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When Lightning Strikes Back: South Carolina's Return to the Unconstitutional Standardless Capital Sentencing Regime of the Pre-Furman Era

John H. Blume

Cornell Law School, john-blume@postoffice.law.cornell.edu

Sheri Johnson

Cornell Law School, slj8@cornell.edu

Emily C. Paavola

Death Penalty Resource & Defense Center, Columbia, S.C.

Keir M. Weyble

Cornell Death Penalty Project, Ithaca, N.Y.

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WHEN LIGHTNING STRIKES BACK:
SOUTH CAROLINA'S RETURN TO THE
UNCONSTITUTIONAL, STANDARDLESS
CAPITAL SENTENCING REGIME OF THE PRE-
FURMAN ERA

*John H. Blume**
*Sheri L. Johnson***
*Emily C. Paavola****
and
*Keir M. Weyble****¹*

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* Professor of Law, Cornell Law School, and Director, Cornell Death Penalty Project, Ithaca, N.Y.

** Professor of Law, Cornell Law School, and Co-director, Cornell Death Penalty Project, Ithaca, N.Y.

*** Executive Director, Death Penalty Resource & Defense Center, Columbia, S.C.

**** Director of Death Penalty Litigation, Cornell Death Penalty Project, Ithaca, N.Y.

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I. INTRODUCTION

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.²

In 1972, the United States Supreme Court held, in *Furman v. Georgia*,³ that Georgia's death penalty statute violated the Cruel and Unusual Punishments Clause of the Eighth Amendment because it gave judges and jurors "untrammelled discretion"⁴ to

2. *Furman v. Georgia*, 408 U.S. 238, 309–10 (Stewart, J., concurring).

3. 408 U.S. 238 (1972) (per curiam).

4. *Id.* at 247 (Douglas, J., concurring).

decide which defendants should be sentenced to death. The pre-*Furman* era of capital sentencing in America was characterized by a standardless sentencing regime resulting in death sentences that were “wantonly and . . . freakishly imposed”⁵ in that there was no “rational basis that could differentiate . . . the few who die from the many who go to prison.”⁶ For the “capriciously selected random handful”⁷ chosen to die, it was akin to being “struck by lightning.”⁸ Justice Stewart further observed that, “if any basis can be discerned for the selection of these few . . . , it is the constitutionally impermissible basis of race.”⁹ The decision in *Furman* effectively created a moratorium on the death penalty for those states (including South Carolina) that had death penalty statutes similar to Georgia’s. Several states attempted to draft new death penalty statutes in accordance with the constitutional principles articulated in *Furman*.

In 1976, the Supreme Court approved of Georgia’s revamped death penalty statute in *Gregg v. Georgia*.¹⁰ The Court pointed to three features of Georgia’s new statute that were critical to its acceptance: (1) it narrowed the class of defendants eligible for the death penalty by providing ten aggravating circumstances, “one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed”;¹¹ (2) it required the jury to consider the particular circumstances of the crime and the defendant before it was permitted to make its sentencing recommendation;¹² and (3) it included the “important additional safeguard”¹³ of requiring the state supreme court to determine whether a sentence had been “imposed under the

5. *Id.* at 310 (Stewart, J., concurring).

6. *Id.* at 294 (Brennan, J., concurring).

7. *Id.* at 309–10 (Stewart, J., concurring).

8. *Id.* at 309.

9. *Id.* at 310.

10. 428 U.S. 153 (1976).

11. *Id.* at 196–97.

12. *Id.* at 197; *see also id.* (“No longer can a Georgia jury do as *Furman*’s jury did: reach a finding of the defendant’s guilt and then, without guidance or direction, decide whether he should live or die.”).

13. *Id.* at 198.

influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases."¹⁴

In response to *Gregg*, South Carolina passed its own death penalty statute essentially identical to the one that the Supreme Court approved of in *Gregg*.¹⁵ However, through legislative expansion of the statute and judicial interpretation over the years, South Carolina has failed to adhere to the constitutional standards set forth in *Furman* and *Gregg*, thus reverting to a pre-*Furman* death penalty scheme. South Carolina's current death penalty statute makes virtually every murderer eligible for the death penalty. The statute's failure to limit the death penalty to only the most extreme and egregious cases returns the decision to the hands of solicitors, judges, and jurors and renders South Carolina's system susceptible to impermissible inequities among defendants and abuses of discretion by state officials. Compelling empirical evidence shows significant racial effects in capital sentencing decisions in South Carolina. Furthermore, the South Carolina Supreme Court has failed to correct these flaws through meaningful proportionality review. Consequently, the death penalty in South Carolina is currently imposed in an unconstitutionally arbitrary and capricious manner.¹⁶

14. *Id.*

15. See *State v. Shaw*, 255 S.E.2d 799, 802 (S.C. 1979) (describing South Carolina's 1977 death penalty statute as "patterned after the death penalty statutes of our sister state Georgia"). South Carolina, like several other states, had previously responded to *Furman* by adopting a mandatory death penalty for certain classes of offenders. These statutes were quickly struck down, however, as constitutionally defective for a variety of reasons. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976); *State v. Rumsey*, 226 S.E.2d 894, 895 (S.C. 1976). For a more detailed history of the death penalty in South Carolina, see John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the Modern "Era" of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285 (2002).

16. We note that we are not the first to observe the general regression toward a pre-*Furman* era. Others have pointed out this trend in some of South Carolina's sister states. See, e.g., Bill Rankin et al., *A Matter of Life or Death:*

Part II of this Article provides a historical overview of the judicial and legislative expansion of South Carolina's death penalty statute. Part III discusses empirical data demonstrating the statute's failure to narrow the class of offenders eligible for the death penalty. Part IV examines and provides empirical data on how this failure to narrow creates an opportunity for race to continue to play an impermissible role in the life-or-death decision, as it has historically. Part V explains how the South Carolina Supreme Court has failed to fulfill its constitutional duty to provide meaningful proportionality review. Finally, Part VI uses a case example to demonstrate that there is no rational basis distinguishing the few who die from the many who do not. Thus, this Article concludes that South Carolina's current death penalty scheme is unconstitutional.

II. HISTORICAL OVERVIEW: THE LEGISLATIVE AND JUDICIAL EXPANSION OF SOUTH CAROLINA'S CAPITAL SENTENCING STATUTE

A. Relevant Legal Background

Prior to 1972, states were free to make capital punishment available as a sentencing option for any murder or other "capital" offense and to leave the determination of whether to actually impose a death sentence entirely to the discretion of jurors in individual cases.¹⁷ Although juries exercising this unbridled

Death Still Arbitrary, ATLANTA J. CONST., Sept. 23, 2007, at A1 (reporting that 56% of all murders in a decade studied in Georgia were eligible for death, including hundreds of moderately aggravated cases); John Seigenthaler, *Deeper Look Shows Even More Cases of Unequal Justice*, TENNESSEAN, Jan. 10, 2010 (reporting on the striking differences in sentences that state judges and juries gave women convicted of killing their abusive husbands in Tennessee); see also Kristen Nugent, *Proportionality and Prosecutorial Discretion: Challenges to the Constitutionality of Georgia's Death Penalty Laws and Procedures Amidst the Deficiencies of the State's Mandatory Appellate Review Structure*, 64 U. MIAMI L. REV. 175 (2009) (arguing that Georgia's capital sentencing scheme is unconstitutional for many of the same reasons discussed herein—particularly, the Georgia Supreme Court's failure to conduct a meaningful proportionality review).

17. See generally *McGautha v. California*, 402 U.S. 183 (1971).

discretion were thus free to impose death sentences in large numbers of cases, they actually imposed it in only a small fraction of the cases in which they could have done so.¹⁸ Over time, the infrequency and randomness with which juries were imposing the death penalty raised concerns that it was being administered arbitrarily and that jurors' determinations of whether a defendant would live or die were turning on discriminatory factors such as race, religion, and economic or social standing.

These concerns over arbitrariness and discrimination in the administration of the death penalty culminated in *Furman v. Georgia*, where the Supreme Court held that sentences imposed under the standardless, entirely discretionary statutes then in use across the country "constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."¹⁹ Although *Furman* resulted in separate opinions from all nine Justices, the risk of arbitrariness and discrimination inherent in a system with no mechanism for objectively separating those who should suffer death from those who should not was a central consideration for each of the Justices who voted to strike down the existing statutes.²⁰ As the

18. *Id.* at 203–04.

19. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

20. *See id.* at 255 (Douglas, J., concurring) ("Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position."); *id.* at 256–57 ("Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."); *id.* at 294 (Brennan, J., concurring) ("When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison."); *id.* at 309–10 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the

Court later observed,

[b]ecause of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . . [T]he concerns expressed in *Furman* . . . can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.²¹

Some states, including South Carolina, responded to *Furman's* concerns over sentencer discretion by simply eliminating that discretion altogether in favor of mandatory death sentences for certain classes of offenders. These statutes, however, were quickly rejected as incompatible with “contemporary standards” and as inadequate “to provide a constitutionally tolerable response to *Furman's* rejection of unbridled jury discretion in the imposition of capital sentences.”²² Other states addressed the problems identified in *Furman* by crafting new capital punishment procedures designed to limit and guide the discretion of decision makers in capital cases. The first such procedure to be reviewed and endorsed by the Supreme

petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [I]f any basis can be discerned for the selection of these few . . . , it is the constitutionally impermissible basis of race. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.” (footnotes omitted); *id.* at 313 (White, J., concurring) (“[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”); *id.* at 365 (Marshall, J., concurring) (“Racial or other discriminations should not be surprising. In *McGautha v. California*, 402 U.S., at 207, this Court held ‘that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is [not] offensive to anything in the Constitution.’ This was an open invitation to discrimination.”) (alteration in original).

21. *Gregg v. Georgia*, 428 U.S. 153, 189 (1979) (opinion of Stewart, Powell & Stevens, JJ.).

22. *Woodson v. North Carolina*, 428 U.S. 280, 301–02 (1976); *see also* *State v. Rumsey*, 226 S.E.2d 894, 895 (S.C. 1976) (striking down South Carolina’s mandatory death penalty statute as “constitutionally defective” in light of *Woodson*).

Court was Georgia's in *Gregg v. Georgia*.²³ The Georgia statutory scheme included three features that proved critical to its acceptance in *Gregg*. First, it worked "to narrow the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed."²⁴ Second, it required particularized consideration of "the circumstances of the crime and the criminal" before the jury was permitted to make its sentencing recommendation.²⁵ And third, the Georgia scheme included the "important additional safeguard"²⁶ of an "automatic appeal,"²⁷ under which the state supreme court was required to determine whether a sentence had been "imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases."²⁸ "On their face," the Court observed, "these procedures seem to satisfy the concerns of *Furman*."²⁹

After *Gregg*, the Supreme Court continued to refine and add meaning to the principles upon which it had relied in upholding Georgia's sentencing scheme. Among the most prominent of those principles has been the requirement that a state's capital sentencing statute "define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'"³⁰ In *Godfrey v. Georgia*, enforcement of this principle required reversal of a Georgia death sentence based

23. 428 U.S. 153 (1976).

24. *Id.* at 196–97.

25. *Id.* at 197; *see also id.* ("No longer can a Georgia jury do as *Furman*'s jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die.")

26. *Id.* at 198.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (quoting *Gregg*, 428 U.S. at 196 n.47) (alteration in original).

solely on the statutory aggravating circumstance that the offense had been “outrageously or wantonly vile, horrible and inhuman.”³¹ The Court reasoned that the language of the aggravating circumstance was so broad and vague that “[a] person of ordinary sensibility could fairly characterize almost every murder as” falling within it, and therefore qualifies the defendant for a death sentence.³² The Court went on to conclude that reversal of the defendant’s death sentence was required because “[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.”³³

In *Zant v. Stephens*,³⁴ the Court considered a claim that Georgia’s capital sentencing scheme was inconsistent with *Furman* because, under Georgia law, “the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty.”³⁵ After emphasizing once again that “an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder,”³⁶ the Court held that Georgia’s decision to have its aggravating circumstances perform only that function was acceptable:

Our cases indicate . . . that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized*

31. *Id.* at 426.

32. *Id.* at 428–29.

33. *Id.* at 433.

34. 462 U.S. 862 (1983).

35. *Id.* at 874.

36. *Id.* at 877.

determination on the basis of the character of the individual and the circumstances of the crime.

The Georgia scheme provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage.³⁷

Over the nearly three decades since *Godfrey* and *Zant*, the Supreme Court has consistently adhered to and reinforced the constitutional requirement that statutory aggravating circumstances meaningfully narrow the class of murder defendants eligible for a death sentence.³⁸ Consistent with this

37. *Id.* at 878–79 (footnote and citations omitted); see also *id.* at 879 (noting that the two aggravating circumstances found by Stephens' jury "adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed.").

38. See, e.g., *Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006) ("[A] state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime."); *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998) ("In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances."); *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) ("As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder."); *Arave v. Creech*, 507 U.S. 463, 474 (1993) ("If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm."); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion."); *Spaziano v. Florida*, 468 U.S. 447, 460 (1984) ("If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not."). The Supreme Court of the United States has further limited the scope of the death penalty in recent decisions holding that persons with mental retardation and persons under the age of eighteen can not be sentenced to death. See *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (under eighteen); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (mental retardation). In doing so, the Court noted that the categorical exclusions were necessary in order to ensure "that only the most deserving of execution are put to death." *Atkins*, 536 U.S. at 319.

unbroken line of precedent, the Court last Term once again reiterated the Eighth Amendment command “that resort to the [death] penalty must be reserved for the worst of crimes and limited in its instances of application.”³⁹

B. South Carolina’s Capital Sentencing Statute, as Written by the Legislature and Construed by the South Carolina Supreme Court, Does Not Perform the Constitutionally Mandated Narrowing Function

A state’s capital sentencing scheme is constitutional only if its statutory aggravating factors genuinely and objectively narrow the class of murder offenders eligible for a sentence of death. South Carolina’s scheme was constitutional at the time of its adoption in 1977 and likely remained so for some time thereafter. More recently, however, dramatic legislative expansion of the list of aggravating factors that make a murder death-eligible and sweepingly broad judicial constructions of several of those factors have combined to yield a set of death-eligibility criteria that can be met in nearly all murder cases. The result is that South Carolina’s scheme for determining death eligibility today bears a much closer resemblance to the standardless regime outlawed in *Furman* than to the guided discretion approach accepted in *Gregg*.

39. *Kennedy v. Louisiana*, 554 U.S. ___, 128 S. Ct. 2641, 2665 (2008). Even strong supporters of capital punishment recognize the importance of applying it narrowly through eligibility criteria designed to objectively identify only the most deserving cases. See, e.g., Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 29 (1995) (“Increasing the number of crimes punishable by death, widening the circumstances under which death may be imposed, obtaining more guilty verdicts, and expanding the population of death rows will not do a single thing to accomplish the objective, namely to ensure that the very worst members of our society—those who, by their heinous and depraved conduct have relinquished all claim to human compassion—are put to death.”) (footnote omitted); *id.* at 31 (criticizing “the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random”).

1. Legislative Adoption and Expansion of South Carolina's Capital Sentencing Scheme

After South Carolina's post-*Furman* mandatory death penalty statute was struck down in the wake of *Woodson v. North Carolina*,⁴⁰ the legislature responded in 1977 with a new statutory scheme "patterned after the death penalty statutes of our sister state Georgia."⁴¹ Like Georgia's system, South Carolina's capital sentencing mechanism purports to perform the constitutionally mandated narrowing function by conditioning a murder defendant's eligibility for a death sentence on the finding of at least one statutory aggravating factor.⁴²

The original statute contained seven statutory aggravating factors.⁴³ The first of these aggravating factors included a list of subparts making a murder death-eligible if it occurred during the commission of any one of eight different offenses: rape, assault with intent to ravish, kidnapping, burglary, robbery while armed with a deadly weapon, larceny with use of a deadly weapon, housebreaking, and killing by poison. The remaining six statutory aggravating factors were: the murder was committed by a person with a prior conviction for murder; the offender "knowingly created a great risk of death to more than one person

40. 428 U.S. 280 (1976).

41. *State v. Shaw*, 255 S.E.2d 799, 802 (S.C. 1979). Both the Georgia and South Carolina statutes were modeled after the Model Penal Code, recommended by the American Law Institute in 1962. On April 15, 2009, however, the American Law Institute withdrew its support for its own statute, citing a variety of reasons including: "the difficulty of limiting the list of aggravating factors so that they do not cover (as they do in a number of state statutes now) a large percentage of murderers," and "the near impossibility of addressing by legal rule the conscious or unconscious racial bias within the criminal-justice system that has resulted in statistical disparity in death sentences based on the race of the victim." Report of the Council to the Membership of The American Law Institute on the Matter of the Death Penalty, Apr. 15, 2009, available at http://www.ali.org/doc/Capital%20Punishment_web.pdf.

42. *Shaw*, 255 S.E.2d at 802.

43. Act of June 8, 1977, No. 177, sec. 1, § 16-52(C)(a), 1977 S.C. Acts 407, 408.

in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person"; the murder was committed for the purpose of receiving money or a thing of monetary value; the murder of a judicial officer, solicitor, or other officer of the court (current or former) during or because of the conduct of his or her official duties; the offender either committed or caused to be committed murder-for-hire; and the murder of a peace officer, corrections officer, or firefighter while engaged in the performance of his or her official duties.⁴⁴

In the three decades since the original death penalty statute was passed, the legislature has expanded the list of aggravating factors on numerous occasions:⁴⁵

- In 1978, physical torture was added to the list of concomitant crimes that made a murder death-eligible.⁴⁶
- In 1986, the legislature added two more aggravating factors: "[m]urder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct,"⁴⁷ and murder of a child eleven years old or younger.⁴⁸
- In 1990, the list was again expanded to include murder during the commission of drug trafficking⁴⁹ and murder of a family member of a judicial officer, a peace

44. Sec. 1, §§ 16-52(C)(a)(2)–(7), 1977 S.C. Acts 407, 408.

45. This steady expansion is precisely the opposite of what the Supreme Court envisioned when it upheld Georgia's statutory response to *Furman* in *Gregg*. See *Zant v. Stephens*, 462 U.S. 862, 877 n.15 (1983) (recalling Justice White's concurring opinion in *Gregg*, which "asserted that, over time, as the aggravating circumstance requirement was applied, 'the types of murders for which the death penalty may be imposed [would] become more narrowly defined and [would be] limited to those which are particularly serious or for which the death penalty is peculiarly appropriate.'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring)) (alteration in original).

46. Act of June 30, 1978, No. 555, sec. 1, § 16-3-20(C)(a)(1), 1978 S.C. Acts 1636, 1636.

47. Omnibus Criminal Justice Improvements Act of 1986, sec. 27, § 16-3-20(C)(a)(8)–(9), 1986 S.C. Acts 2955, 2985.

48. *Id.*

49. Act of June 25, 1990, No. 604, sec. 15, § 16-3-20(C)(a), 1990 S.C. Acts 2549, 2567–68.

officer, a corrections officer, or a firefighter with “intent to impede or retaliate against the official.”⁵⁰

- In 1995, dismemberment of a person was added as an aggravating factor.⁵¹

- In 1996, the legislature added an entirely new aggravating factor: “[t]he murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.”⁵²

- In 2002, the factor covering peace and correction officers was expanded to include “[t]he murder of a federal, state, or local law enforcement officer or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county or municipal detention facility employee, or fireman or former fireman during or because of the performance of his official duties.”⁵³

- In 2006, as part of the “Sex Offender Accountability and Protection of Minors Act of 2006,” the legislature expanded the list again to make sexually violent predators death-eligible.⁵⁴

- And in 2007, the legislature acted again, adding arson in the first degree to the list of concomitant crimes

50. *Id.*

51. Act of June 7, 1995, No. 83, sec. 10, § 16-3-20(C)(a)(1)(i), 1995 S.C. Acts 545, 558.

52. Act of May 20, 1996, No. 317, sec. 1, § 16-3-20(C)(a), 1996 S.C. Acts 2028, 2028.

53. Act of May 1, 2002, No. 224, sec. 1, § 16-3-20(C)(a)(7), 2002 S.C. Acts 2537, 2537–38.

54. Sex Offender Accountability and Protection of Minors Act of 2006, sec. 2, § 16-3-20(C)(a), 2006 S.C. Acts 2697, 2699.

that make a murder death-eligible.⁵⁵

Thus, as it currently stands, the South Carolina death penalty statute enumerates twelve statutory aggravating factors,⁵⁶ the first of which includes ten individual subparts for a total of twenty-one circumstances that can make a murder death-eligible.⁵⁷ On its face, such a broad array of death-eligible circumstances would have difficulty passing muster under *Gregg* and its progeny. In practice, however, the situation is even worse than the statute suggests, as South Carolina's gradual but steady drift toward a pre-*Furman* death penalty scheme has been substantially exacerbated by the state judiciary's broad constructions of several of the statute's aggravating factors.

2. Judicial Expansion of Death-Eligibility in South Carolina

As is true with regard to virtually any statutory provision, the scope of S.C. Code Ann. § 16-3-20's aggravating factors is subject to judicial interpretation.⁵⁸ The more narrowly a state's statutory aggravating factors are construed, the more likely its scheme as a whole is to satisfy the requirements of the Eighth Amendment. Conversely, the more broadly aggravating factors establishing death-eligibility are construed, the greater the likelihood that the state's capital sentencing scheme will violate the requirements established in *Gregg*.⁵⁹

In South Carolina, the legislature's steady expansion of the

55. Act of June 18, 2007, No. 101, sec. 1, § 16-3-20(C)(a)(1), 2007 S.C. Acts 488, 488.

56. S.C. CODE ANN. §§ 16-3-20(C)(a)(1)–(12) (1976 & Supp. 2009).

57. S.C. CODE ANN. §§ 16-3-20(C)(a)(1)(a)–(j) (2009).

58. See, e.g., *Bell v. Cone*, 543 U.S. 447, 453 (2005) (noting that *Proffitt v. Florida*, 428 U.S. 242 (1976), rejected a challenge to a statutory aggravating factor “on the express ground that a narrowing construction had been adopted by that State’s Supreme Court”); *In re Amir X.S.*, 639 S.E.2d 144, 146 (S.C. 2006) (recognizing judicial authority to impose “limiting construction” on a statute).

59. See *Zant v. Stephens*, 462 U.S. 862, 876–77 (1983); see also *id.* at 877 (“To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”) (footnote omitted).

class of death-eligible murders, as described previously, has been matched—if not surpassed—by the South Carolina Supreme Court’s sweeping construction of several statutory aggravating factors. Four examples are described below.

a. Physical Torture

Pursuant to S.C. Code Ann. § 16-3-20(c)(1)(h) (1976), a murder is death-eligible if it occurs during the commission of “physical torture.” The statute does not define the conduct or circumstances which constitute “physical torture.” In 1983, the South Carolina Supreme Court adopted Georgia’s definition of that term, holding in *State v. Elmore* that “[t]orture occurs when the victim is subjected to serious physical abuse before death,”⁶⁰ or “when the victim is subjected to an aggravated battery.”⁶¹

Since *Elmore*, the South Carolina Supreme Court has carried out a significant expansion of what was already a very inclusive definition of physical torture. For example, in *State v. Davis*,⁶² the court endorsed the following description of “aggravated battery” constituting physical torture:

What is aggravated battery? An aggravated battery is an unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation, such as the use of a dangerous, or deadly, object; the infliction of serious bodily injury with intent to commit a felony; a great disparity between the ages and physical condition of the parties; a difference in the sexes.⁶³

On its face, this definition encompasses—and therefore renders death-eligible—the vast majority of murders committed with weapons and all murders involving defendants and victims of opposite sexes. If taken literally, this definition encompasses

60. *State v. Elmore*, 308 S.E.2d 781, 785 (S.C. 1983) (quoting *Hance v. State*, 268 S.E.2d 339, 345 (Ga. 1980)).

61. *Id.* (quoting *Hance*, 268 S.E.2d at 345).

62. 422 S.E.2d 133 (S.C. 1992).

63. *Id.* at 147.

all murders because any object used to murder someone is inherently “a dangerous or deadly object.”

Additionally, in *State v. Johnson*,⁶⁴ the court further expanded the circumstances in which physical torture can be found, this time to include cases in which the victim had no conscious awareness of pain. According to the court, “[p]hysical torture is not predicated upon the amount of pain suffered by a murder victim. Although conscious awareness of pain may buttress the conclusion that the victim was subjected to serious physical abuse before death, its absence does not foreclose a finding of physical torture.”⁶⁵

b. Kidnapping

Under South Carolina law, murder is death-eligible if it occurs during the commission of a kidnapping.⁶⁶ As with “physical torture,” the statute is silent with respect to the definition of kidnapping. The South Carolina Supreme Court filled this definitional void by reference to South Carolina’s kidnapping statute, which provides that “[w]hoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law”⁶⁷ is guilty of kidnapping.⁶⁸

In *State v. Tucker*,⁶⁹ the court expanded the definition of kidnapping when it accompanies a murder. In *Tucker*, the defendant challenged the trial court’s finding of kidnapping⁷⁰ based on evidence that he duct-taped the victim to a bed while he searched for things to steal, then shot and killed the victim while he packed to leave.⁷¹ Relying on a non-murder case, the South Carolina Supreme Court explained that, “[k]idnapping is a

64. 525 S.E.2d 519 (S.C. 2000).

65. *Id.* at 526.

66. S.C. CODE ANN. § 16-3-20(C)(1)(b) (1976).

67. *See* § 16-3-910.

68. *See, e.g., State v. Copeland*, 300 S.E.2d 63, 66 (S.C. 1982).

69. 512 S.E.2d 99 (S.C. 1999).

70. *Id.* at 105.

71. *Id.* at 102.

continuing offense. The offense commences when one is wrongfully deprived of freedom and continues until freedom is restored.”⁷² Applying this view to the facts in *Tucker*, the court concluded that “[the victim] was unquestionably deprived of her freedom once appellant bound her with the duct tape,” and added that “restraint constitutes kidnapping within the meaning [of the statute], regardless of the fact that the purpose of this seizure was to facilitate the commission of a [crime other than murder].”⁷³

In *State v. Stokes*,⁷⁴ the court utilized the kidnapping statute’s references to inveigling and decoying to further expand the range of conduct satisfying § 16-3-20(C)(a)(1)(b). Relying on the *New Webster’s Dictionary and Thesaurus*, the court defined “decoy” as “to lure successfully”⁷⁵ and defined “inveigling” as “enticing, cajoling, or tempting the victim, usually through some deceitful means such as false promises.”⁷⁶ Based on these definitions, the court concluded that the defendant kidnapped the victim by luring her into the woods for the ostensible purpose of facilitating her willing participation in the killing of a third party.⁷⁷

This expansive definition of kidnapping created by the South Carolina Supreme Court has substantially broadened the range of conduct capable of elevating a murder to death-eligibility.⁷⁸

72. *Id.* at 105 (citing *State v. Hall*, 310 S.E.2d 429 (S.C. 1983)).

73. *Id.*

74. 548 S.E.2d 202, 205 (S.C. 2001).

75. *Id.* at 204 n.6 (quoting *NEW WEBSTER’S DICTIONARY AND THESAURUS* 250 (1993)).

76. *Id.* at 204 n.6 (quoting *United States v. Macklin*, 671 F.2d 60, 66 (2d Cir. 1982)).

77. *Id.* at 204.

78. *See, e.g., State v. Vazsquez*, 613 S.E.2d 359, 361 (S.C. 2005) (finding murder during the commission of kidnapping where defendant locked two people in restaurant freezer, from which they escaped five minutes later and fled the scene unharmed); *State v. Kelly*, 540 S.E.2d 851, 853 (S.C. 2001) (finding murder during the commission of kidnapping where defendant duct-taped victim’s hands behind her back); *State v. Cheeseboro*, 552 S.E.2d 300, 304 (S.C. 2001) (finding kidnapping where defendant forced victims to walk from the back of a barbershop to the front, then back again, during holdup).

c. Attempted Armed Robbery

South Carolina also provides for death-eligibility where a murder takes place while in the commission of an armed robbery.⁷⁹ In *State v. Humphries*,⁸⁰ the South Carolina Supreme Court construed the statutory phrase “while in the commission of” to encompass any “acts that are concurrent with the murder.”⁸¹ Consequently, both uncompleted attempts to commit accompanying crimes and accompanying crimes completed only after the murder are sufficient to elevate a murder to a death-eligible offense under § 16-3-20(C)(a)(1).

d. Prior Conviction for Murder

South Carolina also recognizes prior murder convictions as aggravating circumstances.⁸² This provision, too, has been construed expansively by the South Carolina Supreme Court. In *State v. Locklair*,⁸³ the court held that “prior,” as set forth in South Carolina’s death penalty statute, means “prior to trial, rather than prior to the time of the crime.”⁸⁴ As a result, death-eligibility can be established on the basis of a murder conviction that did not exist at the time of the murder for which the death sentence is sought.

III. THE EMPIRICAL DATA: NEARLY ALL MURDER OFFENDERS ARE LEGALLY ELIGIBLE FOR A DEATH SENTENCE IN SOUTH CAROLINA

The transformation of South Carolina’s capital sentencing scheme from one designed to objectively distinguish the few cases in which death could be sought from the many in which it could not, to one in which death is almost always legally available, is

79. S.C. CODE ANN. § 16-3-20(C)(a)(1)(d) (1976).

80. 479 S.E.2d 52 (S.C. 1996).

81. *Id.* at 55 (“That the murder may occur before an armed robbery actually is completed does not mean that a robbery was not taking place.”).

82. § 16-3-20(C)(a)(2).

83. 535 S.E.2d 420 (S.C. 2000).

84. *Id.* at 428–29.

illustrated by data collected in Charleston County. Using court files, contemporary news accounts, and other publicly available information, researchers assembled profiles of all 151 homicides that occurred in Charleston County between 2002 and 2007. These profiles included relevant facts about the circumstances of the offense, the characteristics of the defendants and victims, and whether or not the State chose to seek the death penalty.⁸⁵

Analysis of the Charleston County data in light of S.C. Code Ann. §16-3-20 and the judicial decisions interpreting it indicates that of the 151 cases identified, 115—fully 76%—involved facts that would support the existence of at least one statutory aggravating circumstance sufficient to render them eligible for capital prosecution.⁸⁶ Of those 115 death-eligible cases, only 5—a mere 4.3% of the total death-eligible pool—were actually prosecuted as capital cases.⁸⁷

Strikingly similar results were obtained in Richland County. Using the same methods described above for the Charleston County data collection, researchers assembled profiles on 152

85. It should be noted that South Carolina is not unique in the rate at which it imposes death sentences. A 2002 study, for example, found that the national average was twenty-one death sentences for every 1000 homicides. At that time, South Carolina's death sentencing rate was 16 death sentences for every 1,000 homicides, placing it in twenty-first place among the thirty-eight states that had a death penalty. Blume, *supra* note 15, at 297–98.

86. This statistic is a conservative number. First, if a case was questionable or it otherwise could not be determined whether the facts would render the case death-eligible, we counted it as not death-eligible. Second, this statistic does not account for all murders that fit the definition of “physical torture” as described in subsection II.B.2.a. of this Article. Seemingly any object used to murder someone would inherently be “a dangerous or deadly object.” Thus, this statistic would be 100% if this factor were accounted for.

87. Only 1 of the 5 capitally prosecuted cases—*State v. Dickerson*, 535 S.E.2d 119 (S.C. 2000)—resulted in a death sentence, and that outcome, according to Dickerson's trial attorney, was made possible only by the defendant's rejection of a life sentence offered by the prosecution. Dickerson was not “the worst of the worst”; if he were, there would have been no offer to reject. See generally *Furman v. Georgia*, 408 U.S. 238, 294 (1972) (Brennan, J., concurring). Rather, as the lone recipient of a death sentence from a pool of 115 eligible candidates and 5 actual capital defendants, Dickerson was simply the rare defendant “struck by lightning.”

total homicide cases that occurred in Richland County between 2000 and 2008. Of those 152 cases, 117—or 77%—involved facts that would render them death-eligible under South Carolina’s current death penalty statute as interpreted and applied. Out of the 117 legally death-eligible homicides, only 4—a mere 3.4% of the death-eligible cases—were actually prosecuted as a capital case.

These results confirm that South Carolina’s present day capital sentencing scheme possesses the same combination of defining characteristics that *Furman* condemned: widely applicable death-eligibility (76% of cases in Charleston County and 77% of cases in Richland County), and narrow actual application of death to eligible cases (4.3% in Charleston County and 3.4% in Richland County). As a practical matter, South Carolina’s statutory aggravating circumstances can no longer be relied upon to “adequately differentiate [a capital case] in an objective, evenhanded, and substantively rational way from the many [South Carolina] murder cases in which the death penalty may not be imposed.”⁸⁸ Instead, with 76%–77% of all homicides to choose from, the task of selecting who will live and who will face the prospect of dying rests exclusively with the prosecutors who make the charging decisions⁸⁹—decisions which are as

88. See *Zant v. Stephens*, 462 U.S. 862, 879 (1983).

89. That prosecutorial discretion plays a disproportionate role in determining which eligible defendants will be sentenced to death is confirmed by the substantial disparities in death sentencing among South Carolina counties. See Blume, *supra* note 15, at 298–99 (“There is wide variation from county to county, and from judicial circuit to judicial circuit, in whether the death penalty will be sought, or obtained. Ten of South Carolina’s forty-six (22%) counties have never produced a death sentence. Other counties, even though they are relatively large and have, at least comparatively speaking, significantly more murders, produce very few death sentences. By contrast, more than one-third of the death sentences imposed in the last ten years arose from two of the state’s sixteen Judicial Circuits. Twenty-four of the sixty-two (39%) persons sentenced to death from January 1993 to the present came from either the First Judicial Circuit (Calhoun, Dorchester, and Orangeburg counties) or the Eleventh Judicial Circuit (Edgefield, Lexington, and Saluda counties). However, these counties do not have higher homicide rates than other counties. . . . Lexington County’s death sentencing rate of 11% is approximately five times greater than the national average and seven times the South Carolina average of 1.6%. Based on currently available data, Lexington County

inscrutable, unreviewable, and susceptible to arbitrariness and bias as those *Furman* found to be intolerable. As the jurisprudence described in section II.A. of this Article makes clear, this is decidedly *not* what the Supreme Court envisioned when it upheld the statutory scheme challenged in *Gregg*.⁹⁰

IV. SOUTH CAROLINA'S CAPITAL SENTENCING SYSTEM PERMITS DISCRIMINATION ON THE BASIS OF RACE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

In the long history of capital punishment in the United States, race has played a large role. Although the more blatant forms of racial discrimination are less common in capital prosecutions than they were in the past, there is compelling empirical evidence that, at least in South Carolina, capital punishment decisions continue to be influenced by race. Moreover, the potential for discrimination is exacerbated by four factors: (1) the breadth of death-eligibility; (2) the frequency with which juries are exposed to bias-triggering victim impact evidence; (3) the dearth of African-American decision makers both as prosecutors and as jurors; and (4) the confusing nature of the penalty phase instructions received by capital juries. The resulting distortion of life and death determinations violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and the Cruel and Unusual Punishments Clause of the Eighth Amendment.

has the highest death sentencing rate of *any* large county in the United States.”).

90. See, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (“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.”).

A. The History of Race Discrimination in the Imposition of
Capital Punishment

Until the post-*Furman* era, the history of the imposition of the death penalty in this country has been dominated by race. During the Colonial period, many states made eligibility for capital punishment depend upon the offense committed and the offender's race, status, or both.⁹¹ By the time of the Civil War, none of the northern states provided for capital punishment for any crime other than murder, and in many, the institution itself was questioned, but “[m]uch of the debate that took place in the North simply did not occur in the South because of the perceived need to discipline a captive workforce.”⁹² It is telling that in the first half of the nineteenth century, all of the southern states had abolished the death penalty for certain previously death-eligible crimes committed by *whites*.⁹³ The picture was quite different for African-American perpetrators. In Texas, African-Americans, whether slave or free (unlike whites), were subject to capital punishment for insurrection, arson, attempted murder of a white victim, rape or attempted rape of a white victim, robbery or attempted robbery of a white person, and assault with a deadly weapon upon a white person.⁹⁴ Free African-Americans were death-eligible for the kidnapping of a white woman.⁹⁵ In Virginia, free African-Americans (but not whites) could get the death penalty for rape, attempted rape, kidnapping a woman, and aggravated assault—all provided the victim was white. Slaves in Virginia were eligible for death for commission of a remarkable sixty-six crimes.⁹⁶ In Mississippi, that number was

91. A. LEON HIGGINBOTHAM, JR., IN *THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS* 181–82, 256–57, 262–63 (1978).

92. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 137 (2002).

93. *Id.* at 139. Moreover, the change in practices—for whites—was even more dramatic than the change in theoretical eligibility: “Between 1800 and 1860 the southern states are known to have executed only seven white burglars . . . six white horse thieves . . . four white robbers” and *no* white rapists. *Id.*

94. *Id.* at 141.

95. *Id.*

96. *Id.*

thirty-eight,⁹⁷ and though most southern states did not have such a staggering number of capital felonies for slaves, all had statutes that differentiated between crimes that were capital if committed by a slave but not if committed by a white man.⁹⁸ In all slaveholding states, including South Carolina, the rape of a white woman by a black man was a capital crime.⁹⁹ In Georgia, the disparity in penalty was particularly notable; rape of a white woman by a white man was punishable by imprisonment of twenty years or less, and attempted rape by not more than five years, but rape or attempted rape of a white woman by an African-American was punishable by death.¹⁰⁰

Moreover, race of victim disparities, as well as race of defendant disparities, can be traced to the antebellum period. A slave could not be raped by her owner at all, and the rape of a slave by another white man was not punished as rape but as a trespass against the owner's property.¹⁰¹

Nor were these differences merely unenforced possibilities. This "black-white divergence in southern criminal codes was reflected in actual practice."¹⁰² In the antebellum South, African-Americans were hanged in numbers far out of proportion to their representation in the population and for many more crimes than were whites.¹⁰³

After the Civil War, the Black Codes in some states, such as

97. *Id.*

98. KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* 210–11 (1956); see GEORGE M. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA* 158–88 (2d ed. 1856).

99. JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 142 (8th ed. 2000).

100. LUCIUS Q. C. LAMAR, *A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA* 804 (1821).

101. FRANKLIN & MOSS, *supra* note 99, at 141. Indeed, in antebellum Louisiana, the rape of a black woman, whether slave or free, was no crime at all. JUDITH KELLEHER SCHAFFER, *SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA* 85–87 (1994).

102. BANNER, *supra* note 92, at 141.

103. *Id.*

South Carolina, served to punish African-Americans by death for crimes that incurred lesser punishments for white offenders.¹⁰⁴ In other states, such as Georgia, the same discrimination was accomplished by facially neutral statutes that accomplished the same discrimination by making the death penalty available at the discretion of the jury.¹⁰⁵ The Fourteenth Amendment did away with the formal sources of discrimination, as it was intended,¹⁰⁶ but left untouched the disparate applications made possible by discretion. From 1930, when national statistics were first kept, to 1972, when the Supreme Court struck down unguided discretion statutes, about half of the defendants executed for murder in the United States were African-American, a number which is clearly disproportionate, whether considered in comparison to their proportion in the population or in the ranks of murderers. Even that sizable disparity pales when compared to the racial disparity in executions for rape: of the 455 men executed for rape, 405—or 89%—were African-American men.¹⁰⁷ Virtually all of these men were accused of raping white women.¹⁰⁸

These stark raw numbers reflect disparities that persisted even when possible confounding factors were investigated. When the Legal Defense Fund of the NAACP commissioned a

104. See, e.g., RANDALL KENNEDY, RACE, CRIME, AND THE LAW 84–85 (1997); see also THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 97, 105–06 (1965) (discussing North Carolina law).

105. WILSON, *supra* note 104, at 101, 104–05, 113–14.

106. When Senator Howard introduced the Fourteenth Amendment in the Senate, he described it as “prohibit[ing] the hanging of a black man for a crime for which the white man is not to be hanged.” CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

107. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, BULLETIN NO. 45, NATIONAL PRISONER STATISTICS: CAPITAL PUNISHMENT 1930–1968, at 7 tbl.1 (1969). Unofficial statistics from the longer period of 1864 to 1972 are similar. Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 37–38 (2007).

108. JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 440 (1994). Indeed, it appears that no white man has ever been executed for raping a black victim. Michael L. Radelet, *Executions of Whites for Crimes Against Blacks: Exceptions to the Rule?*, 30 SOC. Q. 529, 537–41 (1989).

comprehensive study by Professor Marvin Wolfgang of capital rape prosecutions between 1945 and 1965, Wolfgang considered over two dozen possibly aggravating nonracial factors and concluded that none of those variables accounted for racial disparities.¹⁰⁹ Controlling for those factors, “[African-American] defendants whose victims were white were sentenced to death approximately eighteen times more frequently than . . . any other racial combination of defendant and victim.”¹¹⁰

Thus, it was not surprising that the influence of race on capital sentencing was one of the factors that led the Supreme Court to overturn Georgia’s standardless death penalty.¹¹¹ Moreover, when the Court upheld remodeled death penalty statutes in *Gregg v. Georgia*,¹¹² it did so on the rationale that the new statutes channeled the sentencer’s discretion, thus minimizing the risk that race—or other arbitrary factors—would influence the imposition of the death penalty.¹¹³

Unfortunately, the newer statutes did not eliminate racial disparities in the imposition of capital punishment in this state—or in any other. Raymond Paternoster conducted a comprehensive analysis of all the death penalty prosecutions in the state of South Carolina between 1977 and 1981.¹¹⁴ After controlling for a host of variables, Paternoster found that the odds of being charged with capital murder in South Carolina during that period were 9.6 times greater in white victim cases

109. Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 126–33 (1973).

110. *Id.* at 130.

111. *Furman v. Georgia*, 408 U.S. 238, 364 (1972) (Marshall, J., concurring) (discussing the history of racial discrimination in the imposition of the death penalty); *id.* at 255 (Douglas, J., concurring) (stating that discretion permits prejudice to determine who receives the death penalty); *id.* at 310 (Stewart, J., concurring) (“[I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”).

112. 428 U.S. 153 (1976).

113. *Id.* at 206–07.

114. Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983).

than in black victim cases.¹¹⁵ A meta-analysis of the relationship between race and the death penalty was conducted by the United States General Accounting Office, which concluded that most studies found that the race of the victim significantly influenced the imposition of the death penalty and that a sizeable minority of studies also found that the race of the defendant played a significant role.¹¹⁶

B. The Legal Standard for Evaluating Evidence of Racial Discrimination

When the Supreme Court first considered a study documenting such racial disparities, in *McCleskey v. Kemp*,¹¹⁷ it held that general statistical evidence showing that a particular state's capital punishment scheme operated in a discriminatory manner did not establish a constitutional violation.¹¹⁸ *McCleskey* did not, however, exempt capital punishment from the ordinary constitutional prohibitions against racial discrimination. Rather, it held that because the large number of actors and aspects of the capital sentencing process increased the likelihood that factors other than race were responsible for racial disparities,¹¹⁹ general statistical evidence was not sufficient to establish discrimination that would violate either the Equal Protection Clause of the Fourteenth Amendment or the Cruel and Unusual Punishments

115. *Id.* at 782–83. See also Michael Songer & Isaac Unah, *The Effect of Race, Gender and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006) (concluding that South Carolina prosecutors are 3 times more likely to seek the death penalty in white victim cases than in black victim cases); John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165 (2004) (noting a significant black defendant/white victim effect in explaining the racial makeup of death row in South Carolina as well as other states).

116. U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990) (reviewing all previous studies), available at <http://archive.gao.gov/t2pbat11/140845.pdf>.

117. 481 U.S. 279 (1987).

118. *Id.* at 317–19.

119. *Id.* at 294–95.

Clause of the Eighth Amendment.¹²⁰

In contrast, racial discrimination claims that focus on the actions of a particular prosecutor (or judge or juror), do not suffer from the confounding influence of multiple actors and multiple stages, nor do they lack the evidence “specific to [the defendant’s] own case” that the Supreme Court found lacking in *McCleskey*.¹²¹ Allegations of selective prosecution based on race must be evaluated in light of “ordinary equal protection standards.”¹²²

Under those “ordinary equal protection standards,” a death-eligible defendant need not prove discriminatory intent by direct evidence.¹²³ Rather, “invidious discriminatory purpose may often be inferred from the totality of relevant facts.”¹²⁴ The appropriate analysis “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available”¹²⁵ because race-based discrimination is rarely announced publicly and those responsible for key decisions may have “[m]ore subtle, less consciously held racial attitudes.”¹²⁶ Such attitudes are especially problematic when, as in the decision to seek the death penalty, those responsible for the decision are entrusted with broad discretion.¹²⁷

In *Arlington Heights*, the Supreme Court provided guidance concerning the proof of covert forms of intentional discrimination. Where the pattern of discrimination is stark, evidence of the impact alone is determinative. “Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation

120. *Id.* at 292–93.

121. *Id.*

122. *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *see also* *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Hunter v. Underwood*, 471 U.S. 222, 232 (1985).

123. *See* *Washington v. Davis*, 426 U.S. 229, 242 (1976); *see also* *Rogers v. Lodge*, 458 U.S. 613, 618 (1982); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

124. *Washington*, 426 U.S. at 242.

125. *Arlington Heights*, 429 U.S. at 266.

126. *Turner v. Murray*, 476 U.S. 28, 35 (1986).

127. *Id.*

appears neutral on its face.”¹²⁸

When impact is not so stark, a number of factors may contribute to a prima facie showing of racially discriminatory intent. Those factors include, but are not limited to, “the impact of the official action,”¹²⁹ (even when short of “clear pattern” evidence); “the historical background of the decision . . . , particularly if it reveals a series of official actions taken for invidious purposes”;¹³⁰ “departures from the normal procedural sequence”;¹³¹ “[s]ubstantive departures . . . , particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached”;¹³² and “contemporary statements by members of the decisionmaking body.”¹³³

C. Evidence that Race Infects the Administration of Capital Punishment in South Carolina

“[S]ensitive inquiry into such circumstantial and direct evidence of intent as may be available”¹³⁴ compels the conclusion that the administration of the death penalty in South Carolina is not color blind. At least four of the *Arlington Heights* indicia are present, and together they establish the purposeful discrimination prohibited by both the Equal Protection and the Cruel and Unusual Punishments Clauses.

128. *Arlington Heights*, 429 U.S. at 266; see also *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (holding that ordinances that gave unfettered discretion to county officials regarding the operation of laundries was unconstitutional where the effect was discrimination against Chinese laundry owners).

129. *Arlington Heights*, 429 U.S. at 266; see also *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (stating *Arlington Heights* supplies the proper analysis for selective prosecution claims).

130. *Arlington Heights*, 429 U.S. at 267.

131. *Id.*

132. *Id.*

133. *Id.* at 268.

134. *Id.* at 266.

1. The Impact of Official Action

As alluded to previously, in the wake of South Carolina's post-*Furman* death penalty reform, Raymond Paternoster conducted a statewide comprehensive analysis of all the death penalty prosecutions between 1977 and 1981. He found disparities even more striking than those reported in *McCleskey*. In Georgia, the odds of being charged with capital murder were about 4 times as great when the victim was white, but in South Carolina, the odds were more than 9 times greater in white victim cases than in black victim cases.¹³⁵ Paternoster's early post-*Gregg* findings of racial disparities in the imposition of South Carolina's death penalty have since been corroborated by at least three different methods. Most simply, one can compare the racial composition of death row to the racial composition of the population. African-Americans comprise slightly less than 30% of South Carolina's population;¹³⁶ yet, as of January 1, 2009, they constituted over half of the inmates on the state's death row.¹³⁷

Another possible comparison is between homicides and death sentences, and this comparison also yields strong racial disparities. Utilizing the FBI database, a comparison of all homicide cases from 1977 to 1998 with cases that resulted in death sentences reveals that African-Americans who kill whites are sentenced to death at approximately three times the rate of whites who kill whites.¹³⁸ Close analysis shows two powerful forms of discrimination at work in the South Carolina capital punishment scheme. First, the death penalty is rarely sought (or obtained) when the murder victim is African-American. Only

135. See generally Paternoster, *supra* note 114.

136. See U.S. Census Bureau Fact Sheet, <http://factfinder.census.gov> on sidebar under "Fact Sheet" menu.

137. Of the 63 death row inmates, 33 were African-Americans. NAACP, DEATH ROW USA: A QUARTERLY REPORT BY THE CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEFENSE AND EDUCATION FUND, INC. 35 (Winter 2009), available at http://naacpldf.org/content/pdf/pubs/drusa/DRUSA_winter_2009.pdf.

138. Blume, *supra* note 15, at 306.

0.46% of black victim cases result in a death sentence, in contrast to white victim cases, where 3.4% result in the death penalty.¹³⁹ Thus, a person charged with killing someone who is white is seven times more likely to be sentenced to death than a person charged with killing an African-American. Secondly, within white victim cases, African-American defendants are disparately prosecuted: “[A]n African American charged with killing a white person is approximately six times more likely to be sentenced to death than cases involving any other race of victim/defendant combination.”¹⁴⁰

A third kind of study has focused on local, identified decision makers. Statistical analyses have been conducted in at least three South Carolina counties, and in every county studied, prosecutors have been found to discriminate on the basis of race in their decisions about whether to seek the death penalty. An examination of all homicide cases in Charleston County from 1981–1990 (the time period during which South Carolina Attorney General Charlie Condon was solicitor) revealed that the prosecution sought the death penalty in 10 of 25 cases (40%) in which the defendant was African-American and the victim was white, and only 2 of 70 cases (2.9%) in which the defendant and the victim were both African-American, producing a pattern that “would occur by chance less than one time in a thousand.”¹⁴¹ Moreover, Mr. Condon sought the death penalty in 32% of all white victim cases and 5% of all black victim cases, another

139. *Id.* at 307; *see also*, David McCord, *A Year in the Life of Death: Murders and Capital Sentences in South Carolina*, 1998, 53 S.C. L. REV. 249, 296–97 (2002) (finding strong race of victim effects over shorter period of time).

140. Blume, *supra* note 15, at 307. These conclusions were confirmed by a 2004 study of all homicides in several states, including South Carolina, from 1977 to 1998. *See* Blume et al., *supra* note 115. The study revealed that, even though most murder victims are African-American, only 0.46% of black victim cases result in a death sentence, while 3.4% of white victim cases resulted in a death sentence. *See id.* at 197 tbl.8. Thus, a person charged with killing a white victim is 8 times more likely to be sentenced to death than a person charged with killing an African-American. Second, African-American’s are generally more likely to be sentenced to death regardless of the race of their victims. *Id.*

141. John H. Blume et al., *Post-McCleskey Racial Discrimination in Capital Cases*, 83 CORNELL L. REV. 1771, 1782 (1998).

statistical discrepancy which “would occur by chance less than one time in one thousand.”¹⁴² Another statistical study revealed that in Lexington County, the solicitor had sought death in 10% of the white victim cases but had never sought death in a black victim case.¹⁴³

In the most sophisticated study, Theodore Eisenberg compiled information concerning all homicide cases that occurred in the Seventh Judicial Circuit from 1993 through 1997 and for each case, determined

the race of the defendant, the race of the victim, the presence of aggravating factors that would render the crime death-eligible, and whether a notice of intent to seek death was filed. For the period between 1977 and 1993, [Professor Eisenberg] found that the [circuit’s] solicitor sought death in fifty percent of the (fifty-two) death-eligible white victim cases and in zero percent of the (nineteen) death-eligible black victim cases. . . . Such a result would occur by chance about four times in one hundred thousand. [Professor Eisenberg] also isolated the cases that occurred when Holman Gossett was solicitor, the period of 1985 to 1993, and found that Gossett decided to seek death in forty-three percent of the death eligible white victim cases, and in zero percent of the black victim cases. This result . . . would occur only six times in ten thousand as a matter of chance.¹⁴⁴

“Moreover,” as found in the state-wide study by John Blume, “the defendant-victim combination most likely to result in the decision to seek the death penalty was a black defendant/white victim pairing.”¹⁴⁵

142. *Id.*

143. *Id.* at 1790.

144. Sheri Lynn Johnson, *Litigation for Racial Fairness After McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 178, 181–82 (2007) (footnotes omitted).

145. *Id.* Professor Eisenberg later testified about his findings in a capital case in South Carolina. *Id.*

Because [the case in which he testified] involved armed robbery, Professor Eisenberg separately considered armed robbery cases, and found that the propensity to seek death in white victim cases was also very pronounced in this subset. Looking at the longer period, the resulting disparity would occur by chance only in eight out of one

Although no formal study has been done in Richland County, the racial impact of the official actions taken by Solicitor Giese is dramatic. African-American males in the Richland County community are being noticed for death—and white defendants are not. Solicitor Giese has managed to maintain a record of 100% discretionary use of the death penalty against non-white defendants, thereby singling out non-white, primarily African-American, defendants for the ultimate penalty of death. Put simply, life and death decisions line up perfectly with the color of the defendant's skin.

Impact is circumstantial evidence of discriminatory intent, and in this case, in at least two counties it rises to the level of a sufficiently “stark” disparate effect that impact alone is sufficient to establish a prima facie case of discrimination. In Richland County, as in *Yick Wo*,¹⁴⁶ where the ordinance regulating laundries was applied only to Chinese laundry owners, “a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”¹⁴⁷ During the entire period of Solicitor Giese's term, he *never* sought the death penalty against a white defendant despite the existence of a pool of white defendants whose offenses included an aggravating circumstance. Likewise, Solicitor Gossett maintained a racially pure pool of capital case victims for eight years.

2. Historical Background

Even aside from the stark patterns presented above, the historical backdrop of discrimination in South Carolina as a whole supplements the undeniably powerful statistical evidence. The “distorting effects of racial discrimination”¹⁴⁸ are at work in

thousand cases, and looking at the shorter period of Holman Gossett's tenure as solicitor, one time in one hundred.

Id.

146. 118 U.S. 356 (1886).

147. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

148. *Godfrey v. Georgia*, 446 U.S. 420, 439 (1980) (Marshall, J., concurring).

this state. South Carolina has a long history of blatant racial discrimination in the selection of persons for execution.¹⁴⁹ By and large the most egregious, or at least the shamelessly open, race-based decision making in capital prosecution is in the past. It is, however, still relevant in assessing the likelihood that purposeful discrimination is the cause of racial disparities.

3. Departures from the Normal Procedural Sequence

Among the most basic criminal procedural rights is the entitlement to a jury trial. Juries must be selected in a race-neutral manner,¹⁵⁰ but at least some South Carolina prosecutors have violated this most basic right when exercising peremptory challenges in capital cases. A study of the use of peremptory challenges in Lexington County capital cases conducted by Professor William Jacoby of the University of South Carolina found systematic elimination of potential black jurors.¹⁵¹ In fact, the study concluded that the statistical likelihood that racial discrimination did not explain the disparity was less than one in a billion.¹⁵² This statistical evidence was supported by the observations of several local attorneys, including that of a public defender who in fourteen years had *never* tried a black defendant case in Lexington county in which an African-American served on the jury.¹⁵³

In the post-*Furman* period, at least twelve African-American defendants were convicted and sentenced to death by all-white juries in South Carolina;¹⁵⁴ two such sentences occurred in the

149. See Margaret O'Shea, *Race Plays Into Death Penalty Use*, AUGUSTA CHRON., Nov. 14, 1999, at A1.

150. See *Batson v. Kentucky*, 476 U.S. 79, 85 (1986).

151. Blume et al., *supra* note 141, at 1792.

152. *Id.*

153. *Id.* at 1792 n.112.

154. These defendants are: J.D. Gleaton, Larry Gilbert, Sterling Spann, Andrew Smith, Donald Jones, Raymond Patterson, Theodore Kelly, Richard Stewart, Albert Thompson, Jeffrey Jones, Andre Rosemond, and Richard Moore. In several of these cases, the selection of an all-white jury was never reviewed on appeal due to procedural default by trial counsel. See Blume, *supra* note 15,

twenty-first century.¹⁵⁵ Given the population of South Carolina, which is nearly 30% African-American, and the constitutional command of racial neutrality in jury selection, these statistics establish a departure from normal procedures.

4. Substantive Departures

Often, the decision to seek death in black defendant/white victim cases itself constitutes a substantive departure due to the relatively unaggravated nature of the case. For example, the state sought death for Earl Matthews despite the fact that he was only nineteen at the time of the offense, had a minimal prior record, and the case arose from a botched armed robbery where only the armed robbery aggravator was present.¹⁵⁶ Holman Gossett's decision to seek death against Keith Simpson under similar circumstances was likewise a substantive departure.¹⁵⁷

5. Contemporary Statements by Decision Makers

In some cases, statements by decision makers have produced anomalously direct evidence of racial discrimination in the death penalty process. In a recent Lexington County case, the prosecutor referred to a large African-American capital defendant as "King-Kong."¹⁵⁸ Earl Matthews, a death-sentenced inmate from Charleston County, presented anecdotal evidence, as well as a statistical study, to support his claim of racial bias in his federal habeas corpus proceedings.¹⁵⁹ A former assistant prosecutor in the Charleston County Solicitor's office at the time of Matthew's trial declared that the office had prosecuted homicide cases in a racially discriminatory manner, treating

at 308.

155. Richard Moore was convicted and sentenced to death by an all-white jury in Spartanburg in 2001. *Id.* at 308 n.145. Kevin Mercer was convicted and sentenced to death by an all-white jury in Lexington County in 2006. See Transcript of Record, *State v. Mercer* (2003-GS-32-0409) (on file with authors).

156. *State v. Matthews*, 373 S.E.2d 587, 589 (S.C. 1988).

157. See *State v. Simpson*, 479 S.E.2d 57 (S.C. 1996).

158. *State v. Bennett*, 632 S.E.2d 281, 285 (S.C. 2006).

159. Blume et al., *supra* note 141, at 1782-83.

cases involving black victims as less important than cases involving white victims.¹⁶⁰ Another former prosecutor similarly declared that she heard a colleague say at a staff meeting that a particular case deserved less priority because the victim was “just a little old black man.”¹⁶¹ Louis Truesdale, who was accused of murdering a young white woman in Lancaster County, was executed in 1998 despite uncontradicted evidence that jurors openly used racial slurs during deliberations at the sentencing phase of his trial.¹⁶² Similarly, Johnny Bennett developed evidence in his post-conviction proceedings that a juror who served on his capital trial thought Bennett committed the crime because he was “just a dumb nigger.”¹⁶³ There have also been shocking examples of discrimination by defense lawyers. In one case, appointed counsel referred to his African-American client as a “big black . . . buck.”¹⁶⁴

One last example is particularly instructive. Theodore Kelly was convicted and sentenced to death for a double homicide in Spartanburg County, South Carolina.¹⁶⁵ After an unsuccessful direct appeal, Kelly’s lawyer serendipitously¹⁶⁶ elicited the following testimony from the deputy solicitor:

I told [Solicitor Gossett] that I felt like the black community would be upset though if we did not seek the death penalty because there were two black victims in this case. . . . The only mention that was ever made of race was when I said that I felt like if we did not seek the death penalty, that the community, the black community would be upset because we are seeking the death penalty in the (Andre) Rosemond case for

160. *Id.*

161. *Id.*

162. Carrie Armstrong, *Truesdale Executed for Murder*, THE STATE (Columbia, S.C.), Dec. 12, 1998, at B1.

163. See Bennett Post-Conviction Relief Hearing Transcript Record at 9 (2006-CP-40-5751) (on file with authors).

164. Application for Post-Conviction Relief at 23, *State v. Butler*, 290 S.E.2d 420 (S.C.1982) (on file with authors).

165. *State v. Kelly*, 502 S.E.2d 99, 102 (S.C. 1998).

166. The deputy solicitor had been deposed prior to the hearing and had not revealed the information at that time.

the murder of two white people.¹⁶⁷

The post-conviction relief court found that these statements revealed an impermissible racial motivation in the decision to seek death. It is worth noting that the solicitor in this case, Holman Gossett—as revealed in Eisenberg’s statistical study—had never previously sought death in a black victim case. Once it is known that Gossett was influenced by race in Kelly’s case, it seems extraordinarily unlikely that Kelly was the only case in which race colored his thinking.

Although the obvious influence of race in these examples may occur in only a handful of cases, we think that their occurrence likely points to a much broader underlying current of racial bias which is likely exacerbated by the broad discretion afforded to decision makers under South Carolina’s capital sentencing scheme. Other studies have conclusively shown that racial prejudice has a more profound effect when the decision maker is afforded a great amount of discretion.¹⁶⁸ Likewise, when the strong statistical disparities that characterize the South Carolina capital punishment system are taken into account with the other evidence of purposeful racial discrimination—history, procedural departures, substantive departures, and contemporary statements by decision makers—it is clear that the system is impermissibly tainted by racial bias.

D. South Carolina’s Capital Punishment System Poses a Constitutionally Unacceptable Risk of Racial Bias, Thereby Violating the Due Process Clause

When a practice creates an “unacceptable risk of racial prejudice infecting the capital sentencing proceeding,”¹⁶⁹ due process is violated. In *Turner*, the Supreme Court held that the refusal to voir dire jurors about racial prejudice in an interracial

167. *State v. Kelly*, No. 99-CP-42-1174, at 38 (S.C. Ct. C.P. Oct. 6, 2003) (order granting relief).

168. See, e.g., Jennifer Eberhardt, et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendant Predicts Capital-Sentencing Outcomes*, 17 *PSYCHOL. SCIENCE* 5 (2006).

169. *Turner v. Murray*, 476 U.S. 28, 37 (1986) (emphasis omitted).

capital case created just such a risk.¹⁷⁰ The Court's judgment that this refusal created an unacceptable risk of racial prejudice infecting the capital sentencing proceeding was "based on a conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given to the jury at the death penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case."¹⁷¹ At least in interracial capital crimes, four South Carolina practices create an analogously unacceptable risk.

1. The Broad, Virtually Untrammelled Discretion Which South Carolina Prosecutors Possess and with Which Capital Jurors are Charged

Part I demonstrates that South Carolina's capital sentencing statute, as written by the legislature and construed by the South Carolina Supreme Court, does not perform the constitutionally mandated narrowing function. This is inherently impermissible because it produces arbitrariness, but it also unacceptably increases the risk that race will influence capital sentencing decisions.

As the Baldus Study of Georgia's death penalty revealed, race effects are most pronounced in the middle range of cases.¹⁷² In contrast, at high levels of aggravation, race does not seem to play a role in selecting who is sentenced to death:

One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of

170. *Id.* at 36–37.

171. *Id.* at 37.

172. *See* *McCleskey v. Kemp*, 481 U.S. 279, 308 n.29 (1987) (alteration in original) (citation omitted) ("McCleskey's case falls in [a] grey area where . . . you would find the greatest likelihood that some inappropriate consideration may have come to bear on the decision.").

arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.¹⁷³

This pattern—racial disparity in close cases—is both consistent with older empirical findings from field studies and corroborated by mock jury studies. Kalven and Zeisel’s classic work, *The American Jury*, reported that, in weaker cases, “[t]he closeness of the evidence makes it possible for the jury to respond to sentiment by *liberating it* from the discipline of the evidence.”¹⁷⁴

[T]he jury does not often consciously and explicitly yield to sentiment in the teeth of the law . . . it yields to sentiment in the apparent process of resolving doubts as to evidence. The jury, therefore, is able to conduct its revolt from the law within the etiquette of resolving issues of fact.¹⁷⁵

Likewise, mock jury studies, which have the virtue of perfect control, have found that racial bias is more often influential in cases with marginal evidence.¹⁷⁶ Thus, one can confidently predict that as the class of cases in which the death penalty is permissible grows larger, more and more cases will be unclear and consequently, will permit the jury to resort to “sentiment” produced by the race of the defendant, the race of the victim, or both.

Four of the nine members of the *McCleskey* court found the risk presented by the Georgia statute constitutionally impermissible.¹⁷⁷ Because the South Carolina legislature and courts have expanded death eligibility in South Carolina substantially beyond that encompassed by the Georgia statute at the time *McCleskey* was decided, race continues to infect decisions of life and death in this state.

173. *Id.* at 367 (Stevens, J., dissenting).

174. *Id.* at 326 n.4 (Brennan, J., dissenting) (alteration in original) (quoting HARRY KALVEN, JR. ET AL., *THE AMERICAN JURY* 165 (1966)).

175. *Id.* (alteration in original).

176. See, e.g., Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133, 139 (1979).

177. *McCleskey*, 481 U.S. at 320 (Brennan, J., dissenting).

2. Victim Impact

The risk that racial bias will infect the capital sentencing decision is further exacerbated by South Carolina's embrace of victim impact evidence. Viewed in isolation, victim impact evidence does not violate the Constitution.¹⁷⁸ Nonetheless, its admissibility may contribute to a constitutionally cognizable risk that racial bias may infect a state's system of capital punishment. As the dissent in *Payne* noted,

Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others. Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black.¹⁷⁹

The majority rejected this view, reasoning,

[a]s a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be.¹⁸⁰

In South Carolina, however, much broader victim impact testimony and argument is permitted, and the breadth of the admissibility rules enhance the likelihood that racial bias will result from the jury's contemplation of victim impact evidence.¹⁸¹ Most notably, a solicitor is permitted to make comparisons

178. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("[I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar.").

179. *Id.* at 866 (Stevens, J., dissenting).

180. *Id.* at 823.

181. See John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257 (2003).

between the defendant's character and the victim's character—a comparison that is highly likely to stir up racial bias in interracial crime cases.¹⁸² Thus, this factor also contributes to the unacceptable risk of racial bias created by the South Carolina capital punishment system.

3. The Racial Identity of the Decision Makers

All of the solicitors in South Carolina are white, as are virtually all of the assistant solicitors. Moreover, in the post-*Furman* period, at least twelve African-American defendants were convicted and sentenced to death by all-white juries.

Under these circumstances, mock jury studies show that racial bias is far more likely to affect the fate of African-American defendants.¹⁸³

Nor is the expression of bias by white jurors against black defendants solely a laboratory phenomenon. An all-white jury is significantly more likely to impose death than is a racially mixed jury, and a black defendant/white victim case is much more likely to result in a death sentence when the jury is heavily white.¹⁸⁴

182. See *Humphries v. State*, 570 S.E.2d 160, 168 (S.C. 2002) (holding that *Payne* only “prohibits comparisons that suggest that there are worthy and unworthy victims,” not comparisons between the worth of the defendant and the worth of the victim); see also *State v. Ard*, 505 S.E.2d 328, 331–32 (S.C. 1998) (upholding the admissibility of photographs of the deceased unborn child of the victim dressed in clothes his mother had purchased in anticipation of his birth).

183. Netta Shaked-Schroer et al., *Reducing Racial Bias in the Penalty Phase of Capital Trials*, 26 BEHAV. SCI. & L. 603, 603 (2008) (demonstrating no correlation between sentence and the defendant's race for non-white jurors, but white jurors were more likely to sentence African-American defendants to death); Thomas W. Brewer, *Race and Jurors' Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants', and Victims' Race in Combination*, 28 LAW & HUM. BEHAV. 529, 539–40 (2004) (demonstrating white jurors are less receptive to mitigation in black defendant/white victim cases than are African-American jurors); John F. Dovidio et al., *Racial Attitudes and the Death Penalty*, 27 J. OF APPLIED PSYCHOL. 1468, 1480 (1997) (demonstrating white mock jurors more likely to impose death penalty on African-American defendants than on white defendants).

184. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 191–96 (2001); see also Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV.

Thus, the fact that South Carolina prosecutors and jurors are overwhelmingly white further increases the likelihood that race will influence the assessment of death-worthiness.

4. The Confusing Nature of South Carolina Jury Instructions

According to Capital Jury Project data, confusion on key matters is common in jurors who have served on capital cases in South Carolina:

[S]ubstantial minorities of jurors believed that the law required them to impose the death penalty if the crime was “heinous, vile or depraved” or if the evidence proved the defendant would be dangerous in the future. Many jurors who survive the death-qualification process also are unable to consider evidence in mitigation of punishment which the law requires them to consider.

. . . [J]urors do not understand the sentencing phase instructions and are mistaken about most key concepts of aggravation and mitigation, which are the cornerstone of the Supreme Court’s belief that a capital sentencing jury’s discretion can be suitably limited and channeled. For example, the sentencing phase of a capital case begins with many jurors presuming that the death penalty is the correct punishment, or with a “presumption of death.” Furthermore, a significant number of jurors do not understand that aggravating circumstances must be established beyond a reasonable doubt. Many jurors believe that the jury must unanimously agree that a mitigating circumstance has been established before it can be considered even though the United States Supreme Court has clearly said otherwise. More than half of the South Carolina jurors interviewed [wrongly] believed that the defendant was required to establish a mitigating factor beyond a reasonable doubt.¹⁸⁵

1538, 1559 (1998) (demonstrating the race of the defendant influences jurors’ perceptions of future dangerousness).

185. Blume, *supra* note 15, at 316 (reviewing the literature). *See also*, Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 10 (1993) (finding 20% of jurors on

The failure of jurors to adequately comprehend such important features of capital punishment law, in and of itself, threatens the legitimacy of the death penalty. But this confusion is especially pernicious because of its racial consequences. Although confusing jury instructions did not affect white mock jurors sentences of *white* defendants, one study found that confusing instructions increased the likelihood that white jurors would vote for a death sentence for *black* defendants.¹⁸⁶ Similarly, other researchers found that mock jurors who understood the instructions treated black and white defendants equally, but mock jurors who had poor comprehension of the instructions sentenced black defendants to death 50% more often than they sentenced white defendants to death.¹⁸⁷

Thus, the lack of clarity in penalty phase instructions, like the breadth of death-eligibility, the racial identity of the decision makers, and the wide latitude given victim impact evidence, increases the risk that racial bias will infect jury deliberations in capital proceedings. Together, these aspects of capital punishment in South Carolina create “unacceptable risk of racial prejudice infecting the capital sentencing proceeding.”¹⁸⁸

V. THE SOUTH CAROLINA SUPREME COURT CONSISTENTLY FAILS TO FULFILL ITS STATUTORY AND CONSTITUTIONAL OBLIGATION TO CONDUCT MEANINGFUL PROPORTIONALITY REVIEW IN CAPITAL CASES

As explained in Parts II and III, South Carolina’s capital sentencing statute fails to perform the constitutionally required narrowing function on the “front end” required by *Furman* and its progeny. Because the statute allows the prosecution to seek

capital juries believe that an aggravating factor can be established by a preponderance of the evidence or only to a juror’s personal satisfaction).

186. Shaked-Schroer, *supra* note 183, at 611.

187. Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 349–50 (2000).

188. *Turner v. Murray*, 476 U.S. 28, 37 (1986).

the death penalty in virtually *any* murder case, the decision whether or not to seek the death penalty in murder cases is placed in the unbridled hands of the circuit solicitors. The evidence also reveals that the “selection” decision (i.e., whether to seek or impose a death sentence) is also tainted by race and other arbitrary factors. These defects on the “front end” are exacerbated by the South Carolina Supreme Court’s failure to adequately monitor and regulate the capital sentencing scheme on the “back end.” The most notable defect in the state supreme court’s appellate review of capital cases is its failure to engage in anything resembling meaningful proportionality review of death sentences. This section discusses the constitutional implications of the “back end” problem caused by the court’s lack of oversight.

A. The Importance of Meaningful Proportionality Review

South Carolina’s death penalty statute mandates the South Carolina Supreme Court review all death sentences to determine “whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”¹⁸⁹ The statutorily required proportionality review is intended to serve as “[a]n additional check against the random imposition of the death penalty.”¹⁹⁰ Meaningful proportionality review can “substantially eliminate[] the possibility that a person will be sentenced to die by the action of an aberrant jury.”¹⁹¹ A robust proportionality review helps to ensure that capital punishment is “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.’”¹⁹²

Of course, proportionality review can only be meaningful to the extent that a reviewing court makes a thorough comparison

189. S.C. CODE ANN. § 16-3-25(C)(3) (2003).

190. *State v. Shaw*, 255 S.E.2d 799, 807 (S.C. 1979).

191. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).

192. *Kennedy v. Louisiana*, 554 U.S. ___, 128 S. Ct. 2641, 2650 (2008) (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005)).

of the outcomes in similar cases for similarly situated defendants. The only logical method for an adequate proportionality review is to engage in a comparison not only of similar cases in which the death penalty was imposed but similar cases in which the death penalty was not imposed. Justice Stevens recently pointed out that this approach 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.”¹⁹³

Consideration of life cases is consistent with the United States Supreme Court’s approval of Georgia’s amended capital sentencing scheme after *Furman* in *Gregg v. Georgia*.¹⁹⁴ One of Georgia’s new procedures was a requirement that the Georgia Supreme Court conduct a proportionality review of the sentences imposed on similarly situated defendants.¹⁹⁵ The Court pointed out that proportionality review was “an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants.”¹⁹⁶ The Court was reassured by Georgia’s claim that “if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive.”¹⁹⁷ The Court pointed to Georgia Supreme Court’s demonstrated willingness to overturn death sentences on proportionality grounds as evidence that the court had “taken its review responsibilities seriously.”¹⁹⁸ Finally, the Court concluded:

193. *Walker v. Georgia*, 554 U.S. ___, 129 S. Ct. 453, 454–55 (2008) (statement of Stevens, J., respecting the denial of certiorari).

194. 428 U.S. 153 (1976); see also *Proffitt v. Florida*, 428 U.S. 242 (1976) (approving Florida’s revised capital sentencing statute).

195. *Gregg*, 428 U.S. at 198.

196. *Id.* at 204.

197. *Id.* at 205 (quoting *Coley v. State*, 204 S.E.2d 612, 616 (Ga. 1974)).

198. *Id.*; see also *Proffitt*, 428 U.S. at 253 (“The Supreme Court of Florida, like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated 8 of the 21 death sentences that it has reviewed to date.”).

[P]roportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.¹⁹⁹

Justice Stevens has explained that the *Gregg* Court naturally assumed that Georgia “would consider whether there were ‘similarly situated defendants’ who had *not* been put to death because that inquiry is an essential part of any meaningful proportionality review.”²⁰⁰ The Court confirmed its expectation in *Zant v. Stephens*,²⁰¹ when it emphasized that its decision to uphold a Georgia death sentence, notwithstanding the jury’s reliance on an invalid aggravating circumstance, “depend[ed] in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.”²⁰² The Court reached its conclusion in *Zant* only after the Georgia Supreme Court expressly stated, in response to the Court’s certified question, that Georgia uses both life and death cases for comparison purposes under its proportionality review.²⁰³

Thus, the Supreme Court’s jurisprudence confirms that meaningful proportionality review is an important procedural safeguard against arbitrary imposition of the death penalty under a capital sentencing scheme like South Carolina’s.²⁰⁴ The

199. *Gregg*, 428 U.S. at 206.

200. *Walker v. Georgia*, 554 U.S. ___, 129 S. Ct. 453, 454 (2008) (statement of Stevens, J., respecting the denial of certiorari).

201. 462 U.S. 862 (1983).

202. *Id.* at 890; see also *Proffitt*, 428 U.S. at 251 (“[T]he Supreme Court of Florida, like its Georgia counterpart, considers its function to be to [guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case”) (alteration in original).

203. *Zant*, 462 U.S. at 880 n.19.

204. As explained in Part I, South Carolina’s death penalty statute was

need is even greater, however, when viewed in conjunction with the remainder of South Carolina's scheme, which fails to meaningfully narrow the pool of death-eligible cases, limit prosecutorial selection of death cases, ensure that death sentences are not imposed in a racially discriminatory manner, channel the jury's discretion in weighing aggravating and mitigating factors, and prevent abusive use of overly prejudicial victim impact evidence. The systemic flaws discussed previously in this Article result in the arbitrary and discriminatory imposition of death sentences in South Carolina that, standing alone, violate the Eighth Amendment. In addition, these failures simultaneously heighten South Carolina's obligation to conduct proportionality review in a meaningful way and highlight its consistent failure to do so.

B. The South Carolina Supreme Court Invariably Fails To Conduct Meaningful Proportionality Review

Notwithstanding its statutory obligation to compare sentences imposed in "similar" cases, the South Carolina Supreme Court has determined that it will only consider other cases in which the death penalty was imposed, thereby ignoring hundreds of other cases involving similar crimes and similarly situated defendants.²⁰⁵ The court has rejected the view of other jurisdictions that the appropriate "universe of cases" includes both those in which the death penalty was not imposed as well as those in which it was.²⁰⁶ The court has noted that "[t]here is, after all, some logic to the view that the heinous crime is *sui*

modeled after and is virtually identical to the Georgia statute approved in *Gregg*. The Court has stated that the Eighth Amendment does not require comparative proportionality review where other statutory procedures adequately channel the sentencer's discretion. See *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987); *Pulley v. Harris*, 465 U.S. 37, 50–57 (1984). But that assertion merely conveys the Court's "recognition of differences among the States' capital schemes," and it "was not meant to undermine [the Court's] conclusion in *Gregg* and *Zant* that such review is an important component of the Georgia scheme." *Walker*, 129 S. Ct. at 456 (statement of Stevens, J., respecting the denial of certiorari).

205. See, e.g., *State v. Copeland*, 300 S.E.2d 63, 74 (S.C. 1982).

206. *Id.*

generis, simply beyond comparison.”²⁰⁷ But this view is inconsistent with the court’s constitutional and statutory obligation to make that comparison.²⁰⁸ Moreover, the court’s method is illogical and tautological. Since the death penalty was reinstated in South Carolina in 1977, the court has never determined that any of the 176 death sentences imposed was excessive or disproportionate. Each case that is affirmed decreases the likelihood that any subsequent sentence will be found disproportionate because of the fact that another case, to which some future case may be similar, has entered the comparison pool.

A survey of the court’s proportionality analysis reveals a perfunctory inquiry. Its undertaking uniformly consists of the same single sentence, or a slight variation thereof, repeated at the end of every opinion affirming a sentence of death: “[A] review of similar cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant.”²⁰⁹ The

207. *Id.* at 72.

208. In further support of its limited proportionality analysis, the court has said that including life cases in the comparison pool would result in “pure conjecture” and that the court will not subject death verdicts to “scrutiny in pursuit of phantom ‘similar cases.’” *Id.* at 74. And yet, the Court has no difficulty conjuring up “phantom similar cases” in affirming death sentences. *Id.* On several occasions, the court has failed to find any similar cases for comparison purposes but nonetheless affirmed on the conclusory basis that the death sentence was simply “appropriate.” See e.g., *State v. Passaro*, 567 S.E.2d 862, 868 (S.C. 2002) (finding no similar cases but affirming on the grounds that it had affirmed other death sentences where the victim was under the age of eleven and defendant’s crime was “no less gruesome than those”); *Copeland*, 300 S.E.2d at 77 (finding no similar case exists that would permit meaningful comparative review but that “we are satisfied that the sentence of death imposed on each of these appellants was appropriate and neither excessive nor disproportionate in light of their crimes and their respective characters”); *State v. Shaw*, 255 S.E.2d 799, 807 (S.C. 1979) (finding no similar cases existed, but the death sentence was appropriate and not excessive considering the crime and the defendants).

209. E.g., *State v. Stanko*, 658 S.E.2d 94, 98 (S.C. 2008); *State v. Stone*, 655 S.E.2d 487, 489 (S.C. 2007); *State v. Evins*, 645 S.E.2d 904, 913 (S.C. 2007); *State v. Bryant*, 642 S.E.2d 582, 589 (S.C. 2007); *State v. Bennett*, 632 S.E.2d 281, 289 (S.C. 2006); see e.g., *State v. Mercer*, 672 S.E.2d 556, 567 (S.C. 2009)

court routinely supports this single sentence analysis with a string cite of approximately three cases, on average, in which death sentences were upheld and the cases involved the same aggravating circumstance as the case under review. The court makes no effort to compare the circumstances of the defendants' lives and backgrounds in even the limited pool of cases that it does consider. The court's inquiry is constitutionally and statutorily deficient because it fails to meaningfully consider similarly situated defendants convicted of similar crimes.

VI. CASE EXAMPLE: A MEANINGFUL PROPORTIONALITY ANALYSIS DEMONSTRATES THAT THERE IS NO RATIONAL BASIS FOR DISTINGUISHING DEATH CASES FROM NON-DEATH CASES IN SOUTH CAROLINA

A meaningful proportionality analysis in an actual case illustrates this point. For this example, we use the facts of an actual homicide case from Lexington County. Kevin Mercer, an African-American male, was convicted of murder and armed robbery in connection with a carjacking at the Raintree Apartment complex near Columbia, South Carolina.²¹⁰ The State alleged, and the jury found, armed robbery as the single aggravating circumstance.²¹¹ An eyewitness viewed the carjacking taking place from an apartment bedroom window and called 911.²¹² Mercer was arrested shortly thereafter driving the victim's car with his co-defendant, Marcus Thompson, seated in the passenger seat.²¹³ The murder weapon was found under the driver's side seat of the victim's vehicle. The ammunition for this weapon and two pairs of gloves were found in Thompson's

("We further find that the evidence supports the jury's finding of a statutory aggravating circumstance, and that the sentence of death is proportionate to sentences imposed under similar situations."); *State v. Owens*, 664 S.E.2d 80, 82 (S.C. 2008) ("[A] review of other decisions demonstrates that appellant's sentence was neither excessive nor disproportionate.").

210. *State v. Mercer*, 672 S.E.2d 556, 558 (S.C. 2009).

211. *Id.* at 557.

212. *Id.* at 558.

213. *Id.*

possession.²¹⁴ Mercer's size and clothing generally matched the description of the eyewitness, although the witness only saw the perpetrator from behind.²¹⁵ At trial, the State offered evidence that testing conducted on Mercer's left hand showed substances consistent with gunshot residue, although it could not be conclusively identified as gunshot residue.²¹⁶ The eyewitness description and inconclusive gunshot residue testing constituted the bulk of the State's case against Mercer. Mercer was convicted by an all-white jury in Lexington County and sentenced to death.²¹⁷ Under the South Carolina Supreme Court's current "rubber stamp" method of proportionality review, looking only at other cases in which the death penalty was imposed and upheld, the court's proportionality analysis was as follows:

We have conducted the statutorily mandated review under S.C. Code Ann. § 16-3-25 (2003). We find the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We further find that the evidence supports the jury's finding of a statutory aggravating circumstance, and that the sentence of death is proportionate to sentences imposed under similar situations. Mercer's convictions and sentence of death are affirmed.²¹⁸

214. *Id.* at 559.

215. *Id.* at 558–59.

216. *Id.* at 558.

217. Mercer's case highlights yet another arbitrary factor in capital sentencing in South Carolina—geographic disparity in death sentences. There is wide variation from county to county in whether the death penalty will be sought or obtained. Blume, *supra* note 15, at 298. Mercer's crime occurred just a few miles over the line between Richland and Lexington Counties. Lexington county is part of the Eleventh Judicial Circuit, from which a disproportionately large share of death sentences have historically been produced. *Id.* at 299. Richland county, however, has traditionally produced very few death sentences, despite its relatively high murder rate. *Id.* Thus, based on the historical trends, had Kevin Mercer's crime occurred just a few short miles over into Richland county, it is likely that the State would never even have sought death against him, or if it had, that a jury would not have imposed it.

218. *Id.* at 567 (citing *State v. Huggins*, 519 S.E.2d 574 (1999); *State v. McWee*, 472 S.E.2d 235 (1996)).

If the court were to look outside this narrow universe of death cases, however, it would find numerous cases involving offenses very similar to Mr. Mercer's in which the jury or judge imposed a sentence of life imprisonment instead of death. Moreover, if the court were to expand its inquiry further, it would discover many similar cases in which the State did not even seek death. Both of these categories are relevant to the question of whether a death sentence in Kevin Mercer's case is proportionate to the offense. Such an approach would be consistent with the methods of several other states, which have embraced a more robust method of proportionality review. For example, Delaware, Montana, New Mexico, South Dakota, Tennessee, and Virginia all consider cases that went to a penalty trial regardless of whether the defendants received life or death sentences.²¹⁹ Louisiana, Washington, and New Jersey (prior to abolishing the death penalty in December 2007) also consider murder cases in which the death penalty was not sought.²²⁰

A. Death Cases Resulting in Life or Less

Collecting and analyzing the data necessary to conduct a thorough, meaningful proportionality review in South Carolina is not a difficult task. Indeed, the same small team of researchers that collected the data described in Part III were able to compile the necessary information in only a few days. The research team

219. See, e.g., *Flamer v. State*, 490 A.2d 104, 139 (Del. 1980) (explaining that including life cases is "inherently fair, logical and necessary to prevent disproportionate sentencing"); *State v. Fry*, 126 P.3d 516, 537 (N.M. 2005) (including as comparison cases "those New Mexico cases in which a defendant was convicted under the same aggravating circumstance(s) and then received either the death penalty or life imprisonment"); *State v. Piper*, 709 N.W.2d 783, 800 (S.D. 2006) ("[A]nalysis of similar cases . . . compares cases involving a capital sentencing proceeding, whether life imprisonment or a death sentence was imposed"); *Gray v. Commonwealth*, 645 S.E.2d 448, 457 (Va. 2007) (comparing "other capital murder cases, including those cases when a life sentence was imposed"); see also *State v. Sattler*, 956 P.2d 54, 72 (Mont. 1998); *State v. Rice*, 184 S.W.3d 646, 679 (Tenn. 2006).

220. See *State v. Campbell*, 983 So. 2d 810, 875-76 (La. 2008); *State v. Feaster*, 757 A.2d 266, 272-74 (N.J. 2000); *State v. Yates*, 168 P.3d 359, 398-99 (Wash. 2007).

created a comprehensive database of cases between the years 1995 and 2007 in which the state sought the death penalty and the outcome of the case was a sentence of life or less. When a South Carolina solicitor serves notice that he or she intends to seek the death penalty in a particular case, the South Carolina Supreme Court issues an order appointing a particular circuit judge to have exclusive jurisdiction over that case. Since late 1994, these appointment orders have been kept by the Office of Court Administration. Thus, the research team began by reviewing the files at the Office of Court Administration and compiling a list of all death-noticed cases in South Carolina from 1995 to 2007.²²¹ Next, the researchers sorted the cases by county and traveled in teams to select county courthouses, where they reviewed the individual case files and collected data about the facts and circumstances of the crime, the characteristics and background of the defendant and the victim, and the ultimate outcome of the case. The research produced the following data:

- From 1995 to 2007, South Carolina solicitors sought death in 226 cases—an average of 17.4 per year.
- The greatest concentration of death-noticed cases came from the following counties: Calhoun, Charleston, Clarendon, Dillon, Florence, Greenville, Greenwood, Horry, Lexington, Richland, Spartanburg, and Sumter. In these counties alone, the state sought death in 124 cases during the relevant years.

The research team collected comprehensive data on each death-noticed case in these counties. Of the 124 cases from the selected counties, 115 resulted in a sentence of life or less. Thus, nearly 93% of the total cases in which the state sought death in these counties resulted in a sentence of life or less. Of those 115 cases:

221. Because the Office of Court Administration did not begin collecting the appointment orders until late in 1994, the data for that year was excluded from the analysis.

- 50 resulted in a sentence less than death as a result of a plea agreement;
- 39 were jury verdicts of life or less;
- 9 were sentences of life or less handed down by a judge;
- In 3 cases, the State opted to withdraw the death notice, without a plea agreement, before trial;
- In 1 case, a judge found that the defendant was not eligible for the death penalty because he was mentally retarded;
- In 6 cases, the state did obtain the death penalty, but it was subsequently vacated because the defendant was under the age of 18 at the time of the crime; and
- 7 resulted in a sentence less than death for a reason that could not be determined by a review of the case files.

A closer look at the facts of these cases shows no meaningful difference from the facts of Mr. Mercer's case. Mr. Mercer was charged with murder and armed robbery. Of the 115 cases that resulted in life or less, 68 (or 59%) involved an armed robbery aggravator and 49 (or 43%) involved purpose of receiving money or a thing of monetary value as an aggravating circumstance. Kevin Mercer's case is, in many respects, an unaggravated homicide compared to the majority of cases in this data set. For example, 100 (or 87%) of the 115 cases that resulted in a life sentence or less involved more than one aggravating circumstance. Seventeen of the cases involved six or more aggravating circumstances in a single case. Sixteen of the defendants in this group killed more than one person. Two dismembered their victims.

The State's evidence against Mr. Mercer was not any stronger in his particular case than in the 115 cases resulting in a sentence of life or less. As discussed above, the State's case for guilt against Mr. Mercer involved eyewitness identification and inconclusive gunshot residue testing. Twenty-eight (28) of the 115 cases in the sample also involved eyewitness testimony. In fact, many of the cases in the sample involved an even stronger case for guilt and/or death than was present in Mr. Mercer's case:

- In 37 cases the defendant gave a full confession directly to the police;
- In 7 cases the defendant confessed to another witness who was not involved in the crime;
- 9 cases had DNA evidence tying the defendant to the crime; and
- 1 case included a videotape of the crime.

B. Death-Eligible cases in Which the State Did Not Seek Death

As explained in Part III, researchers collected data on all homicides in Richland County for the years 2000 to 2008. During this period of time, there were 152 homicide profiles collected. One-hundred and seventeen (117)—or 77%—of these cases involved facts that made them death-eligible, yet Richland County solicitors sought the death penalty in only 4 of these cases. With regard to the remaining 113 cases in which the State could have, but elected not to seek the death penalty, a comparison with the facts of Mr. Mercer's case again reveals no meaningful difference that would render him more deserving of death:

- 38 of the 113 cases involved armed robber;
- 4 involved physical torture;
- 85 involved facts that would support more than one aggravating circumstance;
- 57 cases involved three or more aggravating circumstances.²²²

222. By contrast, Max Knoten was one of the four defendants in this data set against whom the state did seek the death penalty. *State v. Knoten*, 555 S.E.2d 391 (S.C. 2001). Knoten was convicted of murdering a thirty-year-old woman by beating her to death with a pipe and then drowning a three-year-old girl. *Id.* at 393. The jury found four aggravating circumstances: rape, torture, murder of more than one person, and murder of a child under the age of eleven. Nonetheless, that jury voted to impose a life sentence for Knoten. *Id.*

A comparison to the data collected in Charleston County produces similar results. There were 151 homicide profiles collected in Charleston County for the years 2002 to 2007. One-hundred and fourteen (114)—or 76%—of these cases were death-eligible. Charleston County solicitors sought death in four (4) of those cases. In the remaining 110 cases in which the State could have, but elected not to seek the death penalty:

- 31 of the 110 cases involved kidnapping;
- 36 involved robbery;
- 10 involved larceny with the use of a deadly weapon;
- 28 involved physical torture;
- 36 were committed for the purpose of receiving money or a thing of monetary value;
- 3 involved the killing of a law enforcement officer;
- 10 of these cases involved facts supporting five or more aggravating circumstances.

Thus, there is no meaningful basis of distinction—either by comparing Mr. Mercer’s case to others in which the State sought but failed to obtain a death sentence, or by comparing his case to others in which the State could have but opted not to seek a death sentence—that would prove Mr. Mercer was somehow the worst of the worst and therefore more deserving of death than any other defendant charged with murder. Instead, he is simply one of the capriciously selected few who has had the unfortunate luck of being struck by lightning.

VII. CONCLUSION

Through repeated additions to the statutory list of aggravating factors and further expansion of the aggravating factors through judicial interpretation, South Carolina’s capital sentencing statute does not genuinely narrow the class of individuals eligible for a sentence of death as mandated by the Eighth Amendment. The empirical evidence demonstrates that the overwhelming majority of homicides in South Carolina are

legally death-eligible. Thus, to the extent that any narrowing occurs in South Carolina's capital sentencing scheme, it is performed by and at the unbridled discretion of solicitors and judge or jury sentencers, where whim, passion, political pressure, prejudice and caprice have ample and unconstitutional room to roam. To compound the problem, South Carolina has no effective method for monitoring and regulating the capital sentencing scheme because the South Carolina Supreme Court fails to conduct meaningful proportionality review. Thus, the South Carolina Supreme Court has failed to fulfill its constitutional duty to remedy unconstitutional practices occurring at the trial level. These characteristics render South Carolina's methods for the imposition and review of capital punishment more akin to the statute rejected as unconstitutional by the United States Supreme Court in *Furman* than the one approved of in *Gregg*.²²³ As such, South Carolina's statutory scheme has not withstood the test of time and experience, and it should be struck down because it is unconstitutional.

223. Although a detailed discussion of alternative proposals is outside the scope of this Article, there are at least three steps that we would recommend to bring South Carolina's capital sentencing scheme back in line with the requirements of *Furman* and *Gregg*, short of abolishing the death penalty altogether. First, the legislature could scale back the pool of death-eligible offenders by carefully crafting a much narrower and more specific set of aggravating circumstances. Second, South Carolina could adopt a racial justice act that would prevent the State from seeking or carrying out a death sentence in cases where the defendant can show racial bias through the use of historical and statistical evidence. Kentucky and North Carolina have enacted such statutes. See KY. REV. STAT. ANN. § 532.200 (West 2006); N.C. GEN. STAT. ANN. §§ 15A-2010-15A-2012 (West 2009). For a detailed discussion on the merits of a racial justice act, see, e.g., Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for a Racial Justice Act*, 35 SANTA CLARA L. REV. 519 (1995). A racial justice act could also require more transparency in prosecutorial decision making by imposing reporting requirements. Several states have imposed reporting requirements in an effort to combat racial profiling in the context of traffic stops. See, e.g., David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 LAW & CONTEMP. PROBS. 71, 73 (Summer 2003). Third, the South Carolina Supreme Court should conduct a meaningful proportionality review in capital cases, which we have demonstrated is not a difficult task.

