds of receiving a death sentence are exponentially higher in white-victim cases than in Black-victim cases. This is especially true in the judicial circuit in which Mr. Moore was charged, convicted, and sentenced, where solicitors—including the Solicitor who noticed death in Mr. Moore's case—sought death sentences almost exclusively in cases with white victims.

Comparative proportionality review is an important but underutilized feature of this State's death penalty scheme and necessary to aid this Court in ensuring that race has played no impermissible role in the imposition of the death penalty. A key aim of proportionality review is to avoid imposing a death sentence on one defendant where a similarly situated defendant whose murder was equally aggravated is not sentenced to death. Properly applied, it will permit this Court to determine whether a death sentence is consistent with the usual pattern of sentencing decisions in similar cases, with the aim of ensuring that no death sentence is predicated, even in part, on arbitrary factors, such as the race of the defendant or the victim.

But for comparative proportionality review to serve this vital function, this Court must compare the circumstances of a defendant's case to other cases both where the death penalty was imposed and where it was not. This is especially true where most similar cases in which a sentence of death is imposed may themselves have been arbitrarily affected by race. When the Court does not consider a broader universe of similar cases, including those where death was not imposed, the Court has no opportunity to evaluate whether arbitrary factors such as race played a role in distinguishing the cases where death was imposed from the cases where it was not.

Mr. Moore's case is a striking example. Mr. Moore is a Black man convicted of killing a white victim in an armed robbery. In concluding that his death sentence was proportionate on direct appeal, this Court identified four other armed robbery homicides where the defendant received the

death sentence. Beyond Mr. Moore's compelling arguments that those other cases were considerably more aggravated and the death sentences in most of those cases were subsequently vacated, each of the cases this Court cited to support its proportionality finding involved white victims, and three involved Black defendants. By failing to consider cases where death was not imposed, this Court's proportionality review cannot and did not determine whether this pattern indicates that race has an unconstitutional impact on whether defendants convicted of armed robbery homicides receive a death sentence in this State.

By contrast, a more meaningful proportionality review—pulling "similar" cases from a larger pool of cases where a sentence of life or less was imposed—will allow this Court to ensure that impermissible factors like race do not affect a person's likelihood of death. In so doing, this Court will also perform its constitutional duty to ensure that, even among those convicted of homicides, the death penalty is limited to those who commit "'a narrow category of the most serious crimes.'" *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005)).

ARGUMENT

Racial discrimination in the administration of justice is repugnant to our system of justice. And the risk of racial prejudice infecting capital proceedings "is especially serious in light of the complete finality of the death sentence." *Turner*, 476 U.S. at 35. Yet, racial discrimination has long been a hallmark of our criminal justice system, including in the administration of the death penalty specifically. And the guided discretion statutes that the Supreme Court assumed would be sufficient to minimize unconstitutional arbitrariness have been insufficient in addressing this pattern of discrimination that undermines the rule of law itself. Since *Gregg*, studies have repeatedly shown that the likelihood of a defendant receiving a death sentence in capital cases

involving similar aggravating circumstances depends, in significant part, on race. Prosecutors are more likely to pursue death, and juries are more likely to impose it, when the victim is white—especially if the defendant is Black. Proportionality review would allow this Court to remedy this unconstitutional arbitrariness, but only if the Court expands the universe of cases it considers to include those where a death sentence was not imposed.

I. This Country Has a Long History of Racial Discrimination in the Administration of Capital Punishment.

Racial discrimination in the administration of capital punishment is not new. Since the founding of this country, disparate sentencing and the imposition of death based on race has been a consistent feature of capital punishment systems.[1]

Prior to the Civil War, many states maintained separate capital offenses based on slave status and race—offenses committed by Black people and against white people were punished more harshly (and disproportionately by death) than offenses committed by white people or against Black people.[2] For example, in antebellum Virginia, "free African Americans (but not whites) could get the death penalty for rape, attempted rape, kidnapping a woman, and aggravated assault—all provided the victim was white."[3] In Louisiana, an enslaved person "who struck his master, a member of the master's family, or the overseer, 'so as to cause a contusion, or effusion

---

[1] *See* Carol S. Steiker and Jordan M. Steiker, *The American Death Penalty and the (In)visibility of Race*, 82 U. Chi. L. Rev. 243, 245–53 (2015) (hereinafter "(In)visibility of Race") (observing that "[i]t is impossible to find a time in American history . . . when the use of the death penalty was not racially inflected," and tracing racially disparate imposition of death sentences to the Seventeenth Century).

[2] *See* Steiker, *(In)visibility of Race*, *supra* note 1 at 248; *see also* Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 Col. Hum. Rts. L. Rev. 983, 989 (2020) (hereinafter "Valuing Black Lives"); Catherine Grosso, Jeffrey Fagan, Michael Laurence, David Baldus, George Woodworth, Richard Newell, *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L. Rev. 1394, 1441 (2019) (hereinafter "Death by Stereotype").

[3] Steiker, *(In)visibility of Race*, *supra* note 1 at 248.

or shedding of blood,'" was sentenced to death.[4] And in Georgia, the criminal code required a death sentence for any murder committed by a slave or free person of color against a white person.[5]

Following the Civil War, many states, including South Carolina, enacted Black Codes to maintain by law the subjugation of formerly enslaved persons. Many of these Codes contained provisions permitting punishment of Black people by death "for crimes that incurred lesser punishments for white offenders."[6] Even after these facially discriminatory laws were invalidated, the racial discrimination that permeated capital punishment systems before the Civil War persisted as a result of the broad discretion accorded prosecutors and juries.[7] This unbridled discretion was often used to notice and impose death for Black people, especially in cases involving white victims. From 1930 until 1972, approximately half of the people sentenced to death and executed for homicide in the United States were Black.[8] During this same period, 455 men were executed for rape across the United States—405, or 89.1%, of them were Black, and they were virtually all convicted of raping white women.[9]

---

[4] Hoag, *Valuing Black Lives*, *supra* note 2 at 989.

[5] *See* Ngozi Ndulue, Death Penalty Information Center, *Enduring Justice: The Persistence of Racial Discrimination in the U.S. Death Penalty*, at 3 (Sept. 2020), available at https://documents.deathpenaltyinfo.org/pdf/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf (hereinafter "*Enduring Justice*"); *see also McCleskey*, 481 U.S. at 328 (1987) (Brennan, J., dissenting) (citing A. Higginbotham, *In the Matter of Color: Race in the American Legal Process* 256 (1978)).

[6] John H. Blume, Sheri L. Johnson, Emily C. Paavola, Keir M. Weyble, *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-Furman Era*, 4 Charleston L. Rev. 479, 503 (2010) (hereinafter "*When Lightning Strikes Back*").

[7] *When Lightning Strikes Back*, *supra* note 6 at 504.

[8] *Id*.

[9] *Enduring Justice*, *supra* note 5 at 16 (citing U.S. Dep't of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, Capital Punishment 1930–1968 (1969)). The Supreme Court held that the death penalty was a "grossly disproportionate and excessive" punishment for the crime of rape in its decision in *Coker v. Georgia*. 433 U.S. 584, 592 (1977).

II. The Supreme Court Has Held that Any Death Penalty Statute Must Ensure that Death Sentences Do Not Result from Arbitrary Factors Like Race.

The relationship between race and capital punishment was one of the factors that compelled the Supreme Court, in 1972, to invalidate the capital punishment statutes in Georgia, Texas, and 37 other states— including South Carolina—as violative of the Eighth Amendment's prohibition on cruel and unusual punishment. *See Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). The challenged death penalty schemes gave jurors "untrammeled discretion" to decide which defendants should be sentenced to death, *id*. at 247, 248 (Douglas, J., concurring), resulting in death sentences that were "wantonly and . . . freakishly imposed" because there was no perceivable and rational basis differentiating those who died from those who went to prison, *id*. at 310 (Stewart, J., concurring). As Justice Stewart explained, for the "capriciously selected random handful" sentenced to death, it was akin to being struck by lightning. *Id*. at 309–10.

Several justices emphasized the role of race as one of the principal factors leading to these unconstitutionally arbitrary outcomes. Justice Marshall recognized the racial disparity created by unguided sentencing schemes—that "Negroes were executed far more often than whites in proportion to their percentage of the population." *Id*. at 364–65 (Marshall, J., concurring). He noted that evidence of "[r]acial or other discrimination should not be surprising" given the Court's prior endorsement of capital sentencing schemes that commit to the "untrammeled discretion of the jury the power to pronounce life or death"; the Court's prior precedent, Justice Marshall explained, had provided an "open invitation to discrimination." *Id*. at 365 (Marshall, J., concurring). Justice Douglas recognized the same potential for discrimination inherent in Georgia's capital punishment scheme, observing that "the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is . . . a member of a suspect or unpopular minority." *Id*. at 255 (Douglas, J., concurring); *see also id.* at 257

(observing that the death penalty statutes at issue in *Furman* were "pregnant with discrimination"). And although he did not rest his conclusion on evidence of racial discrimination, Justice Stewart observed that other concurring justices had demonstrated that "if any basis can be discerned for the selection of these few . . ., it is the constitutionally impermissible basis of race." *Id*. at 310 (Stewart, J., concurring).

In the four years following *Furman*, at least 35 states had enacted new capital punishment systems.[10] *See Gregg*, 428 U.S. at 179–80. In 1976, the Supreme Court decided in *Gregg v. Georgia* that Georgia's new death penalty statute was constitutional. In *Gregg*, the Court recognized that, because of "the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Id*. at 188 (joint opinion of Stewart, Powell, and Stevens, JJ). The Court in *Gregg* further held that Georgia's new death penalty statute adequately eliminated that risk to pass constitutional muster. The Court highlighted several features of Georgia's new "guided discretion" statute that made it constitutional, both because it limited the types of crimes for which juries could impose a death sentence, and because it provided sufficient guidance to juries in exercising their discretion in choosing a penalty when a crime was death eligible. *See id.* at 193–95. The Court was confident that, "while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.'" *Id.* at 197–98 (quoting *Coley v. State*, 231 Ga. 829, 834 (Ga. 1974)).

The Court in *Gregg* further explained that an "important . . . safeguard" in Georgia's new sentencing scheme was the requirement that the state supreme court determine whether a sentence had been imposed under the influence of passion or prejudice, whether the evidence supports the

[10] *See Enduring Justice*, *supra* note 5 at 18.

jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases. *Gregg*, 428 U.S. at 198.

South Carolina's death penalty statute is materially identical to the Georgia statute sanctioned by the Supreme Court in *Gregg*, including the automatic proportionality review provision. *See State v. Shaw*, 273 S.C. 194, 199, 255 S.E.2d 799, 802 (S.C. 1979) (describing South Carolina's death penalty statute as "patterned after the death penalty statues of our sister state Georgia"); *see also* S.C. Code Ann. § 16-3-25 (South Carolina proportionality review statute requiring review of any case in which "the death penalty is imposed" to review the sentence; the South Carolina Supreme Court is instructed to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and . . . [w]hether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant"). Proportionality review, like other aspects of these new guided discretion statutes, was intended to reduce arbitrariness and capriciousness and the impact of discrimination in the dispensation of death.

III. Notwithstanding *Gregg*'s Requirement that the Imposition of Death Cannot Be Arbitrary, Race Continues to Play a Significant Role in Distinguishing Between Sentences of Life and Death.

Despite the Supreme Court's upholding "guided discretion" statutes on the premise that they would result in the "'non-discriminatory application'" of the death penalty, *Gregg*, 428 U.S. at 198, racial discrimination in the administration of the death penalty has persisted. Following *Gregg*, numerous studies have concluded that race, and especially the race of the victim, continues to factor heavily into whether a defendant is sentenced to death and executed.

Many studies have found that the race of the victim is likely to affect whether defendants are charged with a capital crime and are ultimately sentenced to death, especially when the

defendant is Black and the victim is white.[11] In the late 1980s, the United States General Accounting Office ("GAO") reviewed the then-existing studies about race and the death penalty.[12] The GAO evaluated the quality of 28 studies that used national, state, or local data to examine the role race plays in the death penalty post-*Furman*; the GAO concluded that in 82% of the studies, all of which controlled for level of aggravation, the race of the victim influenced the likelihood of being charged with capital homicide or receiving the death penalty.[13] Recent reviews of capital punishment research are consistent with the GAO's report. A 2015 report reviewed studies of capital charging and sentencing from across the country and reported that all 30 studies reviewed found that persons convicted of killing white victims were more likely than persons convicted of killing Black victims to face a capital prosecution.[14] The trend holds with respect to executions as well: Seventy-five percent of victims in cases resulting in an execution have been white, even though only half of victims are white.[15] And one 2017 study found that defendants who kill white people are executed at a rate 17 times greater than defendants with Black victims.[16]

Consistent with national trends, South Carolina's post-*Furman* death penalty system has continued to reflect the significance of the race of the victim in determining whether a defendant

---

[11] *See Enduring Justice*, *supra* note 5 at 18.
[12] *See* Government Accountability Office, *Report to the Senate and House Committees on the Judiciary: Death Penalty Sentencing* (GAO/GGD–90–57, 1990) at 3.
[13] *Id*. at 5; *see also* Steven Shatz and Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 Cardozo L. Rev. 1227, 1245–1251 (2013) (similar conclusion drawn from 20 plus studies conducted between 1990 and 2013).
[14] Frank R. Baumgartner, Amanda J. Grigg, Alisa Mastro, *#BlackLivesDon'tMatter: Race-of-Victim Effects in US Executions*, 1976–2013, 3 Politics, Groups, and Identities 209, 212 (2015), available at https://fbaum.unc.edu/articles/BlackLives-2015.pdf.
[15] Death Penalty Information Center, *Facts about the Death Penalty* (updated March 24, 2021), available at https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf.
[16] *See* Debra Cassens Weiss, ABA Journal, *Execution rate is 17 times greater for killers of white rather than Black victims, study says*, Aug. 5, 2020, https://www.abajournal.com/news/article/new-study-finds-people-who-kill-white-victims-more-likely-to-be-executed (citing Scott Phillips and Justin Marceau, *Whom the State Kills* (2020),

is sentenced to death. In a 1983 study on the death penalty in the state, Raymond Paternoster demonstrated that, controlling for levels of aggravation among crimes, the odds of being charged as a capital defendant were 9.6 times greater in white-victim cases than in Black-victim cases.[17] His study further indicates that when prosecutors exercise their discretion in deciding whether to seek death, impermissible arbitrary factors, such as the race of the victim or the offender, may enter into their decision.[18] More recent data indicate that juries throughout South Carolina are more likely to sentence a person convicted of killing a white person to death. Statewide, 31 out of 39, or 79% of, people currently on death row were convicted of killing at least one white victim.[19]

Spartanburg, which falls within the Seventh Judicial Circuit where Mr. Moore was prosecuted, has its own stark history of racial discrimination in the administration of the death penalty. Solicitors in Spartanburg have historically and disproportionately sought the death penalty in cases where the victim was white, and rarely (if ever) in cases where the defendant is Black.[20] Between 1977 and 1993, Professor Theodore Eisenberg, a statistical expert, found that Solicitors in the Seventh Judicial Circuit sought death in 50% of the 52 white-victim cases where punishment by death was available, and in none of the 19 Black-victim cases where an aggravating

---

available at https://harvardcrcl.org/wp-content/uploads/sites/10/2020/07/07.30.2020-Phillips-Marceau-For-Website.pdf).

[17] Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. Crim. L. & Criminology 754, 783 (1983).

[18] *Id*.; *see also* Michael J. Songer, Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S. Car. L. Review 161, 187 (2006) (study observing that on a statewide level, South Carolina prosecutors between 1993 and 1998 "processed 865 murder cases with white victims and south the death penalty in 7.6% of the white victim cases," but "sought the death penalty in only 1.3% of the 1,416 murder cases involving black victims").

[19] *See* Justice 360, *South Carolina Death Penalty Fact Sheet*, https://justice360sc.org/wp-content/uploads/2017/04/Fact-Sheet-2018.02.14.pdf (noting that 79% of current death row inmates were convicted of killing a white victim) (last updated Feb. 14, 2018).

[20] Sheri Lynn Johnson, *Litigating for Racial Fairness After McCleskey v. Kemp*, 39 Colum. Hum. Rts. L. Rev. 178, 181–82 (2007) (hereinafter "*Litigating for Racial Fairness*").

circumstance made the defendant eligible for death; according to Professor Eisenberg, "such a result would occur by chance about four times in one hundred thousand."[21]

Between 1977 and 2015, prosecutions in the Seventh Judicial Circuit resulted in 20 total death sentences; 19 of those cases involved white victims.[22] In Spartanburg alone during that same period, prosecutions resulted in 16 death sentences, and 15 of those cases involved white victims.[23] And of the four men currently on death row from Spartanburg, Mr. Moore among them, were all convicted of having at least one white victim.[24]

The record of the solicitor who noticed death in Mr. Moore's case, Former Solicitor Holman Gossett, reflects similar disparate treatment based on the race of the victim. Solicitor Gossett served as the chief prosecutor in the Seventh Judicial Circuit for nearly two decades beginning in 1985. Between 1985 and 1993, Solicitor Gossett sought the death penalty in 43% of cases where an aggravating circumstance made the defendant eligible to receive the death penalty and the victim was white, but he sought death in "zero percent of the black victim cases."[25] In armed robbery cases during this same period, Solicitor Gossett disproportionately sought death in white victim cases at a rate and resulting in a disparity that would occur by chance only one time in one hundred.[26]

---

[21] *Litigating for Racial Fairness*, *supra* note 20 at 181–82.
[22] *See* John H. Blume and Lindsey S. Vann, *Forty Years of Death: The Past, Present, and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 11 Duke J. Const. L. & Pub. Pol'y 183, Appendix A pp. 227–31 (2016) (hereinafter "*Forty Years of Death*").
[23] *See id*.
[24] *See Forty Years of Death*, *supra* note 22 at Appendix B pp. 233–34 (2016). The defendants in these cases reflect a similar racial disparity. Of the 4 men convicted of homicide and sentenced to death in Spartanburg, two are Black, one is Hispanic, and one is white. *See id*.
[25] *See Litigating for Racial Fairness*, *supra* note 20 at 181–82 (Professor Eisenberg testifying that such a disparate outcome would normally occur "only six times in ten thousand as a matter of chance").
[26] *See Litigating for Racial Fairness*, *supra* note 20 at 182.

These profound racial disparities demonstrate the persistence of racial discrimination in South Carolina's administration of the death penalty. But this Court has an underutilized tool to address the problem: comparative proportionality review.

IV. Comparative Proportionality Review is Intended to Address and Remedy the Taint of Race Discrimination in Capital Punishment, But the Scope of Court's Current Proportionality Review Does Not.

Comparative proportionality review allows a court to determine whether a death sentence is consistent with the usual pattern of sentencing decisions in similar cases.[27] A key aim of proportionality review is to avoid imposing a death sentence on one defendant where a similarly situated defendant whose crime was equally aggravated is not sentenced to death. *See Gregg*, 428 U.S. at 206 (the provision for proportionality review is to "assure that no defendant convicted" under the same circumstances as a case where the sentence of death was not imposed "will suffer a death sentence"). By comparing any given death sentence with the penalties imposed on others convicted of death-eligible crimes, proportionality is intended to ensure, first, that there is a rational basis for distinguishing those sentenced to die from those who are not, and, second, that death sentences predicated on constitutionally impermissible factors, such as the race identity of the defendant or the victim, are overturned.[28] *Cf. State v. Dickerson,* 395 S.C. 101, 125 n.8, 716 S.E.2d 895, 908 n.8 (2011) (citing Justice Stevens's statement regarding the denial of certiorari in *Walker v. Georgia,* 555 U.S. 979 (2008), in which Justice Stevens observed the important of comparative proportionality review in reducing the risks of arbitrariness and racial discrimination in the imposition of the death penalty). The Supreme Court and this Court have recognized comparative proportionality review as an important tool and a "check against the random or

[27] Timothy V. Kaufman-Osborn, *Proportionality Review and the Death Penalty*, 29 Just. Sys. J. 257, 260 (2008) (hereinafter "*Proportionality Review and the Death Penalty*").
[28] *Id*. at 258.

arbitrary imposition of the death penalty." *Gregg*, 428 U.S. at 206; *see also State v. Shaw*, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (S.C. 1979) (characterizing comparative proportionality review as "an additional check against the random imposition of the death penalty").

Comparative proportionality review requires a court to perform three steps.[29] First, a court must decide what will encompass the universe of comparator cases to be considered.[30] Second, a court must choose what cases it will deem similar to the case on appeal.[31] And third, a court must decide whether a specific case is proportionate when measures against that pool.[32] Each of these steps is important, but the first—selecting the universe of cases to be considered—is more so. A court can take a restrictive approach and limit review to cases that resulted in death sentences upheld on appeal, or it can review all cases in which the facts provide the legal basis for a possible capital prosecution, regardless of whether such prosecution actually ensues.[33] To be meaningful, though, a court must consider at least some cases where a defendant was accused of a similar crime but the prosecutor did not seek, or the jury did not impose, a death sentence. This Court's current approach to proportionality lacks this critical feature, but this case provides the Court with an opportunity to correct its approach to ensure proportionality review minimizes the risk of arbitrary and discriminatory death sentences.

A. The Scope of This Court's Comparative Proportionality Review Is Ineffective in Eliminating Race Discrimination in the Administration of the Death Penalty.

This Court currently limits its comparative proportionality review to the universe of cases where a sentence of death was imposed. *See State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63,

[29] Proportionality Review and the Death Penalty, *supra* note 27 at 260.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

74 (S.C. 1982) (concluding that, "in [the court's] view, the search for 'similar cases' can only begin with an actual conviction and sentence of death rendered by a trier of fact," and declining to draw from cases that include sentences of life or less). This approach fails to satisfy the aims of proportionality review, as it deprives this Court of any means of evaluating the relative frequency with which this penalty is imposed in the larger class of crimes;[34] under this more limited approach, the exercise of comparative proportionality review is perfunctory.[35] *See* Moore Br. at 33 (observing that this Court's current method of conducting comparative proportionality review fails to identify and correct disproportionate sentences on direct review and does not fulfill its statutory function as intended). Indeed, this Court itself recently acknowledged that restricting proportionality review to cases in which death was imposed "is largely a self-fulfilling prophecy" because "simply examining similar cases where the defendant was sentenced to death will almost always lead to the conclusion that the death sentence under review is proportional." *State v. Dickerson*, 395 S.C. 101, 125 n.8, 716 S.E.2d 895, 908 n.8 (S.C. 2011).

Moreover, such a cramped approach means that comparative proportionality review cannot remedy racial discrimination in the imposition of the death penalty. By using as comparators only

---

[34] *Id.*; *see also* John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the "Modern" Era of Capital Punishment in South Carolina*, 54 S.C. L. Rev. 285 (2002).

[35] *See* Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"*, 87 J. Crim. L. & Criminology 130, 174 (1996) (observing that the limitation of reviewing cases in which the sentence of death had actually been imposed "essentially reduces proportionality review to a perfunctory exercise"); Chris Hutton, *Legitimizing Capital Punishment: Rationality Collides with Moral Judgment*, 42 S.D. L. Rev. 399, 431 (1996) (observing that limiting pool of cases to small subset of those in which death was imposed makes proportionality review perfunctory and risks that death sentences may not have been "meted out as carefully as society demands"); Clark Calhoun, *Reviewing the Georgia Supreme Court's Efforts at Proportionality Review*, 39 Ga. L. Rev. 631, 657 (2005) (observing that the Georgia Supreme Court limits proportionality review to cases where death was imposed, turning the court's review into a perfunctory one).

other cases with similar aggravation where a death sentence was imposed, the Court never has an opportunity to consider whether and how the race of the victim or the race of the defendant influences charging and sentencing decisions. To identify such discrimination, the Court must compare similar cases where death was, and was not, imposed to determine if race is a factor that distinguishes the two.

In other words, if the Court considers only cases with similar aggravation where a death sentence was imposed, a death sentence may appear "proportionate" even though death sentences in such cases always or almost always involve white victims. There are many similar cases involving Black victims where a death sentence is not imposed. This skewed proportionality review allows persisting racial discrimination to go unchecked.[36]

This risk is apparent when, as here, a case involves a homicide committed during a robbery. Most armed-robbery homicides fall into a class of homicides that death-penalty researchers term "mid-range," *i.e.*, they are death-eligible offenses, but the majority of them are neither the least aggravated homicides, for which prosecutors rarely seek death, nor the most aggravated homicides, for which prosecutors seek death the vast majority of the time.[37] It is in these mid-range aggravation cases where race often plays a significant role in distinguishing between a sentence of life and death. Researchers have shown that when cases are ranked from 1 to 8 in increasing

---

[36] *Cf.* Steve Sprenger, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Case*, 73 Iowa L. Rev. 719, 733 (1988) ("If review and comparison are limited to cases where death is actually imposed, the base is too narrow and fails to take any cognizance of the multitude of similar cases where the perpetrator of the homicide never faces the risk of death because of the action taken by the prosecutor in not charging first degree murder." (quoting Hearings on L.B. 711 Before the Judiciary Comm., 85th Leg., 2d Sess. 7377 (1978) (statement of Senator Chambers), quoted in *State v. Palmer*, 399 N.W.2d 706, 752 (Neb. 1986)).

[37] *See* Donald H. Wallace and Jonathan R. Sorensen, *A State Supreme Court's Review of Comparative Proportionality: Explanations for Three Disproportionate & Executed Death Sentences*, 20 T. Jefferson L. Rev. 207, 219–20 (1998).

severity of aggravation, cases in the middle categories involve the most pronounced disproportionate treatment by race.[38] This trend is longstanding. In *McCleskey v. Kemp*, the Baldus study indicated that in cases reflecting an intermediate level of aggravation (in which Mr. McCleskey's armed robbery case fell, *see McCleskey v. Kemp*, 753 F.2d 877, 898 (11th Cir. 1985)), and in which the jury has considerable discretion in choosing a sentence, "death is imposed in 34% of white-victim crimes and 14% of black-victim crimes, a difference of 139% in the rate of imposition of the death penalty," *McCleskey*, 481 U.S. at 325 (Brennan, J., dissenting) (describing findings regarding intermediate-aggravation cases from the Baldus study); *see also id.* at 299 (majority opinion) (assuming the validity of the Baldus study).[39]

If a state supreme court looks only at other cases where the death penalty was imposed in its comparative proportionality review, it may well be able to identify cases that appear broadly similar, which also resulted in a death sentence. But what will not be apparent is that many other cases with similar facts do not result in death sentences, or that race is a significant factor in determining which case falls on which side of the line. This kind of racial discrimination is the ultimate arbitrariness in the administration of death prohibited by the Eighth and Fourteenth Amendments, and a more meaningful proportionality review would allow this Court to remedy it.

---

[38] *Id*. at 219.

[39] *See also* Robert Blecker, *The Death of Punishment: Searching for Justice Among the Worst of the Worst* 237 (2013); Howard Ball, *Thurgood Marshall's Forlorn Battle Against Racial Discrimination in the Administration of the Death Penalty: The McCleskey Cases, 1987, 1991*, 27 Miss. C. L. Rev. 335, 343 (2008); Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment argument for Abolition Based on Unconscious Racial Discrimination*, 45 Wm. & Mary L. Rev. 2083, 2098–99 (2004) (observing that most death penalty states allow the capital sanction for a very broad array of crimes, which encourages the influence of racial bias in cases that are not extreme cases).

B. Proportionality Review in Mr. Moore's Case Failed to Consider the Substantial Risk that His Death Sentence Was Influenced by Race.

Mr. Moore's case is a primary example of what the court misses when it conducts a narrow proportionality review. Mr. Moore, a Black man, was sentenced to death for killing a white convenience store clerk, although there is no evidence he planned to rob and kill anyone; indeed, it is undisputed that he entered the store without a weapon. *See* Moore Br. at 4. In concluding that his death sentence was proportionate on direct appeal, this Court identified four other armed robbery homicides where the defendant received a sentence of death. *See State v. Moore*, 357 S.C. 458, 465–66, 593 S.E.2d 608, 612 (S.C. 2004) (citing *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (S.C. 1996), *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996), *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991), *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984)). In his brief, Mr. Moore explains that, in fact, each of those cases involved more aggravation than his did, and notably the death sentence in three of the four cases were vacated. *See* Moore Br. at 7–8, 17–21.

Moreover, the comparators identified by this Court do not in any dispel the concern that Mr. Moore's death sentence may have been influenced by race. Every single one of those four other cases involved white victims, and three involved Black defendants.[40] But there were several armed robbery homicides involving Black victims in which the death penalty was never sought.[41] By failing to consider other cases where death was not imposed, this Court's proportionality review cannot determine whether this troubling pattern indicates that race has an unconstitutional impact

[40] *See Forty Years of Death*, *supra* note 22 Appendix A p. 229 (listing Keith L. Simpson in row 104 as a Black Male defendant with a white male victim); *id*. (listing Ricky George in row 98 as a Black male defendant with a white male victim); *id*. at 227 (listing Wardell Patterson in row 22 as a Black male defendant with a white male victim); *id*. at 228 (listing Mitchell Sims in row 75 as a white male defendant with two white male victims).

[41] *See Litigating for Racial Fairness*, *supra* note 20 at 182 (Professor Eisenberg noting racial disparities in rate at which solicitors in Seventh Judicial Circuit sought the death penalty in armed robbery cases and concluding that solicitors disproportionately sought the death penalty in white-victim cases).

on whether defendants convicted of armed robbery homicides receive a death sentence in this State. A more meaningful proportionality review—pulling "similar" cases from a larger pool of cases where a sentence of life or less was imposed—will give this Court has an adequate opportunity to ensure that unconstitutionally arbitrary factors like race do not affect a person's likelihood of receiving a death penalty.

CONCLUSION

For the foregoing reasons, this Court should hold that comparative proportionality review must include a consideration of similar cases where death was not imposed. In addition, for the reasons stated in Mr. Moore's brief, his death sentence is disproportionate under any standard, and the Court should therefore grant Mr. Moore's writ of habeas corpus.

Respectfully Submitted,

/s/ Mark C. McLawhorn

Mark McLawhorn, Bar No. 78408
McLawhorn Legal, LLC
1201 Main Street, Ste. 1980
Columbia, SC 29201
(803) 740-5075
mark@mclawhornlegal.com

Mahogane D. Reed*
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
700 14th Street NW, Suite 600
Washington, DC 20005
(202) 682-1300
mreed@naacpldf.org

**Pro Hac Vice* Application Pending

Attorneys for *Amicus Curiae*

April 19, 2021
Columbia, South Carolina