The Supreme Court of South Carolina

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April 6, 2022

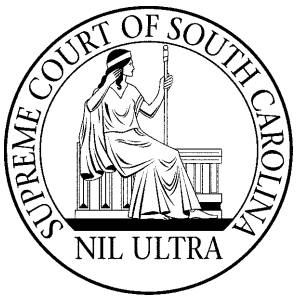
NOTICE

The State of South Carolina, through the Committee established under section 14-3-820 of the South Carolina Code, is soliciting proposals to publish the South Carolina Reports for a five (5) year term beginning July 1, 2022. The South Carolina Reports is the official publication of the opinions of the Supreme Court of South Carolina and the South Carolina Court of Appeals.

The South Carolina Reports is published on a periodic basis averaging four to six volumes per year with each volume containing approximately 650 pages. Additionally, Advance Sheets are published every four weeks. The State currently purchases approximately 160 copies of each volume. Proposals should specify a per book price for the copies purchased by the State. The quoted price should include the Advance Sheets and delivery to Columbia, South Carolina. The publisher may market additional volumes to attorneys and the general public.

For a sample of the style and format to be used, see Volume 434 of the South Carolina Reports. The successful publisher must either obtain a copyright waiver from Thomson Reuters (the current publisher) to continue to include the West headnotes, or include in the proposal a detailed description of how it proposes to prepare headnotes for each case in the Reports which are comparable in functionality to those contained in the current Reports.

Proposals should be submitted in writing on or before May 6, 2022. Proposals and any questions should be directed to the Clerk of the Supreme Court of South Carolina at the above address. The Committee reserves the right to reject any and all proposals.



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 12
April 6, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard Bernard Moore, Petitioner,

v.

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

Appellate Case No. 2020-001519

PETITION FOR WRIT OF HABEAS CORPUS

Opinion No. 28088
Heard May 5, 2021 – Filed April 6, 2022

RELIEF DENIED

Lindsey Sterling Vann and Hannah L. Freeman, both of Justice 360, of Columbia; Gerald Malloy, of Malloy Law Firm, of Hartsville; John H. Blume, III, of Cornell Law School, of Ithaca, NY; and Whitney Boykin Harrison, of McGowan Hood & Felder, LLC, of Columbia; all for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Senior Assistant Attorney General W. Edgar Salter III, all of Columbia, for Respondent.

William Norman Nettles, of Law Office of Bill Nettles, of Columbia, for Amicus Curiae NAACP Legal Defense and Educational Fund, Inc.

CHIEF JUSTICE BEATTY: Richard Bernard Moore ("Moore") filed a petition for a writ of habeas corpus challenging the proportionality of the death sentence that was imposed for his murder conviction. The Court ordered briefing and granted Moore's motion to argue against the precedent of *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982). In *Copeland*, the Court discussed the requirement in S.C. Code Ann. § 16-3-25(C)(3) (2015) that this Court undertake a comparative proportionality review of "similar cases" in death penalty matters. After review of the record and applicable law and consideration of the parties' arguments, we clarify *Copeland* and note the Court is not statutorily required to restrict its proportionality review of "similar cases" to a comparison of only cases in which a sentence of death was imposed. We conclude, however, that Moore has not established that he is entitled to habeas relief.

I. FACTS

This case arises out of the armed robbery and shooting death of a convenience store clerk, James Mahoney, at Nikki's Speedy Mart in Spartanburg County in the early morning hours of September 16, 1999.

At Moore's trial in 2001, a witness who was a frequent customer at Nikki's Speedy Mart testified that he saw Moore enter the store and walk over to a cooler shortly after 3:00 a.m. The witness was seated at a gaming machine, playing video poker. A few moments later, he heard Mahoney exclaim, "What the hell do you think you are doing?" The witness swiveled his seat around and noticed Moore had a gun and was holding both of Mahoney's hands with one hand. Moore told the witness not to move and immediately shot at him. The witness was not struck, but he dropped to the floor and played dead.

The witness then heard more gunshots before Moore fled the scene in a loud pickup truck, taking a moneybag from behind the counter. The witness discovered Moore had shot Mahoney in the chest, killing him. Mahoney had also suffered a wound to his arm, which could have been caused by the same gunshot. A meat cleaver of unknown origin was lying near the body.

Moore was shot in his left arm during the incident. There was no evidence that Moore entered the store with a gun. Rather, the forensic evidence established Moore killed Mahoney with a gun that belonged to the store's owner. Witnesses testified that Mahoney usually carried a gun on his person for protection when he worked late at night, and the store's owner kept several guns on the premises, under the counter.

The State asserted Moore's motive was to obtain money to purchase crack cocaine. George Gibson testified Moore had tried to obtain crack cocaine from him earlier in the evening, but he turned Moore down because he had no money. After the shooting death of Mahoney, Moore went back to Gibson, informing him that he had money but had done something bad and needed to turn himself in. Moore sought drugs and assistance to get to the emergency room, as he was bleeding profusely from his left arm, but Gibson declined Moore's requests. As Moore was backing out of Gibson's yard to leave, he accidentally struck a telephone pole, which caught the attention of a passing officer.

When the officer approached, Moore got out of his truck and laid down in the road, stating, "I did it, I did it, I give up, I give up." On the front seat of Moore's truck, the officer saw a blue moneybag belonging to Nikki's Speedy Mart that had blood on it, as well as a pile of loose money that was covered in blood. The total recovered was $1,408.00. A pocketknife was lying on the seat, under the money.

Moore did not testify at trial. The jury convicted Moore of murder, armed robbery, possession of a firearm during the commission of a violent crime, and assault with intent to kill. In the sentencing phase, the jury recommended the death penalty after finding three of the aggravating circumstances set forth in S.C. Code Ann. § 16-3-20(C)(a) (2015): Moore committed the murder during the commission of a robbery while armed with a deadly weapon, he knowingly created a great risk of death to more than one person in a public place by means of a weapon or device that normally would be hazardous to the lives of more than one person, and he committed the murder for the purpose of receiving money or a thing of monetary value. The trial judge sentenced Moore to death.

On direct appeal, this Court affirmed Moore's convictions and death sentence. *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). As part of the direct appeal, this Court performed the comparative proportionality review required by S.C. Code Ann. § 16-3-25(C)(3) (2015).

Moore subsequently filed an application for post-conviction relief ("PCR"), in which he raised numerous allegations of ineffective assistance of counsel. Moore testified at his PCR hearing in 2011 and contradicted the evidence presented at trial. He alleged Mahoney was the aggressor, that he took a gun away from Mahoney after a struggle and fired "blindly" at him after seeking cover, and that he took the bag of money only as an after-thought as he left the store.[1] Moore further maintained that he went to Gibson's home immediately after the shooting to get help for the injury to his arm, not to obtain drugs. The PCR judge found Moore's claims of ineffective assistance of counsel to be without merit and filed an order of dismissal on August 1, 2011. This Court denied Moore's petition for a writ of certiorari. The Supreme Court of the United States also denied Moore's petition for review. *Moore v. South Carolina*, 576 U.S. 1058 (2015).

Moore filed a federal habeas corpus petition in 2015. The United States District Court for the District of South Carolina adopted the Magistrate's Report and Recommendation and denied the petition. *Moore v. Stirling*, No. 4:14-04691-MGL, 2018 WL 1430959 (D.S.C. Mar. 21, 2018). The United States Court of Appeals for the Fourth Circuit affirmed. *Moore v. Stirling*, 952 F.3d 174 (4th Cir. 2020). The United States Supreme Court denied Moore's request for a writ of certiorari. *Moore v. Stirling*, 141 S. Ct. 680 (2020).

Moore has now filed a habeas petition with this Court that alleges his death sentence is disproportionate and challenges the Court's proportionality review conducted at the time of his direct appeal. We ordered briefing and oral argument on the following two questions:

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

---

[1] Moore testified that he usually went to Nikki's Speedy Mart two or three times a week, but had recently lost his job. Moore stated he was sure Mahoney recognized him from their prior interactions. For example, Mahoney had helped him purchase a lighter and filled it for him. Moore claimed that, on the night of Mahoney's death, he was short of change and had asked Mahoney if he could use money from a "change cup" on the counter, but Mahoney said "no" and the two had words. Moore maintained Mahoney pulled out a gun when he refused to leave the store, and Mahoney was shot when they struggled over the gun.

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

II. DISCUSSION

This Court is statutorily required to undertake a comparative proportionality review to determine if "the sentence of death is excessive or disproportionate to the penalty imposed in *similar cases*, considering both the crime and the defendant." S.C. Code Ann. § 16-3-25(C)(3) (2015) (emphasis added). Moore's contentions to this Court focus on the meaning of "similar cases" as used in the statute. To provide the full context, we note subsection 16-3-25(C) states in its entirety as follows:

> (C) With regard to the sentence, the court shall 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.

Id. § 16-3-25(C).

This Court performed a review of Moore's death sentence pursuant to subsection 16-3-25(C) at the time of his direct appeal in 2004, at which time we found Moore's death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of aggravating circumstances was supported by the evidence. *Moore*, 357 S.C. at 465, 593 S.E.2d at 612. We further found the death penalty was not excessive or disproportionate to the penalty imposed in similar capital cases, referencing four cases relied upon for our comparison. *Id.* at 465–66, 593 S.E.2d at 612 (citing *State v. Simpson,* 325 S.C. 37, 479 S.E.2d 57, *cert. denied,* 520 U.S. 1277 (1997); *State v. George,* 323 S.C. 496, 476 S.E.2d 903 (1996), *cert. denied,* 520 U.S. 1123 (1997); *State v. Sims,* 304 S.C. 409, 405 S.E.2d

377 (1991), *cert. denied,* 502 U.S. 1103 (1992); and *State v. Patterson,* 285 S.C. 5, 327 S.E.2d 650 (1984), *cert. denied,* 471 U.S. 1036 (1985)).

Moore contends his death sentence is disproportionate under any meaning of the term "similar cases" and should, therefore, be vacated by this Court. We previously interpreted "similar cases" in *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982). In *Copeland*, we observed that comparative proportionality review, where it exists, has been left to state determination because the United States Supreme Court has declined to impose any specific model of review upon the states. *Id.* at 590, 300 S.E.2d at 74. As a result, we found subsection 16-3-25(C) "represents an act of legislative grace by the [South Carolina] General Assembly which we are required to interpret in accordance with sound rules of statutory construction." *Id.* at 590–91, 300 S.E.2d at 74. We noted that, "[u]nder the statute, the task of defining 'similar cases' and with it the scope of any comparative analysis is plainly and properly left to this Court." *Id.* at 587, 300 S.E.2d at 72.

We determined in *Copeland* that the Court should begin its comparison by looking to other cases involving an actual conviction and sentence of death. *Id.* 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.").

Moore notes, however, that the current proportionality procedure was previously called into question by this Court in *State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (2011). In *Dickerson*, the defendant asserted to the circuit court that South Carolina's proportionality review was deficient because it failed to examine cases where a sentence of death was not imposed. *Id.* at 125 n.8, 716 S.E.2d at 908 n.8. The defendant relied upon Justice Stevens's statement in *Walker v. Georgia*, 555 U.S. 979 (2008) (Stevens, J., statement respecting denial of certiorari), in which Justice Stevens wrote that examining similar cases "assume[s] that the court would consider whether there were 'similarly situated defendants' who had *not* been put to the death because that inquiry is an essential part of any meaningful proportionality review." *Id.* (alteration in original) (quoting *Walker*, 555 U.S. at 980). This Court observed Justice Stevens had noted that this broader comparison "is 'judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the

sentence before the court.'" *Id.* (quoting *Walker*, 555 U.S. at 981). We recited the following reasoning from Justice Stevens:

> Had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence, it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment. If the Georgia Supreme Court had expanded its inquiry still further, it would have discovered many similar cases in which the State did not even seek death. Cases in both of these categories are eminently relevant to the question of whether a death sentence in a given case is proportionate to the offense. The Georgia Supreme Court's failure to acknowledge these or any other cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations.

Id. (citations omitted in original) (quoting *Walker*, 555 U.S. at 982–83).

We ultimately concluded in *Dickerson* that any issue regarding the pool of suitable cases for proportionality review was not then before us, but "we note[d] our concern 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." *Id.*

Moore now contends to this Court that his sentence is disproportionate based on current precedent regarding comparative proportionality review and based on an extension of that precedent. Moore first argues that, under the existing precedent of *Copeland*, in which a death sentence is compared to other cases resulting in a death sentence, the proportionality review conducted at the time of his direct appeal in 2004 was insufficient due to the nature of the cases selected for comparison. In the alternative, Moore contends this Court should expand its comparative proportionality review to include a larger pool of cases, as a comparison to only other cases in which the death penalty was imposed leads to an inherent bias towards the imposition of the death penalty, as noted by Justice Stevens, *see Walker*, 555

U.S. at 982–83, and by this Court, *see Dickerson*, 395 S.C. at 125 n.8, 716 S.E.2d at 908 n.8. Moore asserts his death sentence is still disproportionate when compared to any larger pool of cases, and he has submitted comparison cases for the Court's consideration.

In response, the Commissioner of the South Carolina Department of Corrections ("Commissioner") argues habeas corpus proceedings are limited to constitutional issues and Moore's arguments concerning statutory comparative proportionality review do not involve a constitutional claim, so his allegation is not cognizable in a habeas proceeding. The Commissioner further asserts Moore received a sufficient proportionality review at the time of his direct appeal and his sentence is not disproportionate. Lastly, the Commissioner contends *Copeland* and existing precedent properly restrict the pool of comparison cases to those in which a sentence of death has been imposed.

We begin by examining the availability of habeas corpus relief in this state. "Notwithstanding the exhaustion of appellate review, including all direct appeals and PCR, habeas corpus relief remains available to prisoners in South Carolina." *Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008) (citing S.C. Const. art. I, § 18); *see also Simpson v. State*, 329 S.C. 43, 46 n.4, 495 S.E.2d 429, 431 n.4 (1998) (stating under our state constitution, this Court retains the ability to entertain petitions seeking habeas relief in our original jurisdiction (citing S.C. Const. art. V, § 5)).

We have repeatedly observed that a writ of habeas corpus is reserved for the very gravest of constitutional violations, "which, *in the setting*, constitute[] a denial of fundamental fairness shocking to the universal sense of justice." *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (citation omitted); *accord Ozmint*, 380 S.C. at 477, 671 S.E.2d at 602; *McWee v. State*, 357 S.C. 403, 406, 593 S.E.2d 456, 457 (2004); *Green v. Maynard,* 349 S.C. 535, 538, 564 S.E.2d 83, 84 (2002). The phrase "'in the setting' refers specifically to the totality of the facts and circumstances in the defendant's case." *Ozmint*, 380 S.C. at 479 n.4, 671 S.E.2d at 603 n.4.

We have cautioned that not every constitutional error will justify issuance of the writ. *Butler*, 302 S.C. at 468, 397 S.E.2d at 88. Rather, two components are needed to meet the standard articulated in *Butler* and other cases. The petitioner must prove (1) the existence of a constitutional violation; and (2) the denial of fundamental fairness which, in the setting, is shocking to the universal sense of justice. *See Tucker v. Catoe*, 346 S.C. 483, 494–95, 552 S.E.2d 712, 718 (2001)

(stating the finding of a constitutional violation "does not end our *Butler* inquiry, for relief is appropriate only where the violation 'in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice'" (quoting *Butler*, 302 S.C. at 468, 397 S.E.2d at 88)).

A habeas petition must support the relief requested. *Gibson v. State*, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998). While the allegations in the petition are treated as true, the petition must set forth a prima facie case showing the petitioner is entitled to relief. *Id.* In other words, it must allege that the petitioner has exhausted all other remedies, and it must set out a constitutional claim that meets the standard delineated in *Butler*. *Id.* at 40, 495 S.E.2d at 428. "Habeas relief is seldom used and acts as an ultimate ensurer of fundamental constitutional rights." *Ozmint*, 380 S.C. at 477, 671 S.E.2d at 602. For these reasons, a defendant bears a much higher burden of proof in a habeas proceeding. *Id.*

The issues Moore asserts concern the alleged insufficiency of the comparative proportionality review conducted by this Court as part of his direct appeal. The United States Supreme Court has held there is a difference between traditional proportionality analysis and comparative proportionality review that is afforded by statute. *Pulley v. Harris*, 465 U.S. 37, 43 (1984). In *Pulley*, the Supreme Court explained, "Traditionally, 'proportionality' has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime." *Id.* at 42–43. It further noted, "Looking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions, this Court has occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime." *Id.* at 43.[2]

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[2] For example, the Supreme Court has determined that the Eighth Amendment's prohibition on cruel and unusual punishment prevents the execution of minors and persons with intellectual disabilities, persons whose role in a crime was minor, or those who committed a non-homicide offense. *See Roper v. Simmons*, 543 U.S. 551 (2005) (minors); *Atkins v. Virginia*, 536 U.S. 304 (2002) (persons with intellectual disabilities); *Enmund v. Florida*, 458 U.S. 782 (1982) (co-defendant had a minor role and did not kill, attempt to kill, or contemplate that life would be taken); *Coker v. Georgia*, 433 U.S. 584 (1977) (non-homicide). The Supreme Court has stated it applies "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and

In contrast, comparative proportionality review, which many states provide by statute, "presumes that the death sentence is not disproportionate to the crime in the traditional sense." *Id.* "It purports to inquire instead whether the penalty is nonetheless unacceptable *in a particular case* because [it is] disproportionate to the punishment imposed on others convicted of the same crime." *Id.* (emphasis added); *see also* Bruce Gilbert, Comment, *Comparative Proportionality Review: Will the Ends, Will the Means*, 18 Seattle U. L. Rev. 593, 623 n.189 (1995) (stating "comparative proportionality review is a separate issue from anything that the jury has been asked to decide, and should be treated as such by [an appellate court]").

In *Pulley*, the Supreme Court described comparative proportionality review as "an additional safeguard against arbitrary or capricious sentencing" that arose in many states in response to *Furman v. Georgia*, 408 U.S. 238 (1972). *Pulley*, 465 U.S. at 44–45. "In *Furman,* the Court concluded that capital punishment, as then administered under statutes vesting unguided sentencing discretion in juries and trial judges, had become unconstitutionally cruel and unusual punishment." *Id.* at 44.

The Supreme Court observed in *Pulley* that comparative proportionality review is not a fixed constitutional requirement under the Eighth Amendment in every capital case. *Id.* at 50–51 ("There is . . . no basis in our [Supreme Court] 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. . . . We are not persuaded that the Eighth Amendment requires us to take that course.").

Since the Supreme Court has not defined its contours, states have varied in their application of comparative proportionality review. *See Copeland*, 278 S.C. at 590, 300 S.E.2d at 74; *see also* Lawrence S. Lustberg & Lenora M. Lapidus, *The Importance of Saving the Universe: Keeping Proportionality Review Meaningful*, 26 Seton Hall L. Rev. 1423, 1461 (1996) (observing "the exact role of proportionality review varies from state to state in relation to the variations in the overall capital sentencing scheme of the particular state"). Some states have even eliminated comparative proportionality review after *Pulley*. *See, e.g.*, *Lawrence v. Florida*, 308 So. 3d 544, 548–52 (Fla. 2020) (eliminating comparative proportionality review from the state's scope of appellate review, noting it was not required by any state statute, that the court was bound under the state constitution's conformity clause to interpret the prohibition on cruel and unusual punishment in conformity with the

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unusual in violation of the Eighth Amendment. *Roper*, 543 U.S. at 561 (citation omitted).

Supreme Court's decisions on the subject, and "[t]he Supreme Court has held that comparative proportionality review of death sentences is not required by the Eighth Amendment" (citing *Pulley*, 465 U.S. at 50–51)).

However, the Supreme Court later clarified that *Pulley* does not stand for the broad proposition that comparative proportionality review is never an essential component of a constitutional death penalty scheme. *See Walker*, 555 U.S. at 983–84 (commenting that, after the assertion in *Pulley* that the Eighth Amendment does not require comparative proportionality review of every capital sentence, some states, including Georgia, initially narrowed their scope of review, "[b]ut that assertion was intended to convey our recognition of differences among the States' capital schemes and the fact that we consider statutes as we find them []; it was not meant to undermine our conclusion in *Gregg* [*v. Georgia*, 428 U.S. 153 (1976)] and *Zant* [*v. Stephens*, 462 U.S. 862 (1983)] that such review is an important component of the Georgia scheme").

In *Gregg v. Georgia*, referenced above, the Supreme Court concluded Georgia's revised death penalty scheme (post-*Furman*) met constitutional standards. The Supreme Court relied on several factors in giving its approval to the revision, including the "important component" (per *Walker*, 555 U.S. at 984) of Georgia's implementation of comparative proportionality review. As one legal commentator has noted, all of the factors cited by the Supreme Court were essential to its determination:

> First, the Court [in *Gregg*] believed that the bifurcated proceedings and enumerated aggravating circumstances helped guide the jury, and hence, reduced the arbitrary imposition of the death penalty. Second, comparative proportionality review was deemed to provide a safeguard against an "aberrant" jury. And finally, the statute provided flexible and individualized procedures for determining whether the death penalty was being imposed in an arbitrary and capricious manner.

Gilbert, *supra*, at 599 (footnotes omitted).

Thus, when examined in detail, *Pulley* merely answered the question whether comparative proportionality review was *always* a prerequisite to a constitutional capital sentencing scheme under the Eighth Amendment. *Id.* While *Pulley*

concluded that no *one* review procedure was universally required because state sentencing statutes and procedures varied throughout the country, the Supreme Court nevertheless confirmed that all states must have "a means to promote the evenhanded, rational, and consistent imposition of death sentences." *Id.* at 600 (quoting *Pulley*, 465 U.S. at 49). Thus, some form of meaningful appellate review is likely still required to avoid the arbitrariness and inconsistencies deemed unconstitutional in *Furman*. *Id.* Because the Supreme Court described the implementation of comparative proportionality review as an "important component" of its approval of Georgia's revised death penalty scheme, it is clear that this procedure was essential to the statute passing constitutional muster in the absence of another, comparable safeguard.

Moreover, while we have previously stated South Carolina's comparative proportionality review under subsection 16-3-25(C)(3) "represents an act of legislative grace by the General Assembly," *Copeland*, 278 S.C. at 590, 300 S.E.2d at 74, this does not end our analysis in this regard. We, like the Supreme Court, "consider statutes as we find them." *Walker*, 555 U.S. at 983. Our General Assembly has specifically required comparative proportionality review as an essential component of South Carolina's capital sentencing scheme to avoid the arbitrariness discussed in *Furman*, *Gregg*, *Pulley*, and other cases. In fact, this Court is statutorily required to provide a comparative proportionality review for a capital case even in the absence of a direct appeal by the defendant. *See* S.C. Code Ann. § 16-3-25(F) (2015) ("The sentence review *shall be in addition to direct appeal, if taken*, and the review and appeal shall be consolidated for consideration." (emphasis added)); *State v. Motts*, 391 S.C. 635, 649, 707 S.E.2d 804, 811 (2011) (recognizing a defendant can waive a direct appeal but "cannot waive this Court's statutorily-imposed duty to review his capital sentence").

Having been statutorily directed to undertake comparative proportionality review for all persons receiving a capital sentence, we hold an allegation concerning the failure to adequately provide this mandated review for an individual defendant to prevent the wrongful deprivation of life implicates that defendant's right to due process and, therefore, presents a constitutional issue. *See* S.C. Const. art. I, § 3 (stating no "person [shall] be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws"); *see also S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 392, 699 S.E.2d 146, 153 (2010) (observing an interest protected by due process arises when there is a legitimate claim of entitlement that is created and defined by

independent sources and not just by a "unilateral expectation" (citation omitted)). The discussion in *Pulley* as to the Eighth Amendment is not controlling of a defendant's right to due process under our state constitution. As a result, we hold Moore's petition alleging an inadequate comparative proportionality review of his sentence presents a cognizable constitutional claim in the context of this state habeas proceeding. *See, e.g.*, *Butler*, 302 S.C. at 468, 397 S.E.2d at 88 (setting forth the habeas framework, the first requirement of which is a constitutional claim).

Because Moore presents a cognizable claim, we turn now to the merits of his contention that this Court's comparative proportionality review was inadequate. Moore asserts the review was insufficient because, since the time of his direct appeal, the death sentences in three of the four cases cited for comparison in the Court's opinion were overturned. We find this point unavailing as none of the cases were overturned for a reason that influenced any part of the Court's analysis under subsection 16-3-25(C), including the proportionality review. The State's failure to disclose exculpatory evidence during the sentencing phase in *Simpson*, the fact that the defendant in *George* was categorically exempt from capital punishment due to his mental status, and the failure to allow the defendant in *Patterson* to show adaptability to prison are reasons or flaws in the trial procedure that do not alter the underlying facts of the offenses committed and the existence of any aggravating factors, nor do they alter our determination that Moore's capital sentence was not the result of passion, prejudice, or any other arbitrary factors.

In addition, Moore opines that the cases relied on by the Court appear to have been selected based solely on having a similar aggravating circumstance of armed robbery. He asserts the circumstances of those cases are more severe than his own and, therefore, do not support a finding of proportionality. In particular, Moore contends the Court's factual recitation in its opinion on direct appeal does not even mention the fact that he did not bring a gun into Nikki's Speedy Mart. He argues this is a significant fact that fundamentally distinguishes his situation from the comparison cases, which he states involved planned robberies.

We disagree with Moore's characterization, as his own offenses were similarly egregious and appropriate for comparison with the selected cases. Whether Moore entered the store with a weapon or whether he armed himself once inside is not determinative of either his intent or the egregiousness of the offenses he ultimately committed. The significant fact is that Moore became armed at some point during the commission of the offenses. *See generally State v. Keith*, 283 S.C. 597, 598–99, 325 S.E.2d 325, 326 (1985) (holding a defendant is guilty of armed robbery if he

becomes armed with a deadly weapon at any point while the robbery is being perpetrated and need not be armed at all times during the offense).

After hearing the evidence at trial, a jury found Moore intentionally shot and killed the store employee during an armed robbery and he endangered the life of a bystander for the obvious purpose of eliminating the only eyewitness to the murder. The robbery in this case could have resulted in two deaths but for the astute actions of the eyewitness, who "played dead" when Moore shot at him. The jury considered all of the attendant facts in determining there were statutory aggravating circumstances that qualified this as a capital case. Looking at the aggravating circumstances present in other cases is an obvious point for comparison when analyzing whether a defendant's capital sentence is the result of a jury's arbitrariness or is disproportionate to the sentences of other offenders.

Moore alternatively argues this Court should expand the relevant pool of cases to be reviewed beyond those in which a death sentence was imposed, as is currently done in accordance with the precedent of *Copeland*. Moore contends this expansion is necessary to adequately fulfill the statutory requirement of reviewing "similar cases," and he asserts his death sentence is disproportionate based on an expanded comparison of cases. We granted Moore's motion to argue against precedent, and we agree that our comparative proportionality review statute should not be so narrowly construed.

Determining the universe of cases to be considered is primarily a matter of statutory interpretation, as indicated in *Copeland*. The General Assembly's statutory directive requires the Court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." S.C. Code Ann. § 16-3-25(C)(3). Because the plain language of the statute directs the Court to compare the death sentence under review "to the *penalty imposed* in similar cases," this clearly requires that the comparison cases be matters that have resulted in a conviction and "penalty," i.e., a sentence. *See id.* (emphasis added). This conclusion is also apparent from the Supreme Court's observation in *Pulley* that comparative proportionality review typically is intended to compare the particular sentence of one defendant "to the *punishment imposed* on others *convicted* of the same crime." *Pulley*, 465 U.S. at 43 (emphasis added). Consequently, we decline to adopt Moore's proposal to expand the pool of cases to incidents or charges that have not resulted in a conviction and sentence.

We agree with Moore, however, that the language of South Carolina's proportionality statute does not expressly limit the pool of cases to only those in which the death penalty was actually imposed. For convictions of murder, therefore, a review can ostensibly encompass a comparison of death-eligible cases for which a record is available for our review. This can include, for example, cases where a defendant's conduct was eligible for a capital sentence, but the State elected to seek only a life or lesser sentence, as well as cases where a jury considered but ultimately declined to impose a death sentence. The comparison cases must have a record because the General Assembly indicates in subsection 16-3-25(E) that this Court must include references in its opinion to the cases considered and transmit the records of those cases to the circuit court in the event resentencing is ordered. *See* S.C. Code Ann. § 16-3-25(E) (2015) ("The court shall include in its decision a reference to those similar cases which it took into consideration."); *id.* § 16-3-25(E)(2) ("The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration."). Accordingly, we clarify *Copeland* and hold subsection 16-3-25(C)(3) does not limit the pool of comparison cases to only those in which the defendant actually received a sentence of death.

Life sentences traditionally were not included in the pool of comparison cases in most states because, as a general rule, life sentences are not appealed, so there is no appellate record. *See generally* Cynthia M. Bruce, *Proportionality Review: Still Inadequate, But Still Necessary*, 14 Cap. Def. J. 265, 267 (2002) (noting life sentences are rarely the subject of an appeal disputing the sentence imposed).[3] However, cases resulting in life sentences are more often being included in the pool of comparison cases in states that conduct comparative proportionality reviews. *See* Lustberg & Lapidus, *supra*, at 1462 (stating "the vast majority of states that conduct proportionality review use a broader universe" of comparison cases than just those in which the death penalty was imposed). Because only the records of cases in which

[3] The category of cases resulting in a life sentence can encompass a number of potential cases in some jurisdictions. *See* Bruce, *supra*, at 269 (enumerating "(1) bench trials resulting in life sentences; (2) guilty pleas resulting in a life sentence not pursuant to a plea bargain on charge or sentence; (3) cases in which the judge sentences to life over the jury's death verdict; (4) jury trials in which a life sentence was imposed and not appealed; and (5) jury trials in which a life sentence was imposed and later appealed on trial error").

there has been an appeal are readily accessible by this Court, if a defendant seeks the Court's consideration of a case that has not resulted in an appeal, the defendant shall submit to the Court an official record of the conviction and sentence, including a trial transcript, for consideration in the Court's review.

In his submissions to this Court, Moore has highlighted additional cases as part of an expanded pool of comparison cases for the Court's consideration. Due to our clarification of *Copeland*, we have considered those cases that would have been available at the time of Moore's direct appeal and comparative proportionality review in 2004. We find, however, that the additional cases he now advances do not alter our determination that his sentence is not disproportionate to the penalties given in other similar cases.

Moore argues his capital sentence is disproportionate based, in large part, on his contention that, unlike some cases he references, he did not enter the premises with a gun and therefore had no intent to commit the robbery and murder of which he stands convicted. As previously discussed, this premise is flawed because the relevant fact is whether Moore became armed at some point during the commission of the offenses, so his argument in this regard does not affect the outcome of our proportionality analysis. Moreover, a jury considered the evidence at trial and found Moore intentionally robbed and murdered the store employee and knowingly endangered the life of another person. The jury specifically found the State had proven, beyond a reasonable doubt, three of the aggravating circumstances set forth in subsection 16-3-20(C)(a): Moore committed the murder during the commission of a robbery while armed with a deadly weapon, he knowingly created a great risk of death to more than one person in a public place by means of a weapon or device that normally would be hazardous to the lives of more than one person, and he committed the murder for the purpose of receiving money or a thing of monetary value. *See* S.C. Code Ann. § 16-3-20(C)(a)(1)(e), -(a)(3), -(a)(4) (2015). Any one of these aggravating circumstances qualified Moore for a capital sentence. *See id.* § 16-3-20(C) ("Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.").

Moore also maintains his case is distinguishable from those in which a defendant received a death sentence for a crime involving more than one murder victim. A sizable number of the defendants receiving a capital sentence in this state have engaged in crimes that involved only one murder victim. The murder of two or more persons is just one aggravating circumstance out of a dozen that statutorily qualifies a defendant for a capital sentence, *see id.* § 16-3-20(C)(a)(9), and the fact

that Moore did not kill more than one person does not negate the presence of the three other aggravating circumstances found by the jury. Further, the jury obviously considered the fact that Moore attempted to eliminate the only eyewitness to the armed robbery and murder of the store clerk, who narrowly avoided being a second victim. Accordingly, we are not persuaded that the lack of a second murder victim renders Moore's capital sentence disproportionate.

Lastly, Moore contends his sentence is disproportionate when compared to similar armed robbery cases that did not ultimately result in a death sentence. Moore notes that in some cases, the solicitor did not seek a death sentence. In addition, Moore generally asserts there have been cases in which a life sentence was given by a jury, or which resulted in a life sentence because the defendant was allowed to plead guilty in exchange for a life sentence after an appeal or was resentenced in cases in which a death sentence was overturned. He argues his case is qualitatively less egregious and that his situation is unique compared to any other defendant because there was no evidence that he planned to commit a robbery or murder the day he went to Nikki's Speedy Mart, and he reiterates that there was no evidence that he carried a gun with him into the store.

We recognize that the severity and brutality of crimes may vary, and Moore questions why a jury did not impose a life sentence in his case. Moore argues others have done far "worse," and the death penalty should be reserved for only the most "atrocious" cases. As written, South Carolina's capital sentencing scheme designates the aggravating circumstances that qualify a defendant for a capital sentence. The selection of those circumstances is a decision that is solely within the purview of the General Assembly, which enacted South Carolina's statutory capital sentencing scheme. Whether that statutory threshold has been met is a determination for the jury, which must then decide whether to recommend a death sentence or a life sentence. Likewise, this Court has no control over the actions of a solicitor in electing to pursue the highest penalty in a case that statutorily qualifies for a capital sentence.

Whether this Court would impose a death sentence under the same circumstances is not within the permitted scope of this Court's appellate review. Rather, the Court's task in comparative proportionality review aims to ensure that a jury's decision was not the result of arbitrariness. In comparative cases where a defendant's death sentence was overturned on appeal, if the sentence was vitiated due to factors that did not relate to the underlying facts and circumstances of the case, it does not present a sufficient justification for finding Moore's sentence is

disproportionate. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (finding minors categorically may not be sentenced to death for murder). To the extent Moore urges the Court to find his sentence disproportionate because he did not bring a weapon to the scene and had no intent to commit the offenses for which he was convicted, we hold, as we must, that this assertion does not negate the jury's findings as to his intent, and a jury has found against him in that regard. This Court's scope of review does not allow it to disregard the factual findings in the case and pronounce an alternative sentence in these circumstances. For all the foregoing reasons, we hold Moore has not established that his capital sentence is disproportionate.

III. CONCLUSION

We conclude Moore has not established grounds for awarding habeas relief. However, as a point of law, we clarify our holding in *Copeland* and hold this Court is not statutorily required to limit the pool of "similar cases" for comparative proportionality review to only those cases in which the death penalty was imposed.

HABEAS RELIEF DENIED.

FEW and JAMES, JJ., concur. KITTREDGE, J., concurring in result only. HEARN, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE HEARN: This Court has never found a single death sentence disproportionate dating back to 1977, the first time comparative proportionality review was required by the General Assembly. This includes the forty-three individuals who have been executed by the State of South Carolina during this modern era of capital punishment, and all of the thirty-five inmates currently housed on death row who have exhausted their direct appeals. The State characterizes these statistics—currently, approximately zero for seventy-seven[4] —as proof that our capital sentencing scheme functions as it should. I write separately to express my view that our system is broken and to disagree with that part of the majority opinion which finds Petitioner Richard Moore's sentence proportionate to his crime.

Moore was duly convicted under the laws of our state for the murder of James Mahoney during the commission of an armed robbery, assault with intent to kill, and possession of a firearm during the commission of a violent crime. My disagreement with the majority has nothing to do with the reliability of Moore's convictions. Unquestionably, Moore is guilty.[5] But that is not the end of the inquiry; rather, it is only the beginning, as a death sentence demands the highest protections afforded by law due to its obvious severity and finality. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (noting "that the imposition of death by public authority is so profoundly different from all other penalties . . . ."); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed."). While this Court affirmed his conviction and sentence on direct appeal—and other courts have done the same throughout Moore's more than twenty years navigating through our criminal justice system—that also is not dispositive. I wholeheartedly agree with the majority that Moore presents a constitutional claim opening the door to habeas review. Yet, I find the majority's conclusion that Moore's sentence is not disproportionate when compared to similar cases utterly unpersuasive. Consequently, Richard Moore will be put to death for a sentence that I do not believe is legal under our law. Nothing could be more "shocking to the universal sense of justice," *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990), and thus, habeas relief is warranted.

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[4] In particular, the direct appeal for Timothy Ray Jones is currently ongoing, thus precluding his case from this number.

[5] Indeed, Moore's counsel candidly acknowledged Moore's guilt during oral argument.

I begin by reiterating that I agree with the majority's conclusion that Moore presents a cognizable claim for habeas review. As the majority thoroughly discusses, notwithstanding the statutory origins of comparative proportionality review, the result of the State executing a person whose death sentence is disproportionate undoubtedly raises serious due process concerns and would be arbitrary. While the form of our review is not constitutionally mandated, its substance reaches to the core of the constitutional enshrinement against the infliction of arbitrary capital punishment. *See State v. Graham*, 172 N.E.3d 841, 890 (Ohio 2020) (Donnelly, J., concurring) ("[T]he form [of proportionality review] is not constitutionally required, but the substance is. And in Ohio we have it backwards: we have the form but lack the substance."). Whether by virtue of the Eighth Amendment's ban on cruel and unusual punishment or the Fourteenth Amendment's protections of substantive due process, the underlying interests at stake invoke more than merely an issue of state law. There can be no debate that a death sentence that is arbitrary and capricious is unconstitutional.[6] *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.").

I also agree that our review of the "pool of similar cases" must not be as narrowly construed as the standard enunciated in *Copeland*. Accordingly, I join the majority's decision to revisit *Copeland* and overrule it to the extent it requires only a comparison of cases resulting in death. However, I respectfully part company with the conclusion that Moore's sentence is not disproportionate to the penalty imposed in similar cases.

Turning to the framework established by the General Assembly, this Court,

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[6] We have implicitly elevated our statutorily required review of death sentences above even certain constitutional rights, as an individual cannot waive our duty to review his death sentence under section 16-3-25(C) but can waive his direct appeal. *State v. Motts*, 391 S.C. 635, 649, 707 S.E.2d 804, 811 (2011) ("Although Motts is entitled to waive his personal right to a direct appeal, we hold that he cannot waive this Court's statutorily-imposed duty to review his capital sentence."). Adopting the State's position that this matter does not qualify for habeas relief would lead to the perplexing result that habeas is not available in a challenge to this mandatory review yet constitutional errors that otherwise may qualify for relief are waivable.

[S]hall 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.

S.C. Code Ann. § 16-3-25(C) (2015). Immediately apparent from the text is that our review involves more than determining whether the jury reached its decision arbitrarily or whether evidence supports the jury's conclusion as to the existence of aggravating circumstances. Admittedly, those two considerations are set forth in subsections (C)(1) and (C)(2), but the General Assembly goes further in (C)(3) by requiring the Court review each death sentence to ensure it is not excessive or disproportionate. Significantly, Moore does not argue the Court erred in its direct appeal determination pertaining to subsections (C)(1) and (2), counsel for Moore specifically disclaimed any challenge to the facts supporting the jury's verdict during oral argument, and his entire dispute concerns only this Court's legal requirement to engage in comparative proportionality review under subsection (C)(3). This is because the Court's order directing briefing and setting oral argument focused on two questions, both of which turned solely on section 16-3-25(C)(3). Accordingly, we are *not* limited to analyzing whether evidence supports the jury's decision because statutorily, our role is much broader.

Following this framework, I would find Moore's death sentence invalid because it is disproportionate. There is no dispute that when Moore entered Niki's convenience store during the early morning hours of September 16, 1999, he did so unarmed. Of course, the majority is correct that an armed robbery occurs the moment a defendant arms himself during the commission of a robbery. Thus, I have no quarrel with the majority's conclusion that the record clearly demonstrates Moore committed armed robbery, meaning there was sufficient proof of the presence of an aggravating factor to qualify him for the death penalty. *See* S.C. Code Ann. § 16-3-25(C)(2). While I do not discount that our comparative proportionality review would include reviewing cases with similar aggravating circumstances—an "obvious point

for comparison" as the majority notes—it cannot represent both the beginning and end of our inquiry because the General Assembly has specifically accounted for that in the preceding subsection. Accordingly, our analysis must be more meaningful, and cannot simply default to determining whether evidence supported the jury's verdict. Stated differently, by discounting Moore's unarmed status upon entering the store, we risk conflating our independent proportionality review with the more traditional appellate role of determining whether any evidence supports the jury's conclusion that certain aggravating circumstances exist.

Consequently, I believe the majority errs in repeatedly rejecting the significance of Moore's unarmed status upon entering the store. For example, the majority states this fact is "not determinative," that it represents a "flawed premise," and that it "does not negate the jury's findings as to his intent, and a jury has found against him in that regard." In isolation, I agree with the truth of those statements. However, I fail to see how they impact the discrete issue before the Court. By focusing on the jury's decision rather than on whether this death sentence is excessive or disproportionate compared to other similar cases, the majority substantially undermines this Court's responsibility under section 16-3-25(C)(3). Only this Court—not a jury—can determine whether a sentence is disproportionate. With all due respect for the jury's verdict here, it should not be our main focus at this latent stage of the proceedings.

Our comparative proportionality review under section 16-3-25(C)(3) does not turn on whether there is evidence of an armed robbery. That consideration is part of the preceding subsection, which *does* take into account the jury's decision. By improperly focusing on whether the crime committed by Moore meets the legal definition of armed robbery, the majority completely loses sight of the vast difference between a "robbery gone bad" and a planned and premeditated murder. In fact, numerous other state appellate courts have found this distinction significant, if not dispositive in their comparative proportionality review. For example, the Florida Supreme Court determined a death sentence was disproportionate where multiple individuals planned a robbery of a coin laundry, armed themselves beforehand, pistol-whipped a witness once inside the store, and fired one fatal shot at the owner after being informed he had no money. In undergoing its proportionality review, the court noted it must "discretely analyze the nature and weight of the underlying facts; we do not engage in a 'mere tabulation' of the aggravating and

mitigating factors." *Scott v. State*, 66 So. 3d 923, 935 (Fla. 2011) (quoting *Terry v. State,* 668 So. 2d 954, 965 (Fla. 1996)).[7] In doing so, the court commented,

> Although not precisely like the "robbery gone bad" cases where we have reduced the sentence of death to life, *see, e.g., Jones v. State,* 963 So. 2d 180, 188–89 (Fla. 2007); *Terry,* 668 So. 2d at 965–66, there is no evidence in this case that Scott planned to shoot any of the individuals inside the coin laundry prior to doing so, and therefore this murder could be viewed as a reactive action in response to the victim's resistance to the robbery.

Id. at 937.

In a case closer to a true "robbery gone bad," the Florida Supreme Court concluded a death sentence was disproportionate where an individual walked into a convenience store armed, pocketed the weapon upon nearing the cashier, took money from the register, and began to walk towards the front door. However, after the clerk made a sudden movement, the robber pulled his weapon and fired two shots, killing the clerk. The court reversed the death sentence, noting "[t]here was no indication that murdering [the clerk] was part of Yacob's original robbery plan." *Yacob v. State*, 136 So. 3d 539, 550 (Fla. 2014), *abrogated by Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). In an inexplicable contrast to South Carolina, Florida has reversed a death sentence based on comparative proportionality review at least a dozen times. *See Johnson v. State*, 720 So. 2d 232, 238 (Fla. 1998) (vacating a death sentence where the defendant murdered a victim during a burglary); *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996) (vacating the death sentence despite little mitigation and because evidence suggested it was a "robbery gone bad" case); *Thompson v. State*, 647 So. 2d 824, 827 (Fla. 1994) (finding a death sentence disproportionate where the defendant entered a Subway store, spoke to the clerk,

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[7] Against a vigorous dissent, the Florida Supreme Court recently abandoned comparative proportionality review because a majority determined that since its responsibility to ensure that a sentence is not disproportionate stemmed from case law—as opposed to a creature of statute like ours—it was bound to follow the United States Supreme Court's jurisprudence that did not require this type of review. *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). Regardless, prior Florida cases analyzing comparative proportionality review are still persuasive as they demonstrate the distinction between cold and calculated murders versus "reactive" ones that ordinarily result in a life sentence.

fired one fatal shot, stole $108, and fled the scene); *Sinclair v. State*, 657 So. 2d 1138, 1143 (Fla. 1995) (vacating death sentence where the defendant entered a taxi cab with a weapon and murdered the driver rather than pay the cab fare); *Clark v. State*, 609 So. 2d 513, 515 (Fla. 1992) (vacating a death sentence where the defendant fatally shot an individual and took the victim's money and boots afterwards, which the court characterized as "incidental to the killing, not a primary motive for it"); *McKinney v. State,* 579 So. 2d 80 (Fla. 1991); *Lloyd v. State,* 524 So. 2d 396 (Fla. 1988); *Proffitt v. State,* 510 So. 2d 896 (Fla. 1987); *Caruthers v. State,* 465 So. 2d 496 (Fla. 1985); *Rembert v. State,* 445 So. 2d 337 (Fla. 1984). While there are certainly differences between these cases, all of them are more egregious than Moore's in one important respect: every perpetrator began the robbery or burglary armed at the inception—unlike Moore—yet *still* their death sentences were determined to be disproportionate. In my view, entering a convenience store unarmed falls well short of engaging in a cold, calculated, and premeditated murder. While tragic and heinous to the victim and his family, Moore's crime does not represent the "worst of the worst" in terms of those murders reserved for the death penalty. *Glossip v. Gross*, 576 U.S. 863, 920–21 (2015) (Breyer, J., dissenting) ("Every murder is tragic, but unless we return to the mandatory death penalty struck down in *Woodson* . . . the constitutionality of capital punishment rests on its limited application to the worst of the worst . . . ."); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'") (*quoting Atkins v. Virginia*, 536 U.S. 304, 319 (2002))).

Florida is not alone in vacating multiple death sentences through its comparative proportionality review. Unlike the path taken by this Court over the years, the North Carolina Supreme Court has found at least eight death sentences disproportionate during the modern era.[8] *See State v. Roache*, 595 S.E.2d 381, 435

[8] A recent study by a professor at Appalachian State University noted that upwards of 23.5% of death sentences in North Carolina could be considered disproportionate. *See* Matthew Robinson, *The Death Penalty in North Carolina, 2021*, APP. STATE UNIV. (June 2021), https://gjs.appstate.edu/sites/default/files/asu_profile_files/nc_death_penalty_2021_by_dr_matthew_robinson_final.pdf. While many people, including judges, may disagree over whether a sentence is proportionate, thus rendering it nearly impossible to settle on a specific

(N.C. 2004) (listing the eight cases where a death sentence was determined to be disproportionate); *see also State v. Benson*, 372 S.E.2d 517, 523 (N.C. 1988) (vacating a death sentence after noting the vast majority of robbery-murders end with life sentences and of those that end with death sentences, the vast majority involve multiple victims), *abrogated on other grounds by State v. Hooper*, 591 S.E.2d 514 (N.C. 2004). Moreover, state supreme courts in Georgia, Louisiana, Mississippi, Missouri, New Mexico, Tennessee, and Utah have all vacated at least one death sentence pursuant to comparative proportionality review.[9]

In the nearly thirteen years I have served on this Court, I have voted to affirm eleven death sentences on direct appeal and have never dissented. Starting with those cases that involved armed robbery, it is readily apparent this case is an outlier. For example, in *State v. Starnes*, 388 S.C. 590, 594, 698 S.E.2d 604, 606 (2010), the defendant fatally shot two of his friends, removed items from their pockets, transported their bodies in the trunk of his car to another location, and later kicked and urinated on their corpses. *Id.* at 594, 698 S.E.2d at 606-07. In finding the death sentence proportional, the Court cited two armed robbery cases resulting in multiple murders, and a single murder armed robbery case committed in the course of kidnapping and burglary. *Id.* at 603, 698 S.E.2d at 611. In *State v. Torres*, 390 S.C. 618, 621-22, 703 S.E.2d 226, 227-28 (2010), police conducted a welfare check after discovering a single vehicle accident involving a van. Once law enforcement arrived at the house of the van's owner, they discovered a husband and wife murdered. The

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percentage of cases, the fact that this Court has never found a single case disproportionate when many other courts have is stunning.

[9] *See Ward v. State*, 236 S.E.2d 365, 368 (Ga. 1977); *State v. Holliday*, __ So. 3d __, 2020 WL 500475 (La. 2020) (noting only one time has a death sentence been vacated as disproportionate in Louisiana); *Coleman v. State*, 378 So. 2d 640, 650 (Miss. 1979); *State v. McIlvoy*, 629 S.W.2d 333, 342 (Mo. 1982) (vacating a death sentence as disproportionate notwithstanding the fact that the jury's decision was not the result of passion, prejudice, or any other arbitrary factor, and evidence supported the aggravating factors charged to the jury); *Fry v. Lopez*, 447 P.3d 1086, 1111 (N.M. 2019); *State v. Godsey*, 60 S.W.3d 759, 793 (Tenn. 2001) (invalidating a death sentence based on disproportionality where "the circumstances . . . are substantially less egregious, overall, than the circumstances of similar cases in which a sentence less than death has been imposed"); *State v. Gardner*, 789 P.2d 273, 279 (Utah 1989).

jury found the defendant guilty of two counts of armed robbery; two counts of murder; one count of burglary of a dwelling, first degree; one count of attempt to burn; and one count of criminal sexual conduct, first degree, resulting in a sentence of death. *See also State v. Justus*, 392 S.C. 416, 417, 709 S.E.2d 668, 669 (2011) (upholding a death sentence as proportional where the defendant, who was serving two life sentences for murdering two convenience store clerks during separate armed robberies, stabbed another inmate eleven times, including a fatal wound to the heart); *State v. Stanko*, 402 S.C. 252, 288, 741 S.E.2d 708, 727 (2013) (affirming appellant's murder and armed robbery convictions and death sentence), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019).

In *State v. Bryant*, 390 S.C. 638, 639, 704 S.E.2d 344, 344 (2011), one need look no further than the opening paragraph of the facts section to realize the death penalty was justified, as Justice Pleicones noted:

> Appellant began a crime spree with a first degree burglary on October 5, 2004. By the time the spree ended eight days later, appellant had committed three murders, assault and battery with intent to kill (ABIK), two more burglaries, and arson. While incarcerated awaiting trial, appellant threatened a correctional officer and subsequently attacked and seriously injured another.

Id. The three murders were particularly heinous. Bryant killed his first victim, leaving him on a rural road. *Id.* at 640, 704 S.E.2d at 345. After stealing from the victim's trailer, Bryant set it on fire. *Id.* A couple days later, Bryant killed his second victim, shooting him nine times and looting his house. *Id.* Bryant even answered several calls from the victim's wife and daughter, informing both of them he had killed their loved one. *Id.* Bryant burned that victim with a cigarette butt and left two notes indicating he planned to kill again. *Id.* Two days later, Bryant shot and killed his third victim, who was discovered by a hunter along a rural road. *Id.*

Coincidently, the first capital case reviewed under our modern statutory scheme involved the aggravating circumstance of armed robbery, but the facts paint a significantly more gruesome picture. *State v. Shaw*, 273 S.C. 194, 197, 255 S.E.2d 799, 800 (1979), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). There, the defendant, joined by two friends, spent an afternoon consuming drugs and alcohol before deciding "to see if we could find a girl to rape." *Id.* at 197, 255 S.E.2d at 801 (quoting one of the perpetrators). After locating a teenage couple in a car, the three friends stole the male's wallet, shot and killed him,

and ordered the female into their vehicle. *Id.* at 197-98, 255 S.E.2d at 801. The group drove to another location, raped the victim at least four times, and shot and killed her. *Id.* at 198, 255 S.E.2d at 801. They returned to where they shot the male to verify that he was dead, and the defendant later went back to where he killed the female victim and subsequently mutilated her body. *Id.*

And today, I voted to affirm the death sentence of Jerome Jenkins, who brutally murdered a store clerk during an armed robbery. *State v. Jenkins*, Op. No. 28089 (S.C. Sup. Ct. filed April 6, 2022) (Howard Adv. Sh. No. 12 at 46, 71). Unlike Moore, Jenkins and two others collectively scouted a convenience store, subsequently entered it wearing masks, and armed themselves with pistols before Jenkins shot and killed the clerk. *Id.* at 47. During sentencing, the State introduced evidence that three weeks after the armed robbery, Jenkins carried out two more robberies within hours of each other using the same *modus operandi*, which left another clerk dead. *Id.* at 48.

Other cases before the Court during my tenure are also more appreciably heinous. *See State v. Dickerson*, 395 S.C. 101, 108, 716 S.E.2d 895, 899 (2011) (affirming a death sentence where the defendant tortured his former friend to death for a period of eighteen to twenty-four hours, including "choking, being tied up and placed in a closet, being sodomized with a gun and a broomstick, having his scrotum burned, being hit with a heavy vase and a mirror, and generalized beating and cutting," all resulting in over 200 wounds to his body); *State v. Inman*, 395 S.C. 539, 544, 720 S.E.2d 31, 34 (2011) (finding a death sentence proportional where the defendant pled guilty to murder, first-degree burglary, first-degree criminal sexual conduct, and kidnapping of a Clemson University student who he strangled with a bathing suit); *State v. Motts*, 391 S.C. 635, 640, 707 S.E.2d 804, 806 (2011) (holding a death sentence was proportionate where the defendant, who was serving a life sentence for the murders of his great-aunt and great-uncle committed during an armed robbery, murdered his cell mate); *State v. Blackwell*, 420 S.C. 127, 134-35, 801 S.E.2d 713, 716-17 (2017) (upholding a death sentence as proportional where the defendant kidnapped and killed the daughter of his ex-wife's boyfriend); *State v. Cottrell*, 421 S.C. 622, 646, 809 S.E.2d 423, 436 (2017) (finding a death sentence proportional where the defendant murdered a police officer). Admittedly, these cases are outside the context of an armed robbery, but they involve truly gruesome crimes warranting capital punishment.

Moreover, on Moore's direct appeal, the cases this Court relied on are significantly more egregious than the facts here.[10] Unlike Moore, all of the defendants were armed at the inception and committed planned, premediated armed robberies that resulted in the death of at least one individual. While there have been individuals executed based on killing a single victim during the commission of an armed robbery, that alone is not dispositive. Even accepting the premise that such a case qualifies for capital punishment—which I do—I have not found any other case involving a defendant receiving the death penalty where he entered the place of business unarmed. Indeed, the State specifically conceded at oral argument that it could not cite to *any* case in our state with this distinguishing fact. This striking concession, which I believe supports my position that Moore's death sentence is disproportionate, is ignored by the majority and in my view, seriously undermines the suggestion that Moore's sentence is sufficiently similar to other cases to warrant capital punishment. *See generally Godfrey*, 446 U.S. at 433 ("There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.").

Respectfully, the majority's decision to dwell on the fact that Moore's crime meets the legal definition of armed robbery and that evidence supports the jury's findings of aggravating circumstances, while ignoring the State's stunning admission and the precedent elsewhere, is wrong. In my view, the majority's analysis belongs in Moore's direct appeal, not in this petition for habeas directed at proportionality review. In concluding that evidence supported the jury's determination that an armed robbery had occurred and the presence of aggravating circumstances, we shirk our statutory responsibility to conduct an in-depth comparative proportionality review and serially affirming death sentences becomes a self-fulfilling prophecy. *See*

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[10] I do not believe this Court's finding on direct appeal is automatically dispositive in this habeas proceeding, as fundamental tenets of justice must transcend principles of finality when capital punishment is involved. *See Sanders v. United States*, 373 U.S. 1, 8 (1963) ("Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged . . . . The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ."); *Clark v. Tansy*, 882 P.2d 527, 532 (N.M. 1994) ("We hold that when a habeas petitioner can show that there has been an intervening change of law or fact, or that the ends of justice would otherwise be served, principles of finality do not bar relitigation of an issue adversely decided on direct appeal.").

Dickerson, 395 S.C. at 125 n.8, 716 S.E.2d at 908 n.8 (noting the "self-fulfilling prophecy" that comparative proportionality review has the risk to become); *Thomason v. State*, 486 S.E.2d 861, 874 (Ga. 1997) (Benham, J., concurring in part and dissenting in part) ("Exacerbating the risk of a faulty proportionality analysis is the doctrine of stare decisis: if we lower the standard in a single case, that case becomes precedent for easier and easier imposition of the most extreme punishment available in criminal jurisprudence.").

My focus on the majority's recitation of the jury's findings in no way should be read as disparaging the verdict of the jury. I fully acknowledge the jury's role in our judicial system is sacrosanct. Nevertheless, our responsibility, as established by the General Assembly, is to review the death sentence to ensure it is not "excessive or disproportionate to the penalty imposed in similar cases . . . ." S.C. Code Ann. § 16-3-25(C)(3). I believe this requires us to do more than simply recite the evidence supporting the jury's sentence. Indeed, the Supreme Court of Tennessee has characterized comparative proportionality review as "whether this case, taken as a whole, is plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed," and specifically rejected the state's contention that it is designed to determine "whether, viewing the entire record, the decision of the jury was based in reason as opposed to whim or prejudice." *State v. Godsey*, 60 S.W.3d 759, 787 (Tenn. 2001). Stated differently, the court noted "that reviewing the record in each case in isolation, as the State suggests, is not the appropriate analysis when conducting *comparative* proportionality review." *Id.* (emphasis in original).

This case also highlights the unsettling constitutional waters which surround the death penalty. The majority appropriately identifies the General Assembly's role in setting forth the list of aggravating circumstances that qualify an individual for capital punishment, and the solicitor's role in electing to pursue the death penalty in an eligible case. Where I part company with the majority is in its view that the Court has no role in those two arenas. While on the surface that is correct, it is equally true that in order for a punishment to pass constitutional muster, it must not be imposed arbitrarily. Accordingly, I believe this Court has a responsibility to illuminate how our capital punishment scheme is actually functioning in practice.[11] Unfortunately,

[11] Indeed, at oral argument, one Justice noted the various factors at play in whether a solicitor pursues the death penalty, including the resources available, the historical likelihood of obtaining a death sentence from the jury, the number of other crimes

but not surprisingly, Moore's case highlights many of the pitfalls endemic to the death penalty, beginning with the role race plays.

Moore's death sentence is a relic of a bygone era, where he was convicted by a jury comprised of eleven Caucasians and one Hispanic. No African Americans served on the jury, despite several being included in the jury pool. Alarming statistics also surface when reviewing the race of the victim. From 1985 to 2001, there were twenty-one cases in Spartanburg County where a death notice was filed, and in all but one the victim was white.[12] As Moore highlights in his petition for habeas relief, during the first eight years of that timeframe, the solicitor's office sought the death penalty in 43% of death eligible cases involving a white victim but not once in a case with a black victim. *See Simpson v. Moore*, No. 98-CP-42-1911, PCR Tr. (Dec. 10,

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that requires prosecuting, the county where the crime occurred, and other similar considerations. Significantly, one state supreme court recently declared its capital punishment scheme unconstitutional precisely due in part to these same variables, as well as race, which lead to an unconstitutionally acceptable rate of arbitrariness. *See State v. Gregory*, 427 P.3d 621, 627 (Wash. 2018) ("[T]he use of the death penalty is unequally applied—sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant."). Moreover, at least one member on the United States Supreme Court believes these variables seriously undermine the constitutionality of capital punishment. *See Glossip*, 576 U.S. at 918 (Breyer, J., dissenting) ("Such studies indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*.") (emphasis in original).

[12] Shockingly, in the one capital case involving black victims, the solicitor admitted considering potential backlash from the African American community if the office did not pursue the death penalty in that case due to the decision to pursue a death sentence in a similar case with white victims. That defendant subsequently was granted post-conviction relief due in part to the evidence demonstrating race played a role in pursuing the death penalty. Order Granting Relief, *Kelly v. State*, No. 99-CP-42-1174 (Ct. Common Pleas, Oct. 6, 2003).

2001). According to one law professor and statistician, the statistical likelihood of race not contributing to this disparity is six in ten thousand. *Id.*

South Carolina is not unique in this as similar findings persist across our nation, with studies demonstrating the death penalty is disproportionately sought in cases involving white victims. *See generally* Steven F. Shatz and Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman*,* McCleskey*, and A Single County Case Study*, 34 CARDOZO L. REV. 1227, 1246 (2013) ("Since *McCleskey*, there have been numerous empirical studies focused on racial disparities in death-charging and death-sentencing, and virtually all found significant racial disparities in death-charging, death-sentencing, or both."). Further, as the amicus brief starkly notes, "From 1930 until 1972, approximately half of the people sentenced to death and executed for homicide in the United States were Black. 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." Brief of NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* 7. South Carolina's statistics are equally troubling dating back to 1912 when official records began. Of the 282 people that have been executed since then, 208, or 74% were black and 74, or 26% were white. *Death Row/Capital Punishment*, S.C. DEP'T. OF CORRECTIONS (last visited March 31, 2021), http://www.doc.sc.gov/news/deathrow.html#execution. While our state has substantially reduced the level of bias in the modern era,[13] the foundation of our capital punishment scheme is deeply rooted in racial disparity. I fully acknowledge the Supreme Court has held that general patterns of racial discrimination are not enough to prove an arbitrary sentence, *see McCleskey v. Kemp*, 481 U.S. 279, 317-19 (1987), but it is disingenuous to discount the factor race plays.

Race is not the only factor that leads to bona fide questions as to whether our capital sentencing scheme is capable of being conducted in a constitutionally

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[13] In South Carolina, executions in the modern death penalty era resumed in 1985, and since then, forty-three people have been executed. Of those, twenty-seven, or 63% were white while sixteen, or 37% were black, which more closely approximates the racial makeup in our state. *Execution Database*, DEATH PENALTY INFO. CTR., (last visited March 31, 2021), https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=South%20Carolina. *See also QuickFacts*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/SC (estimating 64% of our state's population is white and 27% is black).

permissible manner. Gender—of both the defendant and the victim—plays a substantial role as well. *See* Shatz & Dalton, *supra*, at 1251 (noting gender disparities are present in both the gender of the defendant and of the victim, and recounting that "although women constitute 10% of those arrested for murder, they constitute only 2% of those sentenced to death at trial, and only 1% of those actually executed"). Additionally, the geography or location of where the criminal offense occurs significantly affects whether similar offenses are treated in a likewise manner. *Id.* at 1253-54 (noting that one South Carolina study on the role of geography in death penalty charging revealed "tremendous variation in death-charging rates that, applying a regression model, could not be explained by any of the legitimate or illegitimate variables"). Further, at the outset of a decision to seek the death penalty, budgetary restrictions and other considerations may influence whether a death-eligible case proceeds accordingly. After sentencing, the lengthy period an inmate spends on death row is staggering. Of the thirty-five inmates currently on death row, three were sentenced to death in the 1980s, eight during the 1990s, and twenty-four during the 2000s. *Death Row Roster*, S.C. DEP'T. OF CORRECTIONS (March 31, 2021), http://www.doc.sc.gov/news/death-row-report.pdf. Thus, almost one-third of the individuals have spent over twenty years on death row, and some more than thirty-five years. Because our state has not carried out an execution in over a decade, nearly 92% of inmates have been confined to death row for at least a dozen years. It could be persuasively argued—and indeed has been argued by the participants in the system, most especially the victims and their families—that our system of capital punishment is broken. Perhaps Justice Marshall was correct over forty years ago when he stated that "[t]he task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system—and perhaps any criminal justice system—is unable to perform." *Godfrey*, 446 U.S. at 440 (Marshall, J., concurring).

In conclusion, I completely support the majority's decision to expand the pool of cases relevant to our comparative proportionality review. I share the sentiments of Justice Labarga on the Florida Supreme Court, who noted,

> As a Court, and as individual Justices, we are called upon to either affirm or reverse the most severe penalty that can ever be imposed on a human being. That is a responsibility that must be carried out in a manner that gives the Court, as a whole, and each Justice individually, moral and legal certainty that the defendant is deserving of the ultimate penalty when the facts of the crime, the aggravating circumstances,

> and the mitigating circumstances are carefully considered. This, in my view, is necessary to ensure that the penalty is imposed fairly and consistently throughout the State.

Yacob, 136 So. 3d at 557 (Fla. 2014) (Labarga, J., concurring), *abrogated by Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). However, I believe that review should begin with this case and that Moore's sentence of death should be held disproportionate to the facts surrounding his crime. The death penalty should be reserved for those who commit the most heinous crimes in our society, and I do not believe Moore's crimes rise to that level. Because I believe Moore's death sentence is disproportionate, I would grant habeas relief and vacate it. Accordingly, I concur in part and dissent in part.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jerome Jenkins Jr., Appellant.

Appellate Case No. 2019-001280

Appeal from Horry County
Robert E. Hood, Circuit Court Judge

Opinion No. 28089
Heard October 12, 2021 – Filed April 6, 2022

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, Kathrine Haggard Hudgins, and Adam Sinclair Ruffin, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Melody Jane Brown, and Senior Assistant Attorney General William Edgar Salter III, of Columbia, for Respondent.

JUSTICE FEW: Jerome Jenkins Jr. was convicted of murder, attempted murder, and armed robbery. An Horry County jury sentenced Jenkins to death on the murder

charge. This opinion consolidates Jenkins' direct appeal and our mandatory review of his death sentence under section 16-3-25 of the South Carolina Code (2015). We affirm.

I. Facts and Procedural History

On January 2, 2015, James Daniels entered the Sunhouse convenience store at the intersection of Highway 905 and Red Bluff Road in Longs, South Carolina, on the pretense of buying a bottle of lemonade. James' actual purpose was to scout the store for Jerome Jenkins and James' brother McKinley Daniels to rob it. Minutes after James left the store, Jenkins and McKinley entered, masked and armed with pistols. They first encountered Jimmy McZeke, who worked at the store. Jenkins and McKinley fired at McZeke, but both missed. McZeke then ran into the bathroom at the back of the store and locked the door. Jenkins followed McZeke and shot at him through the bathroom door. The gunshots shattered several glass bottles, and the shattered glass cut McZeke on his head.

McKinley stayed at the front of the store where the store clerk—Bala Paruchuri—stood behind the cash register. McKinley pointed his pistol at Paruchuri, went behind the counter, and robbed Paruchuri of the money in the register. Jenkins quickly returned to the front of the store. As he and McKinley left the store, both shot Paruchuri. According to the store's video security system that recorded the entire sequence, Jenkins and McKinley were in the store for thirty-seven seconds. Paruchuri died as a result of multiple gunshot wounds.

The State charged Jenkins with murder of Paruchuri, attempted murder of McZeke, and armed robbery, and sought the death penalty for the murder charge. During defense counsel's opening statement in the guilt phase of trial, Jenkins admitted his guilt, stating through counsel, "Let me say this to you. I listened to the Solicitor's presentation, and a lot of what he said is true. I will tell you this right up front, straight up: Jerome Jenkins is guilty. . . . He's guilty of the charges that the State has brought against him." The jury found Jenkins guilty of all three charges, and after the twenty-four-hour mandatory waiting period, the case proceeded to the sentencing phase of trial.

During the sentencing phase, the State introduced evidence that Jenkins and the Daniels brothers robbed two additional convenience stores—one Scotchman and a second Sunhouse—within hours of each other on January 25, 2015, three weeks after

the first Sunhouse robbery and murder. As in the first Sunhouse robbery and murder, James scouted each store minutes before Jenkins and McKinley entered wearing masks and armed with pistols. In the course of the robbery of the second Sunhouse store, Jenkins shot and killed the store clerk Trisha Stull.[1]

Also during the sentencing phase, the State introduced Jenkins' prior convictions for burglary in the second degree and grand larceny in 2011, and for distribution of cocaine in 2013. The State also presented a written summary of Jenkins' twenty-six disciplinary infractions in pre-trial detention in South Carolina Department of Corrections (SCDC) as evidence of Jenkins' future dangerousness. Witnesses testified to several specific instances, including Jenkins throwing "unknown liquids" on correctional officers, cutting an officer with a sharp object, assaulting an officer and threatening to kill him, throwing a metal object at an officer, throwing feces in an officer's face, and throwing a homemade knife at an officer and threatening to kill another one of the officers. The jury heard that all of this conduct occurred while the State held Jenkins as a "safekeeper" in SCDC pending trial, but the jury did not hear the reasons Jenkins was held at SCDC instead of the county jail.[2]

Jenkins called two SCDC officers to testify they had not had any disciplinary issues with Jenkins. Jenkins also presented witnesses testifying—among other things—Jenkins had three young children, was a "respectful guy," and was "vulnerable to the influence of others" because he was "very immature."[3] Dr. Donna Maddox—an

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[1] We refer to robbery of the second Sunhouse store and the murder of Trisha Stull as "the second Sunhouse robbery and murder." The State indicted Jenkins for all of these crimes but tried only the indictments from the first Sunhouse robbery and murder.

[2] Ordinarily, a defendant who has not been given—or who has not posted—bail is held in the county jail pending trial. Section 24-3-80 of the South Carolina Code (Supp. 2021) provides a prisoner may be detained in SCDC for "safekeeping" when "commitment [is] duly authorized by the Governor, provided, a warrant in due form for the arrest of the person so committed shall be issued within forty-eight hours after such commitment and detention." A person held for safekeeping under section 24-3-80 is generally referred to as a "safekeeper."

[3] Jenkins was twenty years and eight months old at the time of the crime.

expert in forensic psychiatry—diagnosed Jenkins with several mental health disorders, including post-traumatic stress disorder, an unspecified depressive disorder, and a substance abuse disorder. Dr. Maddox also testified Jenkins was "under the influence" of McKinley or James.

The trial court charged the jury on two statutory aggravating circumstances: the defendant committed the murder while in the commission of robbery while armed with a deadly weapon and the defendant committed the murder while in the commission of larceny while armed with a deadly weapon.[4] Additionally, the trial court charged five statutory mitigating circumstances[5] to the jury.

The jury unanimously found both statutory aggravating circumstances existed and sentenced Jenkins to death for the murder of Bala Paruchuri. The trial court sentenced Jenkins to thirty years in prison for attempted murder and thirty years in prison for armed robbery but did not indicate whether the sentences were consecutive or concurrent.

II. Analysis

Under our mandatory duty to review a sentence of death, we must "consider the punishment as well as any errors by way of appeal." § 16-3-25(B). We first address the seven errors Jenkins alleges the trial court made and then review the death sentence as required by section 16-3-25.

A. Sentencing by Court on a Guilty Plea

The first error Jenkins alleges on appeal is the trial court denied him the right to plead guilty and be sentenced by a jury. As Jenkins acknowledges, however,

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[4] *See* S.C. Code Ann. § 16-3-20(C)(a)(1)(e)-(f) (2015) (providing the trial court "shall include in [the trial court's] instructions to the jury for it to consider . . . Statutory aggravating circumstances: (1) The murder was committed while in the commission of the following crimes or acts: . . . (e) robbery while armed with a deadly weapon . . . [or] (f) larceny with use of a deadly weapon").

[5] *See* S.C. Code Ann. § 16-3-20(C)(b) (2015) (listing ten statutory mitigating circumstances to be considered by the jury if supported by the evidence).

subsection 16-3-20(B) of the South Carolina Code (2015) requires that when a capital defendant pleads guilty to murder, he must be sentenced by the trial court and must not be sentenced by a jury. Jenkins initially states this issue as whether the trial court "erred by refusing to declare the state's death penalty statute, S.C. Code § 16-3-20(B), unconstitutional to the extent it mandates that the sentencer is the judge and not a jury." We have repeatedly addressed this very argument, and on each occasion, we held this subsection is constitutional. *See State v. Downs*, 361 S.C. 141, 146-47, 604 S.E.2d 377, 380 (2004) (holding a defendant is not deprived of his right to a trial by jury when he pleads guilty because—as a predicate to pleading guilty—he must voluntarily waive his right to a jury trial on both guilt and sentencing; distinguishing *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)); *see also State v. Allen*, 386 S.C. 93, 102, 687 S.E.2d 21, 25 (2009) (same); *State v. Crisp*, 362 S.C. 412, 418-19, 608 S.E.2d 429, 433 (2005) (same); *State v. Wood*, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004) (same).

Jenkins argues the Supreme Court's 2016 decision in *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), requires that a jury impose the sentence in all capital cases, effectively overruling *Allen*, *Crisp*, *Wood*, and *Downs*. In *Hurst*, the Supreme Court stated, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 577 U.S. at 94, 136 S. Ct. at 619, 193 L. Ed. 2d at 508. *Hurst* is distinguishable from this case, however, for the same reason we distinguished *Ring v. Arizona* in *Allen*, *Crisp*, *Wood*, and *Downs*. *Hurst* dealt with a Florida statute under which "the jury renders an 'advisory sentence' of life or death," after which, "Notwithstanding the recommendation of a majority of the jury, the [trial] court . . . shall enter a sentence of life imprisonment or death." 577 U.S. at 95-96, 136 S. Ct. at 620, 193 L. Ed. 2d at 509 (quoting Fla. Stat. § 921.141(2)-(3) (Supp. 2012)). The Florida procedure applied even in cases in which the defendant exercised his right to a trial by jury. As we explained in *Allen*, *Crisp*, *Wood*, and *Downs*, the situation is different when the defendant makes a valid waiver of his right to a trial by jury as a predicate to pleading guilty. *See, e.g.*, *Crisp*, 362 S.C. at 418-19, 608 S.E.2d at 433 ("The constitutionality of Section 16–3–20(B) . . . rests . . . on whether the statute comports with the right to a jury trial as established by this Court and the United States Supreme Court in interpreting the state and federal constitutions."); *Downs*, 361 S.C. at 146, 604 S.E.2d at 380 ("*Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty."). Thus, we disagree *Hurst* has any impact on *Allen*, *Crisp*, *Wood*, or *Downs*. We once more affirm the constitutionality of the subsection 16-3-20(B)

requirement that a capital defendant who pleads guilty to murder must be sentenced by the trial court.

Jenkins' more precise and compelling argument, however, is based on a particular discussion the trial court had with him during a pre-trial hearing on March 7, 2019, nine weeks before trial. The trial court conducted the hearing without the Solicitor present pursuant to subsection 16-3-26(B)(1) and (C)(1) of the South Carolina Code (2015).[6] As the hearing concluded, the trial court and Jenkins joked with each other about Jenkins' move from SCDC back to the county jail in preparation for trial. Jenkins himself—not speaking through counsel—then asked the trial court whether it was legal for the State to deny him a guilty plea and make him go to trial.

> Jenkins: I have a question. Is it legal for them to make me go to trial?
>
> Court: Make you go to trial?
>
> Jenkins: Basically, they made me go to trial. I didn't get no plea or nothing. So, is it legal?
>
> Court: I mean, you have the right to plead guilty if you want to plead guilty.
>
> Jenkins: Plead guilty to the death sentence?
>
> Court: Right. I mean, we are both kind of smiling at each other as we say that, but I mean, there are some people who believe criminal defendants do not have a right to plead guilty. You know, I don't think you can stop somebody from pleading guilty as charged. But, you know --

[6] These subsections permit the trial court to conduct ex parte hearings for purposes of addressing the appointment of counsel and funding. In the March 7 hearing, the trial court heard and resolved Jenkins' concerns about his counsel.

Jenkins: So if I plead guilty to the death sentence, I would be on death row?

Court: Yeah.

Jenkins: Not a chance.

Court: Right. . . .

We wish to be very clear this was error by the trial court. *See generally Crisp*, 362 S.C. at 415-16, 608 S.E.2d at 431-32 (discussing the propriety of a trial court's statements to a capital defendant concerning his right to a trial by jury); *State v. Owens*, 362 S.C. 175, 178, 607 S.E.2d 78, 79-80 (2004) (same). In *Crisp* and *Owens*, we relied on a series of four cases in which the trial court made erroneous statements to a defendant concerning his right to testify or to remain silent.[7] *Crisp*, 362 S.C. at 416-17, 608 S.E.2d at 431-32; *Owens*, 362 S.C. at 177-78, 607 S.E.2d at 79-80. The central premise of these six cases is that while discussing with a defendant a choice the defendant must make about a constitutional right, the trial court may not make an inaccurate statement of law nor inject its personal opinion into the defendant's analysis. In this case, the trial court made an inaccurate statement of law that Jenkins appears to have interpreted as the trial court's personal opinion—formed before hearing any evidence—as to whether Jenkins deserved the death penalty. This is error.

The question then becomes whether the error warrants reversal. In *Crisp* and *Owens*, we rejected the idea the error in those cases could be harmless, stating in *Crisp* "such

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[7] *See State v. Gunter*, 286 S.C. 556, 559-60, 335 S.E.2d 542, 543 (1985) (explaining a trial court must inform the defendant of his choices accurately and stating, "A statement by the trial judge which intimates that the jury will ignore his instructions is improper"); *State v. Pierce*, 289 S.C. 430, 434, 346 S.E.2d 707, 710 (1986) (relying on *Gunter* and stating the defendant "had the right to make that decision free of any influence or coercion from the trial judge"), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Cooper*, 291 S.C. 332, 336-37, 353 S.E.2d 441, 443 (1986) (relying on *Gunter* and *Pierce*), *overruled on other grounds by Torrence*; *Butler v. State*, 302 S.C. 466, 467, 397 S.E.2d 87, 87 (1990) (relying on *Gunter*, *Pierce*, and *Cooper*).

comments by a trial judge during a guilty plea proceeding are fundamentally erroneous and constitute prejudicial error." 362 S.C. at 417, 608 S.E.2d at 432. In *Owens*, we recited our discussion of prejudicial error from *Pierce*, in which the Court explained, "It is virtually impossible to determine the actual effect the judge's improper statements had on Pierce." *Owens*, 362 S.C. at 178, 607 S.E.2d at 80 (quoting *Pierce*, 289 S.C. at 434, 346 S.E.2d at 710). In each of those six cases—*Crisp*, *Owens*, *Gunter*, *Pierce*, *Cooper*, and *Butler*—however, the trial court made the erroneous statements *during* the hearing at the conclusion of which the defendant made the choice whether to exercise his right to a jury trial or his right to remain silent. Thus, the prejudicial effect of the trial court's erroneous statements was known by this Court to be present in the mind of the defendant at the time he made the decision about his constitutional right.

In this case, on the other hand, the erroneous comments were made on March 7, jury qualification did not begin until May 6, and the trial itself did not start until May 10. On April 26, the trial court heard motions, including Jenkins' "Motion to Find S.C. Code 16-3-20(B) Unconstitutional and Allow Defendant to Plead Guilty & Be Sentenced by Jury of His Peers," which Jenkins previously filed in written form on April 22. In the written motion and in arguing the motion, defense counsel said nothing about what occurred at the March 7 hearing. Thus, in the April 26 motion hearing, Jenkins did not make the more precise and compelling argument he makes on appeal; he made only the argument we have repeatedly rejected in holding subsection 16-3-20(B) is constitutional. As our holdings in *Allen*, *Crisp*, *Wood*, and *Downs* required, the trial court denied the motion.

On May 10—the morning of trial and only moments before opening statements—Jenkins again brought up his motion to declare subsection 16-3-20(B) unconstitutional. His counsel stated,

> We believe that statute is unconstitutional and it takes away a defendant's right to plead guilty and be sentenced by a jury. We think every defendant is entitled to have a jury trial, that every defendant is entitled to have a jury trial on the issue of sentencing in a capital case; this being a capital case.

Jenkins still did not mention what the trial court said at the March 7 hearing, again relying only on the argument we rejected in *Allen*, *Crisp*, *Wood*, and *Downs*. The

trial court did not immediately respond. Jenkins' counsel then explained to the trial court,

> So, what we want to do is -- because we cannot plead guilty and then have a sentencing trial by jury, what we want to do is explain to the jury in this case that we are not pleading not guilty, that we admit guilt as to the issues in this case . . . , but that the only way we could have a jury do the sentencing is to go through this process, which means the State has to present evidence and we have to wait and let the jury hear the aggravating and mitigating factors in order to make their decision.

Jenkins' counsel then asked the trial court "to inquire of Mr. Jenkins if that is his understanding and if he is on board with that, and whether or not that is okay with him. Because, obviously, this is not something that is commonly done." After confirming both defense counsel believed the strategy to be in Jenkins' best interest, the trial court spoke directly to Jenkins, beginning with a specific reference to the March 7 conversation,

> You and I have talked before on the record that if you did plea, then I would be the one -- we would have a sentencing trial, but there is no jury, just up to me.[8] I think you said something like, "I like you, but not like that," or something like that.[9] We all kind of chuckled about it . . . .

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[8] We have not been asked to consider nor have we considered whether the trial court's comments at the May 10 hearing—particularly this statement—cured the March 7 error. Rather, as explained below, we simply do not reach this issue because the March 7 error is not preserved.

[9] At this point in the transcript, the court reporter indicated the trial judge was "laughing."

After a lengthy dialogue, the trial court confirmed Jenkins understood the strategy. The trial court then approved the strategy, stating, "I think it is a very good strategy, and a very positive strategy."

Thus, Jenkins' trial counsel had at least three opportunities to object to the trial court's March 7 error: (1) the March 7 hearing, which—though ex parte—was attended by both defense counsel, (2) the April 26 hearing, and (3) the May 10 hearing. The trial court's playful May 10 recitation of the March 7 conversation indicates he did not realize what he told Jenkins on March 7. In fact, we see no indication in the record that the trial court was ever aware his March 7 comments could have been an issue or could have improperly influenced Jenkins' decision on his constitutional right to not plead guilty. If defense counsel had objected to the March 7 comments at any of the at least three opportunities, the trial court could have taken steps to correct its error. Or, in the unlikely event the trial court actually meant what he said, a different error would be confirmed. The first time Jenkins mentioned the March 7 error, however, was in his brief to this Court.

In addition to counsel's obligation to object to the trial court's March 7 error, the Sixth Amendment requires counsel to independently explain to a criminal defendant the law applicable to each significant issue in his case, particularly where the defendant must make an important decision about exercising a constitutional right. *See generally Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984) ("From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."). It is inconceivable that defense counsel did not have an extended conversation with Jenkins—probably on more than one occasion—about his right to a trial by jury, and consequently, what the law permitted and required of the trial court if Jenkins decided not to exercise his right to a trial by jury. This is particularly true in this case, where we know the question of a guilty plea was very much on the mind of Jenkins and his lawyers. In those conversations, it is equally inconceivable counsel did not explain to Jenkins that the trial court would be required by law to consider both death and life as options for his sentence, and to do so with an open mind without preconceptions as to which sentence the evidence would warrant the trial court impose.

Therefore, as to the first error Jenkins alleges on appeal, we stand by our holdings in *Allen*, *Crisp*, *Wood*, and *Downs* that the subsection 16-3-20(B) requirement that a capital defendant who pleads guilty to murder must be sentenced by the trial court is constitutional. As to Jenkins' more precise and compelling argument, we find the trial court's March 7 error is not preserved for our review because counsel never brought the error to the attention of the trial court. *See State v. Dial*, 429 S.C. 128, 132, 838 S.E.2d 501, 503 (2020) ("It is firmly established law that, ordinarily, an issue must be presented to the trial court or it is not preserved for appellate review." (citing *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003))). On this point, we find it important that the trial court's comments in *Crisp*, *Owens*, *Gunter*, *Pierce*, *Cooper*, and *Butler* not only were contemporaneous with the defendant's decision to exercise the applicable constitutional right, but also the comments were nowhere near so clearly wrong as the erroneous statement that if Jenkins pled guilty, he would, "Plead guilty to the death sentence." The trial court's playful demeanor—laughing—at the time of the March 7 comments and when the court recounted the comments on May 10 convince this Court that the trial court had no knowledge of its error. Under the circumstances present here, defense counsel was obligated to point out this error to the trial court. Had counsel done so, we are confident the trial court would have corrected its error.

Finally, because the March 7 error occurred nine weeks before trial—nine weeks before Jenkins had to actually decide whether to exercise his right to a trial by jury—we do not know whether the trial court's erroneous comments actually affected Jenkins' decision to exercise his right to a trial by jury. In *Owens* and *Pierce*, we found the erroneous comments were prejudicial with specific reliance on our finding, "It is virtually impossible to determine the actual effect the judge's improper statements had on [the defendant]." *Owens*, 362 S.C. at 178, 607 S.E.2d at 80; *Pierce*, 289 S.C. at 434, 346 S.E.2d at 710. In this case, it is quite possible "to determine the actual effect the judge's improper statements had on" Jenkins and to determine whether trial counsel's later conversations with him—or the trial court's statements during the May 10 hearing—cured Jenkins' apparent interpretation of the trial court's March 7 comments. That possibility lies in the post-conviction relief process, during which counsel's conversations with Jenkins between March 7 and May 10 can be fully explored, and Jenkins' actual understanding of both what the trial court told him and his right to have a fair and impartial trial court sentence him if he pled guilty can also be fully explored.

B. Statement by McKinley Daniels

The second error Jenkins alleges on appeal is the trial court's refusal to admit into evidence, during the sentencing phase, a statement made by Jenkins' co-defendant McKinley to Jenkins' expert witness Dr. Maddox. Dr. Maddox interviewed McKinley several days before Jenkins' trial. During the interview, McKinley told her that, during the course of the second Sunhouse robbery and murder, he told Jenkins to kill the store clerk—Trisha Stull. Jenkins called Dr. Maddox to testify during the sentencing phase and asked, "Do you have an opinion as to whether or not J.J. was under the influence of James or McKinley Daniels?"[10] Dr. Maddox answered, "Yes. It is my opinion he was, absolutely." In a hearing outside the jury's presence moments earlier, Jenkins told the trial court he intended to elicit from Dr. Maddox the statement by McKinley to her that McKinley "told J.J.[11] to kill Trisha Stull." The trial court refused to admit the statement, ruling it is hearsay.

The State argues the trial court was correct to find the statement is hearsay because Jenkins offered the statement in evidence to prove the truth of what McKinley asserted in his statement to Dr. Maddox—that McKinley did in fact tell Jenkins to kill Stull. *See* Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Jenkins argues, however, he did not offer the statement for that purpose, but for the purpose of explaining the basis of Dr. Maddox's opinion that Jenkins was "under the influence of . . . McKinley."[12] To

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[10] This particular testimony was addressed to the mitigating circumstance found in subsection 16-3-20(C)(b)(5), which provides the jury must consider whether "The defendant acted under duress or under the domination of another person."

[11] Jenkins is also known by the nickname "J.J."

[12] Jenkins argues on appeal the statement was admissible under Rule 804(b)(3) of the South Carolina Rules of Evidence as a statement against interest. Jenkins did not argue admissibility under Rule 804(b)(3) to the trial court. Nevertheless, Rule 804(b)(3) applies only if the declarant is "unavailable as a witness." McKinley was present by subpoena at Jenkins' trial, had already pled guilty to murder and armed robbery, and had been sentenced to forty-five years in prison at the time of Jenkins' trial. Thus, McKinley was not "unavailable." *See Mitchell v. United States*, 526

support this argument, Jenkins relies on Rule 703 of the South Carolina Rules of Evidence.

Rule 703, SCRE, provides, "If [the facts or data . . . upon which an expert bases an opinion] [are] of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Rule 703, SCRE, clearly provides facts or data need not be admissible for an expert to rely on the facts or data in reaching an opinion. In this respect, Rule 703 reflects a change to the common-law rule to the contrary.[13] *See State v. King*, 158 S.C. 251, 286-87, 155 S.E. 409, 422 (1930) (applying the common-law rule that an expert must base an opinion on "his [or her] own [personal] knowledge [of] the facts" or "a hypothetical state of facts" recited in a hypothetical question), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 352, 520 S.E.2d 614, 616 (1999); *see also* Fed. R. Evid. 703 advisory committee's note to 1972 proposed rules ("In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court."). It has been less clear how Rule 703, SCRE, affects admissibility of those otherwise inadmissible facts or data when an expert has relied on the evidence in forming an opinion. As the Federal Rules Advisory Committee stated when Federal Rule 703 was amended in 2000, "Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference." Fed. R. Evid. 703 advisory committee's note

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U.S. 314, 326, 119 S. Ct. 1307, 1314, 143 L. Ed. 2d 424, 436 (1999) ("It is true . . . that where there can be no further incrimination, there is no basis for the assertion of the privilege. . . . If no adverse consequences can be visited upon the convicted person by reason of further testimony, then there is no further incrimination to be feared.").

[13] The common-law rule was actually changed in South Carolina in 1990 with the addition of new Rule 24(b) to the South Carolina Rules of Criminal Procedure and Rule 43(m)(2) to the South Carolina Rules of Civil Procedure. *See* Rule 24(b), SCRCrimP (1991) (repealed 1995); Rule 43(m)(2), SCRCP (1991) (repealed 1995). *See* Rule 703, SCRE, note ("The rule is identical to the . . . former Rule 43(m)(2), SCRCP, and former Rule 24(b), SCRCrimP."); Rule 1103, SCRE ("These rules shall become effective September 3, 1995.").

to 2000 amendment. The Advisory Committee noted some federal courts and states provide unlimited admissibility of facts or data relied on by experts, while other courts allow admissibility only in limited circumstances. *Id.*

This Court and our court of appeals have made it clear that—in South Carolina—Rule 703 allows admissibility of otherwise inadmissible evidence only in limited circumstances. In other words, the mere fact an expert relies on inadmissible evidence does not make the evidence admissible. As this Court stated in *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), Rule 703, SCRE, "does not . . . make hearsay automatically admissible simply because it was relied upon by the expert." 401 S.C. at 358, 737 S.E.2d at 499 (citing *Allegro, Inc. v. Scully*, 400 S.C. 33, 46-47, 733 S.E.2d 114, 122 (Ct. App. 2012), *remanded on other grounds*, 408 S.C. 200, 758 S.E.2d 716 (2014); *see also Jones v. Doe*, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006) (stating Rule 703 "does not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion"). We have yet to be so clear, however, as to how a trial court should determine whether to admit evidence reasonably relied on by an expert when the evidence is otherwise inadmissible.

We begin our analysis of whether the trial court properly excluded the evidence in this case by observing the obvious fact that evidence often serves dual purposes. Here, McKinley's statement to Dr. Maddox would be useful to the jury for the improper hearsay purpose of determining whether McKinley did in fact tell Jenkins to kill Stull during the second Sunhouse robbery and murder. McKinley's statement would also be useful for the legitimate purpose of explaining the basis for Dr. Maddox's opinion that Jenkins was "under the influence of . . . McKinley." In *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020), we addressed how a trial court should analyze this situation. We stated, "To the extent a trial court finds evidence . . . does serve these dual purposes, the court must determine whether the evidence has sufficient probative force for serving the legitimate purpose that the evidence should be admitted, despite its inherent tendency to serve the improper purpose." 430 S.C. at 31, 842 S.E.2d at 657-58.

We hold the same analysis must be conducted under Rule 703, SCRE. This application of Rule 703 is consistent with the Federal Rules Advisory Committee's interpretation of the original version of Federal Rule 703, which is identical to South

Carolina's existing Rule 703.[14] Explaining that the 2000 amendment to the Federal Rule was intended to better reflect the original meaning, the Advisory Committee stated, "Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted." Fed. R. Evid. 703 advisory committee's note to 2000 amendment. The Advisory Committee then explained,

> When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect.

Id.

In a lengthy hearing outside the jury's presence, the trial court conducted this very analysis on the admissibility of McKinley's statement to Dr. Maddox. After hearing from both parties, the trial court ruled the statement is inadmissible hearsay. We begin our review of the trial court's analysis by pointing out that Dr. Maddox's opinion did not specifically address the subsection 16-3-20(C)(b)(5) mitigating circumstance, "The defendant acted under duress or under the domination of another person." Rather, responding to defense counsel's question "whether J.J. was under the influence of . . . McKinley," Dr. Maddox answered, "Yes." In addition, the statement McKinley "told J.J. to kill Trisha Stull" relates directly to the second Sunhouse robbery and murder on January 25 and, thus, only indirectly to Dr.

[14] When South Carolina adopted the Rules of Evidence in 1995, Rule 901(a) was "identical to the federal rule." Rule 703, SCRE, note. Rule 703, SCRE, has not been amended.

Maddox's opinion McKinley "influenced" Jenkins during the first Sunhouse robbery and murder on January 2. These facts lessen the probative value of the statement for the purpose of explaining Dr. Maddox's opinion. Jenkins makes an effective argument, however, that McKinley's statement would have served as a "factual anchor" to solidify and give credence to Dr. Maddox's opinion Jenkins was "under the influence" of McKinley. Without the statement, Jenkins argues, the jury was likely to view Dr. Maddox as a "hired gun."

Turning to the "prejudicial effect" on the State from the jury's consideration of McKinley's statement for its truth, the fact the statement relates only indirectly to the first Sunhouse robbery and murder diminishes the prejudice. In addition, the admission of the statement would have significantly helped the State in another respect because the statement directly contradicts what Jenkins told investigators in interviews admitted into evidence in the sentencing phase, that he denied participation in the second Sunhouse robbery and murder. The State placed particular emphasis on Jenkins' guilt in the Scotchman robbery and the second Sunhouse robbery and murder as justification for its seeking, and the jury's imposing, the death penalty.[15] The statement would thus have supported the State's sentencing phase argument that the death penalty is warranted against Jenkins because he committed the second Sunhouse robbery and murder. Therefore, we find the jury's use of McKinley's statement for its truth would have been only minimally prejudicial to the State.

Whether the trial court erred in excluding the statement McKinley made to Dr. Maddox is a close question. Some members of this Court would have admitted the statement, while others agree with the trial court and would have excluded it. The standard is whether the probative value of the statement for explaining Dr. Maddox's opinion "substantially outweighs" the probative value for its truth. Ultimately, we cannot say the trial court's decision to exclude the statement was an abuse of its discretion. *See State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) (stating, as to the sentencing phase of a capital trial, "The admission or exclusion of evidence

[15] In the Deputy Solicitor's opening statement to the jury in the sentencing phase, he emphasized the importance of Jenkins' guilt in the second Sunhouse robbery and murder to the question of whether Jenkins deserved the death penalty, stating, "The reason we are here isn't January 2, 2015. We are here for January 25, 2015; that is why we are here."

is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice").[16]

C. Closing Argument

The third error Jenkins alleges on appeal is the trial court's refusal to allow defense counsel to tell the jury in his closing argument of the sentencing phase "that the verdict for life . . . does not have to be unanimous" or "that one vote for life would result in a life sentence." The trial court found the first statement was in "direct contradiction" to what it was going to instruct the jury and the second statement was "not necessarily true either, because if there is no unanimity as to aggravating circumstances, then the options for the Court are 30 to life."[17] The trial court also noted it was not permitted to charge the jury on the consequences of a deadlock, citing *State v. Adams*, 277 S.C. 115, 283 S.E.2d 582 (1981), *overruled on other grounds by Torrence*. Jenkins contends the trial court should have allowed counsel to make these statements and its failure to do so placed an unreasonable limitation on Jenkins' right to a meaningful closing argument. We disagree.

Subsection 16-3-20(C) outlines the procedure to be followed when the jury reaches a deadlock in a capital case after finding an aggravating circumstance, providing,

> If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the

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[16] Jenkins also argues the statement should have been admitted based on *Green v. Georgia*, 442 U.S. 95, 97, 99 S. Ct. 2150, 2151-52, 60 L. Ed. 2d 738, 741 (1979). We reject this argument. *See State v. Blackwell*, 420 S.C. 127, 160-61, 801 S.E.2d 713, 731 (2017) (discussing the "limited" applicability of *Green*); 420 S.C. at 161 n.29, 801 S.E.2d at 731 n.29 (noting the trial court's "application of our state's hearsay rules" was by no means "rote"). As did the trial court in *Blackwell*, the trial court in this case engaged in a thorough analysis.

[17] *See* § 16-3-20(A) (providing—if no aggravating circumstance is found—the sentence for murder must be a "term of imprisonment for thirty years to life"); § 16-3-20(B) (providing "if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment").

> death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

In *Adams*, this Court considered the previous version[18] of this statute and held the consequence of a deadlock was not required to be charged to the jury. 277 S.C. at 124, 283 S.E.2d at 587. We noted a unanimous vote by the jury is the normal and required result, while an "undecided jury is the exception." *Id.* We stated, "That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only . . . ." *Id.*

We considered again whether the jury should be told of the consequences of a deadlock in *Winkler v. State*, 418 S.C. 643, 795 S.E.2d 686 (2016). In *Winkler*, the jury specifically asked the trial court during deliberations in the sentencing phase to "explain what happens if we're not able to reach a unanimous decision." 418 S.C. at 647, 795 S.E.2d at 689. The trial court refused to answer that and a similar question, and trial counsel did not object. 418 S.C. at 647-48, 795 S.E.2d at 689. We held trial counsel was not ineffective for failing to object because there was no applicable precedent to support an objection. 418 S.C. at 653-54, 795 S.E.2d at 692. We stated, "A juror's knowledge that if the jury does not reach a verdict the court will impose a sentence of life in prison will not help the juror understand the evidence, or assist the jury in reaching a verdict." 418 S.C. at 656, 795 S.E.2d at 693. We then expressed concern "that informing the jury what the sentence will be if they do not reach a verdict creates a risk that some juror's attention may be diverted away from the duty to deliberate, and perhaps even alert a juror that he or she can control the sentence by refusing to deliberate." *Id.*

In *Adams*, we held "the legal effect" of a deadlock "is addressed to the trial judge only." 277 S.C. at 124, 283 S.E.2d at 587. In *Winkler*, we suggested instructing the jury as to the consequences of a deadlock may interfere with a jury's deliberations. 418 S.C. at 656, 795 S.E.2d at 693. Here, Jenkins argues defense counsel should be permitted to do what we suggested in *Adams* and *Winkler* the trial court should not do, inform the jury that one juror may control the outcome of the case by refusing to

[18] The language of the previous version does not differ in substance from the current version. *See* S.C. Code Ann. § 16-3-20(C) (Supp. 1981).

deliberate. We disagree and now hold a party may not argue the consequences of a deadlock in its closing argument to the jury. The risk we discussed in *Winkler* does not disappear because trial counsel, instead of the trial court, argues the law to the jury. In a death penalty trial—in any trial—a jury verdict must be unanimous. S.C. Const. art. V, § 22 ("All jurors in any trial court must agree to a verdict in order to render the same."). The State has a legitimate interest in fostering the resolution of criminal trials by verdict. If the jury does not unanimously agree, then there is no verdict. Informing jurors an individual juror can control the outcome of the trial by holding out their vote directly frustrates the goal of a unanimous jury verdict. Therefore, we hold the trial court was correct to prohibit counsel from making the closing argument he requested.

D. Juror Qualification

The fourth and fifth errors Jenkins alleges on appeal are the trial court's qualification of two jurors. Generally, there are three ways to disqualify a juror in a capital case. The first way—inapplicable here—is when the juror falls into a category requiring automatic disqualification. The second way is based on constitutional requirements and a juror's views on capital punishment. When a juror's "views regarding capital punishment would prevent or substantially impair the performance of his duties as a juror, then he should be excluded for cause." *State v. Bell*, 302 S.C. 18, 25, 393 S.E.2d 364, 368 (1990) (applying *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 852, 83 L. Ed. 2d 841, 851-52 (1985)); *see also State v. Dickerson*, 395 S.C. 101, 114, 716 S.E.2d 895, 902 (2011) ("A juror must be excused from service if the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (internal quotation marks omitted) (quoting *Wainwright*, 469 U.S. at 424, 105 S. Ct. at 852, 83 L. Ed. 2d at 851-52)). The third way is when the juror is not capable of rendering a fair verdict of guilt or innocence based on the evidence presented at trial. *See* S.C. Code Ann. § 14-7-1020 (2017) ("The court shall . . . examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.").

Unless a juror is statutorily disqualified under the first option, juror qualification is within the discretion of the trial court, and this Court has recognized, "Deference must be paid to the trial court who saw and heard the juror." *State v. Woods*, 382 S.C. 153, 159, 676 S.E.2d 128, 132 (2009) (applying abuse of discretion standard under option two (citing *State v. Green*, 301 S.C. 347, 354, 392 S.E.2d 157, 160 (1990))); *see also State v. Hardee*, 279 S.C. 409, 413, 308 S.E.2d 521, 524 (1983) ("Where a juror unequivocably states he is not conscious of any bias or prejudice and he can give the defendant and the state a fair and impartial trial and render a verdict according to the law and evidence, there is no abuse of discretion in the trial court's decision to qualify the juror." (citing *State v. Johnson*, 248 S.C. 153, 163-64, 149 S.E.2d 348, 353 (1966))).

i. Juror 350

During individual juror qualification, defense counsel asked Juror 350 if she understood "that in South Carolina that you are never required to vote for the death penalty?" Juror 350 responded, "Yes." Defense counsel then asked her if it was "a moral decision you would make after hearing any aggravating and/or mitigating circumstances after His Honor instructs you on the law?" and whether she "would make that decision on [her] own?" The juror answered "Yes" to both questions. Defense counsel then asked her, "And do you also understand you could give a life sentence for any reason or no reason just because that is what you want to do?" Juror 350 responded, "Yes, but that is not necessarily morally correct." Jenkins now argues the "not necessarily morally correct" answer indicates Juror 350 was not constitutionally qualified under *Wainwright*.

After Jenkins objected to the juror's qualification, the trial court allowed defense counsel to ask Juror 350 to explain her "not necessarily morally correct" answer. She explained, "I believe that for someone to decide whether or not the death penalty is appropriate or not should be decided on facts and evidence, not just because I want to or I don't want to. If someone were to decide for that reason, that is not morally correct." Defense counsel then asked, "So even though the Court instructed you that you could do that, you are saying that is not something you could do?" Juror 350 responded, "I mean, I could, but I wouldn't want to because of the fact I wouldn't want to be, like, that is the reason to give them a death penalty. It is more so what is presented in court." The State then asked the juror whether she would follow the trial court's instructions regarding aggravating and mitigating circumstances and that

she may choose to give mercy if she wanted, and she responded, "Yes." The trial court concluded Juror 350 was qualified, stating,

> This "morally not" statement, I took that to mean people shouldn't just base their decisions on what someone looks like or something else, you need to listen to the facts and circumstances of each case and follow the law, listen to the aggravating and mitigation that may be presented. She said she is willing and able to do that, and that she would consider all of that. And she said very clearly she could impose either sentence depending upon the facts and circumstances.

It is clear to us from the juror's answers to the follow-up questions that Juror 350 meant she would not sentence someone to *death* just because she wanted to. She stated her decision "should be decided on facts and evidence, not just because I want to or don't want to." Nothing in her responses indicates her personal opinions for or against the death penalty would have "prevented or substantially impaired" the performance of her duties as a juror. Therefore, the trial court did not abuse its discretion by qualifying Juror 350.

ii. Juror 161

During individual juror qualification, Juror 161 stated he received an e-mail with information and photographs about this case in early 2015 because he was a detention officer at Myrtle Beach Police Department. The juror also stated he had been "reading up on the case." The juror then clarified he meant, "Right after it happened," and he had not heard or seen anything about the case since. The trial court questioned the juror and confirmed the juror would consider only the evidence presented during the trial despite his prior knowledge about the case. Jenkins objected to Juror 161's qualification, arguing, "given his employment and employer, and that he actually works at the Myrtle Beach Detention Center, that he is not qualified to serve as a juror based on employment." The trial court qualified the juror, finding the juror testified honestly, he did not know Jenkins, and he could listen to both sides.

Jenkins now argues Juror 161 should have been disqualified "not because of his employment at MBDC alone, but because of the fact that through his employment

he had viewed a BOLO and still shots of appellant." Thus, Jenkins argues the trial court should have disqualified Juror 161 under the third option of juror disqualification. We disagree. The trial court confirmed Juror 161 had not heard or read anything about the case since 2015 and ensured the juror would disregard the prior information and base his decision solely on the evidence presented in Jenkins' trial. *See Irvin v. Dowd*, 366 U.S. 717, 722-23, 81 S. Ct. 1639, 1642-43, 6 L. Ed. 2d 751, 756 (1961) ("It is not required, however, that the jurors be totally ignorant of the facts and issues involved. . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."); *DeLee v. Knight*, 266 S.C. 103, 111-12, 221 S.E.2d 844, 847 (1975) (affirming the trial court's finding that jurors were qualified because "Each stated he would abide by the instructions of the court and render a just verdict based solely on the evidence adduced at trial, without regard to any preconceived ideas resulting from pretrial publicity" (citing *Irvin*, 366 U.S. at 722-23, 81 S. Ct. at 1642-43, 6 L. Ed. 2d at 756)). Based on this and Juror 161's assurances to the trial court that he would decide the case based on the evidence presented at Jenkins' trial, the trial court did not abuse its discretion in qualifying the juror.

E. Admissibility of pre-trial misconduct and Lee Correctional Institution prison riot

The sixth error Jenkins alleges on appeal is the trial court's admission of evidence in the sentencing phase of trial regarding his twenty-six pre-trial disciplinary infractions that occurred while he was held in SCDC as a "safekeeper." Jenkins contends the State never satisfied the requirements for holding Jenkins in SCDC under section 24-3-80,[19] and should not be permitted to benefit from its "unconstitutional" treatment of him. The seventh, and related, error Jenkins alleges is the trial court's exclusion of evidence regarding a prison riot in 2018 at Lee Correctional Institution in which seven inmates were killed. Jenkins sought to

[19] Section 24-3-80 itself does not contain any requirements for holding a prisoner in SCDC as a safekeeper. However, Executive Order Number 2000-11 section 1 states a pre-trial detainee may be transferred to SCDC in accordance with section 24-3-80, "if the individual: (1) is a high escape risk; (2) exhibits extremely violent and uncontrollable behavior; and/or (3) must be removed from the county facility to protect the individual from the general population or from other detainees." S.C. Exec. Order No. 2000-11 § 1 (Feb. 16, 2000), https://www.scstatehouse.gov/Archives/ExecutiveOrders/exor0011.htm.

introduce evidence of the riot in response to the State's evidence of his own pre-trial misconduct.

The admissibility of any evidence begins with the basic premise that "All relevant evidence is admissible . . . ." Rule 402, SCRE. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

As to the disciplinary infractions, the trial court admitted the evidence during the sentencing phase, stating, the "testimony is directly relevant and appropriate of the issues that are at hand in the juror's determination of whether or not the appropriate sentence is life or death." We agree the evidence is relevant. The Supreme Court has stated, "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: 'any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.'" *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S. Ct. 1669, 1671, 90 L. Ed. 2d 1, 7 (1986). The Supreme Court continued, "evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an 'aggravating factor' for purposes of capital sentencing." *Id.* (citations omitted). It is clear to us evidence of Jenkins' misconduct—particularly towards correctional officers—as a pre-trial detainee is relevant to determine and evaluate Jenkins' future dangerousness as an aggravating circumstance in the sentencing phase of trial.

When evidence is found relevant—as it is here—the next question is whether any rule of evidence or provision of law operates to exclude the evidence. *See* Rule 402, SCRE (providing "relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina"). A defendant seeking to have relevant evidence excluded must point to some rule of evidence or other provision of law that supports the exclusion. *Hamrick v. State*, 426 S.C. 638, 651-52, 828 S.E.2d 596, 603 (2019).

Jenkins argues evidence of his pre-trial misconduct should have been excluded because it occurred while the State "unconstitutionally" held him for over three years pre-trial in maximum security prison and on death row. However, Jenkins does not point to any rule of evidence or other statutory or constitutional provision that

excludes this type of evidence. He merely argues that it is unfair for the State to use his own conduct against him. We disagree and find the trial court did not abuse its discretion in admitting Jenkins' pre-trial misconduct.

Turning to the Lee prison riot, Jenkins argues evidence of the riot was relevant in response to the State's introduction of his misconduct to show he acted in an unruly manner because he lived in an unruly environment at SCDC. The trial court refused to allow the testimony, finding evidence of the riot was irrelevant. We agree. We have stated "the Eighth Amendment demands that a capital defendant be given wide latitude to present any relevant evidence of potentially mitigating value that might convince the jury to impose a sentence of life in prison instead of death." *Bowman v. State*, 422 S.C. 19, 36, 809 S.E.2d 232, 241 (2018). The proffered testimony here reveals that although Jenkins was housed at Lee during the time of the riot, he was not involved in the riot in any way, even as a spectator. Jenkins' nonparticipation in a riot has no relevance to whether he should be sentenced to life in prison or to death.

III. Mandatory Review of the Death Sentence

Concluding none of the errors alleged on appeal support reversal of Jenkins' death sentence, we turn to our review of the punishment itself. Pursuant to subsection 16-3-25(C), we are required to conduct a review of Jenkins' death sentence and 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.

As to subsection 16-3-25(C)(1), Jenkins' appellate counsel argued during oral argument to this Court that the trial court's erroneous March 7 comments confirming Jenkins would be sentenced to death if he pled guilty to murder "introduced an arbitrary factor into this proceeding." However, Jenkins elected a jury trial and was sentenced to death by a jury. The March 7 comments were made in a pre-trial ex

parte discussion two months before the trial started. Thus, the error was completely removed from the jury's decision to impose the death sentence.

Turning to subsection 16-3-25(C)(2), we find the evidence clearly supports the jury's finding of statutory aggravating circumstances. The jury found two statutory aggravating circumstances existed: "the murder was committed while in the commission of the robbery while armed with a deadly weapon" and "the murder was committed while in the commission of a larceny with the use of a deadly weapon."[20] Jenkins admitted in the guilt phase of his trial that he was guilty of the charges against him—murder, attempted murder, and armed robbery. The evidence supports these findings.

Finally, as to subsection 16-3-25(C)(3), we hold the death penalty is neither excessive nor disproportionate to the sentences imposed in similar capital cases. We recently held that in conducting this proportionality review "subsection 16-3-25(C)(3) does not limit the pool of comparison cases to only those in which the defendant actually received a sentence of death." *Moore v. Stirling*, Op. No. 28088 (S.C. Sup. Ct. filed Apr. 6, 2022) (Howard Adv. Sh. No. 12 at 13, 27) (clarifying *State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 74 (1982)). Thus, we must consider "similar cases in which the sentence of death has been upheld," *State v. Inman*, 395 S.C. 539, 567, 720 S.E.2d 31, 46 (2011) (citing *Wise*, 359 S.C. at 28, 596 S.E.2d at 482), and other "death-eligible cases for which a record is available for our review," *Moore*, Op. No. 28088 (Howard Adv. Sh. No. 12 at 27); *see also* S.C. Code Ann. § 16-3-25(E) ("The court shall include in its decision a reference to those similar cases which it took into consideration.").

In capital cases where the State proceeded on the same aggravating circumstances and in which there were similar circumstances, we have affirmed the sentence of death. In *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004), the Court upheld Moore's death sentence in connection with an armed robbery of a convenience store in which Moore killed a store clerk and shot at a witness in the store. 357 S.C. at 460-61, 465, 593 S.E.2d at 609-10, 612, *aff'd*, *Moore v. Stirling*, Op. No. 28088, (Howard Adv. Sh. No. 12 at 30) (reaffirming the holding from the direct appeal and finding, again, "Moore has not established that his capital sentence is disproportionate"). Moore entered the store without a gun, took the store clerk's gun

[20] *See* § 16-3-20(C)(a)(1)(e)-(f).

away from him, shot and killed the store clerk, shot at a witness with the purpose of killing him, and robbed the store before he left. 357 S.C. at 460-61, 593 S.E.2d at 609-10. Moore's crimes are less egregious than those Jenkins admitted to committing in this case because Jenkins entered each convenience store with a gun.

In *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), the Court upheld McWee's death sentence under similar circumstances. McWee and an accomplice shot and killed a store clerk in a convenience store and robbed the store before they left. 322 S.C. at 390, 472 S.E.2d at 237. During the sentencing phase, the State introduced evidence McWee and his accomplice committed another murder one week after the first. *Id.* McWee admitted shooting the victim in the first robbery and denied killing the victim in the second robbery, *id.*, just as Jenkins did at his trial.

Jenkins admitted he entered the first Sunhouse convenience store, shot and killed Paruchuri, shot at McZeke, and robbed the store before he left. The jury found him guilty of murder, attempted murder, and armed robbery. Jenkins' crimes are highly similar to the murder we reviewed in *McWee* and more egregious than the murder we reviewed in *Moore*. Jenkins' admission to those crimes coupled with the aggravating circumstances of Jenkins' future dangerousness and the evidence that Jenkins committed two more armed robberies and a murder just weeks later leads us to conclude the death sentence was neither excessive nor disproportionate.

IV. Conclusion

We affirm Jenkins' conviction and death sentence.

AFFIRMED.

BEATTY, C.J., KITTREDGE, HEARN and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Phillip Wayne Lowery, Appellant.

Appellate Case No. 2018-002242

Appeal From Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 5903
Heard March 8, 2022 – Filed April 6, 2022

REVERSED AND REMANDED

Appellate Defender Taylor Davis Gilliam, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General William M. Blitch, Jr., and Assistant Attorney General Ambree Michele Muller, of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, all for Respondent.

THOMAS, J.: Phillip Wayne Lowery appeals his driving under the influence (DUI) conviction, arguing the trial court erred in (1) admitting statements he made on a dash camera recording and (2) not dismissing the charge due to the State's

failure to comply with the DUI statute regarding a second dash camera recording. We reverse and remand.

FACTS

During a *Jackson v. Denno*[1] pre-trial hearing, Trooper David Vallin of the South Carolina Department of Public Safety testified he responded to a call about an accident. Shortly thereafter, Vallin responded to another call indicating a vehicle that left the scene of the accident was at the Spinx gas station. When he arrived at the Spinx, Vallin noted the vehicle had front end damage, Lowery was standing next to the vehicle, and three or four other officers were already present and surrounding Lowery. Vallin testified he preliminarily questioned Lowery about the car accident, but it developed into a DUI investigation. Vallin testified he had a dash cam in his vehicle and it recorded the investigation. The State played Vallin's video for the trial court. In Vallin's video, Lowery made many incriminating statements, including admitting he had been driving the vehicle. Vallin admitted his questioning of Lowery was accusatory because Vallin believed Lowery was involved in the accident.

Lowery argued his statements on Vallin's video should not be admitted because he was in custody, being interrogated, and had not yet been given *Miranda*[2] warnings. The State argued the video was admissible because Vallin was investigating an accident. After reviewing Vallin's video, the court ruled Lowery was not in custody and recitation of *Miranda* warnings was not required. The court also found the questions were "fairly innocuous questions regarding the traffic accident" and asked in "furtherance of a routine traffic violation." Thus, the court found the video was admissible. The court ruled any evidence of the accident as a hit and run was inadmissible; thus, all references to the accident were to be redacted from Vallin's video.

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[1] 378 U.S. 368, 376−77 (1964) (entitling a defendant in a criminal case to an evidentiary hearing on the voluntariness of a statement).

[2] *Miranda v. Arizona*, 384 U.S. 436, 471−76 (1966) (explaining a suspect's statement obtained as a result of custodial interrogation is inadmissible unless he was advised of and voluntarily waived his rights).

Vallin similarly testified before the jury, additionally claiming Lowery smelled strongly of alcohol and his speech was slurred. Vallin's video was played for the jury.

Trooper Brandon Lee McNeely, of the South Carolina Highway Patrol, testified he was also present at the Spinx. McNeely testified Lowery smelled of alcohol and displayed signs of impairment. McNeely's dash cam was activated. McNeely testified the horizontal gaze nystagmus (HGN) sobriety test, which tests for involuntary eye movement due to the influence of drugs or alcohol, was given. According to McNeely, the HGN test indicated Lowery was impaired. Lowery performed a walk and turn test and a one leg stand test, which McNeely testified indicated Lowery's impairment. Lowery was placed under arrest, handcuffed, and then given *Miranda* warnings.

The court admitted McNeely's video and the video began playing for the jury. After the video showed the HGN test and at least one of the other sobriety tests, the video stopped playing. An off-the-record bench conference was held, the court commented on the State's inability to use the computer, and the State asked McNeely, "I know we didn't finish that video, but you said you [*M*]*irandized* him, correct?" and "Does [*M*]*iranda* appear on that video?" McNeely responded "yes" to both questions.[3] The State rested, and Lowery moved for a directed verdict. Lowery argued the State failed to provide evidence Lowery was driving a vehicle. The court denied the motion.

Lowery presented a defense indicating he rode with a friend that night and was not driving the vehicle. At the close of evidence, Lowery renewed his motion for a directed verdict and also argued the State failed to comply with the statute requiring the dash cam video to show all of the field sobriety tests and the *Miranda* warnings. Lowery argued, "I don't know what is on that video and what can and can't be played. The field sobriety tests weren't shown in full there and neither was [*M*]*iranda* as required by the statute shown on camera." The State argued, "[W]e addressed this at the bar a minute ago," and the parties redacted the video together. The court denied Lowery's motions, finding the State substantially complied with

[3] The video transported to this court stops playing at approximately five minutes into the twelve minute video. The final sobriety test and *Miranda* warnings are not viewable.

the statute. Lowery was convicted and sentenced to two years' imprisonment and a fine. This appeal follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Gordon*, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015). "[A]n appellate court is bound by the trial court's factual findings unless they are clearly erroneous." *Id.*

LAW/ANALYSIS

A. Admissibility of Statements

Lowery argues the trial court erred in admitting the statements he made before being *Mirandized* because he was in custody at the time and being interrogated; thus, his statements were not freely and voluntarily made. We agree.

"A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." *State v. Pittman*, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007). The State must establish the defendant voluntarily and knowingly waived his *Miranda* rights when giving a statement. *State v. Miller*, 375 S.C. 370, 379, 652 S.E.2d 444, 449 (Ct. App. 2007). *Miranda* warnings are only required if a suspect "has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

The State argues Lowery was not in custody because this was merely a routine traffic stop. "[R]outine traffic stops do not constitute 'custodial interrogation' for purposes of the *Miranda* rule." *State v. Peele*, 298 S.C. 63, 65, 378 S.E.2d 254, 255 (1989) (citing *Berkemer v. McCarty*, 468 U.S. 420 (1984) and *Pennsylvania v. Bruder*, 488 U.S. 9 (1988)). We find guidance from *State v. Easler*, in which police officers responded to a call regarding an automobile accident after one of the parties involved had left the scene. 327 S.C. 121, 125–26, 489 S.E.2d 617, 620 (1997), *overruled on other grounds by State v. Greene*, 423 S.C. 263, 283, 814 S.E.2d 496, 507 (2018). Easler was convicted of numerous charges, including felony DUI causing death and felony DUI causing great bodily injury. *Id.* at 125, 489 S.E.2d at 619. The officers found Easler, who matched a description given to the officers, at the pay phone at a convenience store. *Id.* at 126, 489 S.E.2d at 620.

The officers questioned Easler about his involvement in the accident, and Easler admitted he had been involved. *Id.* When asked why he left the scene, Easler stated he was afraid and had no driver's license. *Id.* An officer requested Easler return to the scene, and Easler asked for a package he had left at the pay phone, which contained a six-pack of beer and cigarettes. *Id.* The officer asked Easler when he had his last drink, and Easler admitted "he'd had a Milwaukee's Best just prior to the accident . . . ." *Id.*

The court found the case did not involve a routine traffic stop, stating, "[o]n the contrary, the officers, having been advised there had been an accident and that someone had left the scene, went looking for that individual based upon a description given by two eyewitnesses." *Id.* at 127, 489 S.E.2d at 620. The court concluded the questioning was "clearly interrogation[, and t]he only remaining inquiry [was] whether Easler was 'in custody' at the time." *Id.* at 127, 489 S.E.2d at 621.[4]

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[4] The court found Easler was not "in custody" for purposes of *Miranda*, stating the following:

> [T]he officers had no basis to suspect Easler of DUI or to know the extent of the injuries in the accident. Accordingly, they requested him to return to the scene of the accident where, upon seeing the injuries and realizing Easler's intoxicated state, they arrested him and issued *Miranda* warnings. Given the totality of these circumstances, we find Easler was not 'in custody' for purposes of *Miranda.*

Id. at 128–29, 489 S.E.2d at 621 (footnote omitted); *see State v. Morgan*, 282 S.C. 409, 411–12, 319 S.E.2d 335, 336–37 (1984) (finding the defendant was not in custody where he and a companion returned to the scene of an accident, the companion volunteered information that they had seen the accident, and the defendant made statements "during the course of this routine investigation"); *State v. Barksdale*, 433 S.C. 324, 335, 857 S.E.2d 557, 562 (Ct. App. 2021) (finding the defendant was not in custody where the police officer responded to the scene of a traffic accident, questioned the defendant to investigate the accident, permitted the defendant to move about freely, and questioned the defendant about his alcohol consumption).

We likewise find Lowery's questioning was more than a routine traffic stop. Vallin first went to the scene of the accident and was given a description of a vehicle. Vallin admitted his questioning was accusatory because he believed Lowery was involved in the accident. We have reviewed Vallin's video and, like the situation in *Easler*, we find the questioning was interrogational. *See State v. Kennedy*, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996) ("The special procedural safeguards outlined in *Miranda* are not required if a suspect is simply taken into custody, but only if a suspect in custody is subjected to interrogation. Interrogation is either express questioning or its functional equivalent. It includes words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.").

Next, we look to whether Lowery was in custody. *See State v. Williams*, 405 S.C. 263, 273, 747 S.E.2d 194, 199 (Ct. App. 2013) ("To determine whether a suspect was in custody for the purposes of *Miranda*, the Supreme Court has asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."); *Easler*, 327 S.C. at 128, 489 S.E.2d at 621 ("The relevant inquiry is whether a reasonable man in the suspect's position would have understood himself to be in custody."). We find Lowery was in custody.[5]

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[5] The State argues that even if Lowery was subjected to custodial interrogation, the public safety exception applies. We disagree, finding *State v. Medley*, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016) instructive. In *Medley*, officers chased a suspect that fled from a checkpoint. *Id.* at 22, 787 S.E.2d at 849. When he was found at his parents' house, handcuffed, and pinned to the ground, an officer "asked Medley whether he had a license and how much he had been drinking. Medley responded that he did not have a license and '[t]oo much.'" *Id.* (alteration in original). Medley was arrested and *Miranda* warnings were given. *Id.* This court held Medley was in custody and under interrogation when he made his statement about his alcohol consumption. *Id.* at 26, 787 S.E.2d at 852. In a footnote, this court summarily rejected the State's argument that the public safety exception applied and stated "[a]sking Medley how much he had to drink, although perhaps relevant to his own health and safety, was simply irrelevant to the public's safety. The only purpose for asking such a question was to obtain evidence for his DUI case." *Id.* at 27 n.5, 787 S.E.2d at 852 n.5.

"In determining whether a suspect is 'in custody,' the totality of the circumstances, including the individual's freedom to leave the scene and the purpose, place and length of the questioning must be considered." *Easler*, 327 S.C. at 127, 489 S.E.2d at 621. "The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody." *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003).

The *Williams* court stated the following factors have been considered by courts in determining whether an interrogation was "custodial" within the meaning of *Miranda*:

> (1) whether the contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to interview; (2) whether the express purpose of the interview was to question the person as a witness or suspect; (3) where the interview took place; (4) whether the police informed the person he or she was under arrest or in custody; (5) whether they informed the person he or she could terminate the interview and leave at any time or whether the person's conduct indicated an awareness of such freedom; (6) whether there were restrictions on the person's freedom of movement during the interview; (7) how long the interrogation lasted; (8) how many police officers participated; (9) whether they dominated and controlled the course of the interrogation; (10) whether they manifested a belief that the person was culpable and they had the evidence to prove it; (11) whether the police were aggressive, confrontational, or accusatory; (12) whether the police used interrogation techniques to pressure the suspect; and (13) whether the person was arrested at the end of the interrogation.

Williams, 405 S.C. at 276–77, 747 S.E.2d at 201.

In this case, the factors used to determine custody indicate Lowery was in custody. First, he was surrounded by numerous officers and denied his request to use the telephone or the restroom. Lowery was being questioned as a suspect rather than as a witness. The interrogation was initiated by Vallin. Lowery's movements were restricted by the officers surrounding him. Vallin admitted his interrogation was accusatory. Given these factors, we find a reasonable person in Lowery's position would have believed he was in custody. Accordingly, we find there was a custodial interrogation that necessitated *Miranda* warnings.

Our analysis next requires us to determine whether the failure to give *Miranda* warnings until after Lowery's arrest was harmless error. *See State v. White*, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) ("[A]ny error in the failure to suppress a statement allegedly taken in violation of *Miranda* is subject to a harmless error analysis."). There was evidence Lowery was intoxicated from the officers' testimony. However, there was no direct evidence he was driving the vehicle except from his statements made during Vallin's interrogation. Therefore, Lowery's incriminating statements made prior to *Miranda* warnings, while being interrogated and in custody, could reasonably have affected the verdict. Thus, we find the error was not harmless. *See State v. Byers*, 392 S.C. 438, 447−48, 710 S.E.2d 55, 60 (2011) ("[T]he materiality and prejudicial character of [a trial] error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." (quoting *State v. Reeves*, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990))).

B. Section 56-5-2953

Lowery argues the trial court erred in not dismissing the DUI charge when the dash cam videos failed to comply with the DUI statute because the dash cam videos "did not include all of the field sobriety tests administered, or any of the officers reading [Lowery] his *Miranda* rights." Although we disagree dismissal is required, we agree the video failed to comply with the DUI statute.

McNeely's video was not introduced until his trial testimony before the jury. It appears from the record that the State experienced technical issues in publishing McNeely's video to the jury; thus, not all of the sobriety tests were viewed by the jury, and *Miranda* warnings were not seen on the video.

Lowery was convicted of violating South Carolina's DUI statute, found in section 56-5-2930 of the South Carolina Code (2018). The statute governing the video recording of a DUI offense, section 56-5-2953 provides:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
> (1)(a) The video recording at the incident site must:
> (i) not begin later than the activation of the officer's blue lights;
> (ii) *include any field sobriety tests administered*; and
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, *and show the person being advised of his Miranda rights*.
> . . .

S.C. Code Ann. § 56-5-2953(A) (2018) (emphases added). The purpose of the statute is two-fold: "The first purpose is to create direct evidence of a DUI arrest by requiring the video include any field sobriety tests administered. The other purpose . . . is to protect the rights of the defendant by 'requiring video recording of the person's arrest and of the officer issuing *Miranda* warnings.'" *State v. Kinard*, 427 S.C. 367, 372, 831 S.E.2d 138, 140−41 (Ct. App. 2019) (internal citation omitted) (quoting *State v. Taylor*, 411 S.C. 294, 306, 768 S.E.2d 71, 77 (Ct. App. 2014)).

Statutory language "should be given a reasonable and practical construction consistent with the purpose and policy of the Act." *Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 214, 423 S.E.2d 101, 103 (1992). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993). "[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). Section 56-5-2953 is "a statute which governs the admissibility of certain evidence." *State v. Sawyer*, 409 S.C. 475, 481, 763 S.E.2d 183, 186 (2014).

The statute requires a video recording of all of the sobriety tests and the issuance of *Miranda* warnings. The recording at trial did not comply with the statute. Until recently, dismissal of a DUI charge was an appropriate remedy if a police officer failed to produce a video in compliance with the statute unless an exception applied. *See City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007) (explaining dismissal as a proper remedy and noting exceptions that excuse compliance with section 56-5-2953(A) are provided in section 56-5-2953(B)). However, in *State v. Taylor*, Op. No. 28085 (S.C. Sup. Ct. filed Feb. 23, 2022) (Howard Adv. Sh. No. 7 at 24, 29), our supreme court found a violation of the statute as to *Miranda* warnings no longer required a per se dismissal of the DUI charge. The court stated any statements made by the defendant in violation of the statute should be considered the same as any other violation of *Miranda*. *Id.* The court did not apply this new rule in *Taylor*, stating it applied "from this point forward." *Id.* at 32. Based on *Taylor*, we find the remedy for the failure to meet the statutory requirement is not dismissal.

CONCLUSION

Accordingly, Lowery's conviction is

REVERSED AND REMANDED.

MCDONALD and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Eric Emanuel English, Appellant.

Appellate Case No. 2018-000850

Appeal from Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5904
Heard September 14, 2021 – Filed April 6, 2022

AFFIRMED

Appellate Defender Joanna Katherine Delany, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, all for Respondent.

LOCKEMY, A.J.: Eric Emanuel English appeals his conviction for first-degree criminal sexual conduct (CSC) with a minor and sentence of forty years' imprisonment. English argues the trial court erred in admitting medical test results of himself and another individual who was also alleged to have sexually abused the

victim because no one from the laboratories that provided the test results testified to substantiate the results. We affirm.

FACTS

The victim (Victim) was English's daughter. She was eleven years old at the time of English's trial. Victim lived with her mother, and until the incident in question, she spent weekends with English at his home.

On the morning of March 3, 2014, a few days after the last visit with English, Victim went to the nurse's office at her elementary school and complained her underwear was wet and dirty. In the early afternoon of the next day, Victim returned to the school nurse's office, this time complaining not only that her underwear was wet but also that she felt pain in her genital area. Victim went back to the nurse's office about an hour later, again requesting to change her underwear and complaining of discomfort in her genital area. Eventually, the school nurse was able to reach Victim's mother, who agreed to take Victim to a doctor.

After Victim returned home from school that day, she showed her soiled underwear to her mother. Victim then revealed that during her last visit with English, which occurred when she was between six and seven years old, English "put his private in [her] private" and ejaculated while she was sleeping. Victim's mother took Victim to Palmetto Health Richland Hospital, where a nurse collected samples of Victim's blood and urine and swabs from her vagina. The samples were sent to the hospital's laboratory for analysis, and some of the test results were sent to a reference laboratory outside the hospital for additional work. On March 5, 2014, a pediatrician diagnosed Victim with gonorrhea.

Jamie Stroman was the boyfriend of Victim's mother and lived with Victim and her mother. On March 5, 2014, Stroman visited a Lexington Medical Center urgent care facility in Swansea and requested to be tested for sexually transmitted diseases (STDs) because he had engaged in unprotected sex during the past two weeks. The hospital provided a hepatitis profile and tests for HIV, syphilis, gonorrhea, chlamydia, and herpes. Blood work and urethral swabs for the testing were collected on March 5, 2014, and sent to the laboratory at the main hospital on March 6, 2014. Stroman tested positive only for type I herpes.

On March 6, 2014, English went to Lexington Medical Center and requested to be checked for STDs. After examining English and inquiring about his symptoms, Dr. Wesley Frierson obtained swabs for gonorrhea and chlamydia, which he sent to the in-house laboratory at Lexington Medical Center. English tested positive for gonorrhea.

Although Victim had already been diagnosed with gonorrhea, no charges were pending against English when he and Stroman were tested for STDs.

On March 18, 2014, Victim was interviewed at the Dickerson Children's Advocacy Center (the Dickerson Center).[1] Victim revealed English assaulted her during her last weekend visit to his house. She said she was seven at the time and the assault occurred while she was sleeping on the living room floor.[2]

In a subsequent counseling session at the Dickerson Center on June 3, 2014, Victim disclosed Stroman had also assaulted her. On June 16, 2014, Stroman admitted to law enforcement that he assaulted Victim by digitally penetrating her. On March 30, 2017, Stroman was convicted of first-degree CSC with a minor following a jury trial.[3]

English was arrested in March 2014, and on October 16, 2017, he was indicted for first-degree CSC with a minor. A jury trial in the matter took place from January 8 through January 10, 2018. English did not appear, and he was tried in his absence.

The State made a pretrial motion to introduce the test results of both English and Stroman pursuant to Rule 803(6), SCRE. Citing *Ex parte Department of Health and Environmental Control*, 350 S.C. 243, 565 S.E.2d 293 (2002) (*Ex parte DHEC*), the State argued the results were business records of tests done for the purposes of medical diagnosis and treatment. The State asserted it could introduce

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[1] The Dickerson Center is an organization that provides investigative services, multidisciplinary team coordination, victim advocacy services, and counseling.

[2] Victim slept on the living room floor when she stayed with English.

[3] Stroman appealed to this court, which affirmed his conviction. *State v. Stroman*, Op. No. 2019-UP-281 (S.C. Ct. App. filed Aug. 7, 2019).

the test results without presenting witnesses to substantiate them. English opposed the motion and argued the results were inadmissible hearsay pursuant to *State v. James*, in which our supreme court stated, "Whe[n] the results of tests or analyses are offered to prove an essential element of a crime or connect a defendant directly with the commission of a crime, such results must be substantiated by the person who conducted the tests or analyses." 255 S.C. 365, 370, 179 S.E.2d 41, 43 (1971). Citing *State v. Chisholm*, 395 S.C. 259, 717 S.E.2d 614 (Ct. App. 2011), the trial court stated it would allow the State to introduce the test results, provided a witness laid the foundation for the test. English renewed his objections when the State introduced the test results during trial, and the trial court admitted the results into evidence under *Chisholm* and "as a business record exception of hearsay."

Victim testified at trial and stated that when she last spent the night with English, he "put his thing in [her] private" and ejaculated. Victim testified she was six or seven when this occurred. Victim stated she did not tell anyone at first because she was afraid she would get in trouble. She recounted her visits to the school nurse and explained that when she got home from school, she showed her mother her underwear and told her about what English had done. In its closing argument, the State argued English's STD test results connected him directly to the sexual assault.

The jury found English guilty of first-degree CSC with a minor, and the trial court issued a sealed sentence. On April 9, 2018, English was brought before the trial court, which unsealed the sentence and ordered him to serve forty years' imprisonment. Thereafter, English moved to have his sentence reconsidered. The trial court held a hearing and issued a ruling from the bench denying the motion. This appeal followed.

ISSUE ON APPEAL

Did the trial court err in admitting medical test results for English and Stroman without requiring testimony from the persons who tested the samples and determined the test results?

STANDARD OF REVIEW

"The appellate court reviews a trial [court's] ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." *State v. Cross*, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019) (alteration

in original) (quoting *State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* (quoting *State v. Douglas*, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006)).

LAW AND ANALYSIS

English argues the trial court erred in admitting the STD test results of himself and Stroman because the persons who tested and analyzed the samples did not testify and the State used the results to connect him directly to the crime. He contends that pursuant to *James*, without substantiation of the test results by witnesses who could attest to the methods and the qualifications of the testers, the test results were inadmissible hearsay. English contends the STD test results were not admissible as a record of regularly conducted activity pursuant to Rule 803(6), SCRE, because without information about the testing methods and the qualification of the testers, the results could not be "found to be trustworthy by the [trial] court." We disagree.

First, we conclude the trial court did not abuse its discretion in admitting the STD test results into evidence because *James* is distinguishable and does not require exclusion of the test results in this case. In *James*, the defendant was convicted of administering arsenic to her husband with intent to kill him. 255 S.C. at 367, 179 S.E.2d at 42. At issue in her appeal was the trial court's decision to allow two physicians to testify about the arsenic content of urine collected from the decedent while he was being treated at Greenville General Hospital for polyneuritis. *Id.* at 367-69, 179 S.E.2d at 42-43. The urine was mailed to a California laboratory, which completed an analysis that was sent to Greenville General Hospital and copied into the decedent's hospital record. *Id.* at 367-68, 179 S.E.2d at 42. The trial court allowed the disputed testimony despite the witnesses' admissions that they did not know who performed the analysis or the method employed and could not vouch for the validity of the report. *Id.* at 368, 179 S.E.2d at 42. Our supreme court reversed the conviction, stating,

> Whe[n] the results of tests or analyses are offered to prove an essential element of a crime or connect a defendant directly with the commission of a crime, such results must be substantiated by the person who conducted the tests or analyses. Otherwise, the effect of their admission would be to allow a witness to testify

> without being subject to cross-examination, and thus deprive the accused of his constitutional right to be confronted with and to cross-examine the witness against him.

Id. at 370, 179 S.E.2d at 43.

This case is distinguishable from *James*. First, in *James*, the hospital sent the sample off to an independent lab in California and the physicians who testified were not familiar with the lab and could not verify the results. *Id.* at 367-68, 179 S.E.2d at 42. Here, however, the lab that conducted the testing was an in-house lab, and both healthcare providers testified they reviewed and verified the test results of English and Stroman, respectively. Second, unlike the case in *James*, the evidence at issue in this case did not present a Confrontation Clause problem. *See id.* at 370, 179 S.E.2d at 43 ("Whe[n] the results of tests or analyses are offered to prove an essential element of a crime or connect a defendant directly with the commission of a crime, such results must be substantiated by the person who conducted the tests or analyses. Otherwise, the effect of their admission would be to allow a witness to testify without being subject to cross-examination, *and thus deprive the accused of his constitutional right to be confronted with and to cross-examine the witness against him*. The hearsay rule signifies a rule rejecting assertions offered testimonially which have not been in some way subjected to the test of cross-examination." (emphasis added) (citations omitted)). Subsequent case law has clarified statements "are testimonial when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 814 (2006). These STD tests were not conducted to establish or prove past events potentially relevant to later criminal prosecution. Instead, English and Stroman voluntarily requested these tests without any law enforcement involvement. Pursuant to *Davis*, the test results were nontestimonial and therefore the admission of these test results did not present a Confrontation Clause issue. For the foregoing reasons, we find the ruling in *James* did not prohibit the admission of English's and Stroman's test results.

Next, we find the test results were admissible under Rule 803(6), SCRE. In 1995, the South Carolina Rules of Evidence took effect. Rule 1103(b), SCRE. The rules provide, "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802,

SCRE. Rule 803(6), SCRE, provides the following is "not excluded by the hearsay rule":

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness . . . .

Dr. Frierson testified concerning English's results and Nurse Practitioner Pamela Levi testified concerning Stroman's results. Dr. Frierson, an emergency medicine physician at Lexington Medical Center, testified he saw English as a patient on March 6, 2014, at which time English requested an STD check. Dr. Frierson testified that during the March 6, 2014 visit, he "swabbed" English to test for gonorrhea and chlamydia. Dr. Frierson explained the swabs were then transported to the in-house lab at Lexington Medical Center. Dr. Frierson acknowledged he did not personally perform the lab test, but he stated the lab analysts entered the results into the records and he verified the results. Dr. Frierson testified the test result for gonorrhea was positive.

Nurse Levi, a nurse practitioner at the Lexington Medical Center urgent care facility in Swansea, testified Stroman visited the facility on March 5, 2014, and requested STD testing. Nurse Levi stated a urethral swab was collected from Stroman to perform gonorrhea and chlamydia tests and the tests were run at the main Lexington Medical Center facility. She stated that after the tests were run, the person who conducted the tests entered the results directly into the patient's chart and a physician, nurse practitioner, or physician's assistant was required to then sign off on the results. Nurse Levi testified Stroman's results were entered March 6, 2014, and she saw, reviewed, and verified the results on March 7, 2014. Nurse Levi testified Stroman's test was negative for gonorrhea.

The testimony of Dr. Frierson and Nurse Levi established both records containing the test results were "made at or near the time" of Stroman's and English's healthcare visits. The records were made "by, or from information transmitted by, a person with knowledge." Lexington Medical Center—the same organization that both Stroman and English visited to receive healthcare—conducted both sets of tests.[4] The analysts who performed English's and Stroman's tests entered the results into the patients' records and the results were verified by Dr. Frierson and Nurse Levi, respectively. Both practitioners testified they kept records of patient visits, including tests run and diagnoses made, in the regular course of business of treating patients at Lexington Medical Center. Dr. Frierson testified he relied on such records to treat his patients. Furthermore, no evidence demonstrates a lack of trustworthiness as to the sources of the information or the methods or circumstances of preparation. Stroman and English each voluntarily requested STD testing before law enforcement became involved in Victim's case. Healthcare professionals with Lexington Medical Center—as opposed to a law enforcement agency—performed the testing and recorded the results. Because law enforcement was not involved in the testing and the sole purpose of the testing was to diagnose and treat the patients, the trustworthiness of the test records is presumed. *See Ex parte DHEC*, 350 S.C. at 250, 565 S.E.2d at 297 ("The trustworthiness of medical records is presumed, based on the fact that the test is relied on for diagnosis and treatment."); *Jamison v. Morris*, 385 S.C. 215, 227, 684 S.E.2d 168, 174 (2009) (recognizing that if a medical test had been performed as part of the hospital's medical treatment of the subject, rather than in response to a request from law enforcement, the results "would be presumed reliable as a business record").

Based on the foregoing, evidence supports the trial court's ruling that the test results of Stroman and English were admissible under Rule 803(6) because they were records of diagnoses made at or near the time of testing "by, or from information transmitted by, a person with knowledge," and were kept in the course of a regularly conducted business activity, all as shown by the testimony of a qualified witness as Rule 803(6) requires.[5] Accordingly, we conclude the trial

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[4] According to Nurse Levi, the Urgent Care Center in Swansea was part of Lexington Medical Center.

[5] Although we acknowledge *James* has not been expressly overruled, the South Carolina Rules of Evidence, which provide exceptions to the rule against hearsay, were enacted subsequent to *James*. We believe this point distinguishes this case

court did not abuse its discretion in admitting the test results under the business record exception.[6]

CONCLUSION

For the foregoing reasons, we find the trial court did not abuse its discretion in admitting Stroman's and English's test results under the business records exception to the rule against hearsay pursuant to Rule 803(6). English's conviction and sentence are therefore

AFFIRMED.

WILLIAMS, C.J., and MCDONALD, J., concur.

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from *James* and supports the trial court's ruling that the evidence is admissible under Rule 803(6).

[6] As we stated, the trial court cited to *Chisholm* in making its pretrial ruling; however, *Chisholm* is not probative of the issue on appeal. There, in deciding whether the trial court erred in failing to exclude HIV test results for both the defendant and the victim, this court found it unnecessary to decide the question based on its holding that any error in admission of the results was harmless in light of overwhelming evidence of the defendant's guilt. 395 S.C. at 271, 717 S.E.2d at 620. Further, the HIV test of the defendant was obtained pursuant to the State's motion rather than at the defendant's voluntary request. *Id.* at 268-69, 717 S.E.2d at 618-19. Thus, the holding in *Chisholm* is inapplicable.