

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

SHAWN PAUL HUMPHRIES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

Jurisdiction 1

Questions Presented..... 2

Statement of the Case 2

Argument..... 5

I. In light of the unpremeditated nature of the crime, the presence of only one aggravating circumstance in the form of an “attempt” crime, and the factual circumstances under which Humphries fired the gun, the sentence of death in this particular case is “inherently disproportionate” and thus “excessive” under the *Pully v. Harris* standard.8

II. Since under the facts of this particular case, a sentence of death is “disproportionate to the punishment imposed on others convicted of the same crime” the sentence is unconstitutional. 25

III. Given (a) the deep but closely reasoned differences on the Fourth Circuit over the propriety of the State’s jury argument in this case, (b) the fact that a federal court has limited review and can set aside a state court determination only if it is not only “wrong” but also “objectively unreasonable,” (c) the residual uncertainties that have arisen because of the Court’s decision in this case and its later decision in *Hall*, and (d) the urgent need for clarification of the law in this State, this Court should grant review and find that the Solicitor’s argument injected an arbitrary and inherently prejudicial element into the case and that defense counsel’s failure to make a timely objection was a violation of Humphries’ constitutional right to adequate representation of counsel.28

A. The prior rulings on this issue in *Humphries* and *Hall*. 29

B. The relevant *Payne* precedent. 33

C. Argument. 36

1. There is no real distinction between victim-to-victim comparisons and victim-to-defendant comparisons.37

2. There is no real distinction between an argument by the State comparing the defendant's and the victim's "lives" and their "worth."³⁸

Conclusion..... 40

Shawn Paul Humphries, a death-sentenced inmate, is seeking a stay of his execution and respectfully requests that this Court grant a writ of habeas corpus vacating his sentence of death.¹ This petition is based on two substantial constitutional violations. Humphries has never argued the first of these violations before this Court. The second violation presents a conflict between this Court's decisions in this case, *Humphries v. State*, 351 S.C. 362, 570 S.E.2d 160 (2002), and *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004). These issues bring into question the fundamental fairness of Humphries' sentencing hearing and the constitutionality of his death sentence. He entreats this Court to consider his arguments carefully in light of his impending execution.

Jurisdiction

This Court has original jurisdiction under the South Carolina Constitution, Art. V, § 5. *See also* S.C. Code § 14-3-310 (1976). Relief under this provision is appropriate when there has been a “violation, which, in the setting constitutes a denial of fundamental fairness shocking to the universal sense of justice.” *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). *See also Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001). As this Court recognized in *State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991), the Court's original jurisdiction gives it the “ability to provide relief to those who have, for whatever reason, been utterly failed by our criminal justice system.”

¹For the Court's convenience, Petitioner has consolidated the petition for original jurisdiction and complaint into one pleading. Rule 229(c), SCRAP.

Questions Presented

I. In light of the unpremeditated nature of the murder, the presence of only one aggravating circumstances in the form of an “attempted” crime, and the other factual circumstances of this case, was the sentence of death “inherently disproportionate” and thus “excessive” under the controlling United States Supreme Court test?

II. Under the facts of this particular case, is a sentence of death “disproportionate to the punishment imposed on others convicted of the same crime” and thus unconstitutional?

III. Is de novo, original jurisdiction review of this case warranted in light of the deeply divided opinion of the Fourth Circuit on this issue, the federal court’s statutory inability to correct state court decisions that are “wrong” but not patently “unreasonable,” the uncertainties that arise when this Court’s *Hall* decision is compared with its decision in this case, and the urgent need for this issue to now be clearly and definitively resolved so as to avoid any future use of victim impact evidence in an arbitrary and prejudicial manner?

Statement of the Case

As this Court stated the facts on direct appeal:

On January 1, 1994, Humphries shot Dickie Smith, the owner of the Max-Saver convenience store in Fountain Inn, South Carolina. The evidence at trial established that on the night before the killing [for at least seven hours], Humphries and his friend Eddie Blackwell drove around drinking beer.

They also stole a gun that night. Shortly after 7:00 a.m. on January 1, they entered the Max-Saver convenience store. Smith, who was working in the store, asked Humphries whether he wanted something hot, and Humphries

flashed the stolen gun [which was tucked into the front of his pants] and replied that he wanted money.

There was some evidence to suggest Smith then reached under a counter to pull out a gun. . . .² Humphries fired a shot in Smith's direction and fled from the store. The bullet fired by Humphries struck Smith in the head, killing him. Meanwhile, Blackwell slumped to the ground in the store. The police arrested Blackwell at the scene and apprehended Humphries later that day.

State v. Humphries, 325 S.C. 28, 29, 479 S.E.2d 52, 53 (1996). Humphries “immediately confessed his crime,” *id.*, and “remained cooperative throughout the arrest,” *id.* n.2.

On August 5, 1994, Humphries was found guilty of attempted armed robbery, possession of a firearm during the commission of a violent crime, criminal conspiracy, and murder. On August 9, 1994, he was sentenced to death for murder based on the sole aggravating factor of attempted armed robbery. 325 S.C. at 31-33, 479 S.E.2d at 54-55. On December 9, 1996, this Court affirmed Humphries' convictions and death sentence. A petition for rehearing was denied on January 10, 1997. The United States Supreme Court denied certiorari on June 9, 1997. *Humphries v. South Carolina*, 520 U.S. 1268 (1997).

On September 16, 1997, Humphries filed an Application for Post-Conviction Relief in the Court of Common Pleas of Greenville County, South Carolina, and an amended

²Indeed, a crime scene photo showed the butt of a gun under the victim's leg or hip, Appendix (filed in this Court in the post-conviction proceedings) 259. Likewise, “three hand guns were observed at the scene, all three of these being located directly under the check-out counter on a shelf. These weapons were in very close proximity to the victim's body.”

Application on April 29, 1998. On December 21, 1998, the court entered an order of dismissal.

Humphries filed a petition for writ of certiorari in this Court on June 18, 1999. On September 27, 2001, this Court granted the petition for writ of certiorari to determine whether Humphries' trial counsel "were ineffective for failing to timely object to the solicitor's closing argument," *Humphries v. State*, 351 S.C. 362, 372-73, 570 S.E.2d 160, 166 (2002), that, in this Court's view, "compared the lives of Smith and [Humphries] based on the evidence presented," 351 S.C. at 364, 570 S.E.2d at 167. This Court denied relief on August 26, 2002.

Humphries filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina on December 24, 2002. On February 25, 2003, United States Magistrate Judge Bruce H. Hendricks issued a Report and Recommendation that Humphries' petition be denied and dismissed. On June 18, 2003, the Honorable Joseph F. Anderson, Jr., of the United States District Court for the District of South Carolina, granted the State's motion for summary judgment and denied relief. Following a timely notice of appeal and application, Judge Anderson granted a Certificate of Appealability to the United States Court of Appeals for the Fourth Circuit.

A divided panel of the Fourth Circuit held that "the failure of Humphries' counsel to object to the State's extensive and egregious use of comparative worth arguments amounted to ineffective assistance of counsel," which "was, on these facts, so unduly prejudicial that it

Appendix (App.) 337.

rendered the jury's recommendation of a capital sentence fundamentally unfair." *Humphries v. Ozmint*, 366 F.3d 266, 278 (4th Cir. 2004). The panel thus ordered that Humphries' death sentence be vacated and that he was entitled to a new sentencing trial. *Id.* at 278. Senior Circuit Judge Hamilton dissented from that ruling. *Id.* at 278-91.

The State's petition for rehearing and en banc consideration was granted. The divided en banc court (in a 10 to 4 vote) declared:

When all is said and done the issue before this Court is unmistakably narrow. The issue is not whether we think all comparative worth arguments are unconstitutional or only those involving victim-to-victim comparisons. Nor are we called upon to determine if there are shortcomings in the *Payne* [*v. Tennessee*, 501 U.S. 808 (1991)] framework. . . . We, as an inferior court, simply are not at liberty to ignore our solemn constitutional responsibility to faithfully apply the law by converting the applicable deferential [28 U.S.C.] § 2254 standard of review to the *de novo* standard.

Humphries v. Ozmint, 397 F.3d 206, 225 (4th Cir. 2005) (*en banc*). The "deferential standard" referred to here is that, in federal habeas proceedings, the petitioner must demonstrate that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* at 215. "An unreasonable application of federal law is different from an incorrect application of federal law" under this standard. *Williams v. Taylor*, 529 U.S. 362, 410 (2000). A state court decision is unreasonable only if the decision is "objectively unreasonable." *Id.* at 409.

Under this standard, the majority held: "After reviewing . . . [the South Carolina Supreme Court's] thorough opinion, we simply cannot conclude that the South Carolina Supreme Court unreasonably applied the *Payne* decision." *Id.* at 226. Humphries' timely

petition for writ of certiorari in the United States Supreme Court was denied on October 3, 2005.

Argument

PURSUANT TO S.C. CODE § 16-3-25(C)(3), THIS COURT
“SHALL DETERMINE . . . WHETHER THE SENTENCE OF
DEATH IS EXCESSIVE OR DISPROPORTIONATE TO THE
PENALTY IMPOSED IN SIMILAR CASES, CONSIDERING BOTH
THE CRIME AND THE DEFENDANT.” THE
“EXCESSIVENESS” ASPECT OF THIS REVIEW HAS BEEN
DESCRIBED BY THE UNITED STATES SUPREME COURT
AS BEING

an abstract evaluation of the appropriateness of a sentence for a particular crime. Looking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions, this Court has occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime. . . .

Pulley v. Harris, 465 U.S. 37, 42-43 (1984). The “disproportionate” aspect of this review

is of a different sort. This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime.

Id. ALTHOUGH THIS COURT PREVIOUSLY CONDUCTED
THIS REVIEW ON DIRECT APPEAL IN 1996, WITH NO
ARGUMENT SUBMITTED BY HUMPHRIES’ COUNSEL AT
THE TIME, HUMPHRIES’ SUBMITS THAT THIS COURT MUST
RE-EXAMINE THE ISSUE FOR SEVERAL REASONS.

FIRST, THIS COURT SHOULD RE-EXAMINE THIS ISSUE, because in the nine years since first addressing proportionality in this case, this Court has reviewed numerous capital cases but has not “affirmed a single death penalty” where the sole aggravating factor was an “attempted” felony³ or where the defendant’s moral culpability and blameworthiness was as “insubstantial” as in this case. *Bullock v. State*, 525 So. 2d 764, 770 (Miss. 1987) (setting aside death sentence as disproportionate seven years after the court found it to be proportionate on direct appeal because there were an additional 40 cases in the pool for consideration). “In short, if you line up all of the death sentences [this Court has] considered and affirmed since [1996 and before] and rank them by reference to the defendant’s culpability . . . , from the most egregious to the least” this case “would rank at the bottom as the least egregious.” *Id.*

Second, this Court should re-examine this issue because of additional data and information, which reveals that Humphries’ execution would be a constitutional “violation, which, in the setting constitutes a denial of fundamental fairness shocking to the universal sense of justice.” *Butler*, 302 S.C. at 468, 397 S.E.2d at 88. This Court’s original jurisdiction review gives it the “ability to provide relief to those who have, for whatever reason, been utterly failed by our criminal justice system.” *Torrence*, 305 S.C. at 69, 406 S.E.2d at 328. Here, out of 985 persons executed nationally,⁴ as of September 28, 2005, very few people

³During direct appeal of this case, this Court held that “attempted” armed robbery was sufficient to establish “an aggravating circumstance supporting a request for a death penalty,” even though this Court acknowledged that “[n]o South Carolina case squarely address[ed] the propriety of using an *attempted* crime” as an aggravating circumstance before. *Humphries*, 325 S.C. at 31, 479 S.E.2d at 54 (emphasis in original).

⁴This information was taken from the website of the Death Penalty Information

have actually been executed for a similar crime or a crime involving only an attempted felony as an aggravating circumstance. Indeed, out of those executed since 1977, as well as the 3,415 death-sentenced inmates still on death row and pending in further litigation in this country as of July 1, 2005,⁵ Humphries' death sentence appears to be one of the most excessive and disproportionate sentences in the entire country.

Center. <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186>.

⁵See http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Summer_2005.pdf.

I. In light of the unpremeditated nature of the crime, the presence of only one aggravating circumstance in the form of an “attempt” crime, and the factual circumstances under which Humphries fired the gun, the sentence of death in this particular case is “inherently disproportionate” and thus “excessive” under the *Pully v. Harris* standard.

In the United States, the death penalty is allowed as punishment in 40 jurisdictions (38 states, the U.S. courts, and the U.S. military), 16 of which do not allow imposition of a death sentence solely on the basis of a single aggravating circumstance of an attempted armed robbery (or other attempted felony),⁶ and 24 of which do allow a death sentence under these circumstances.⁷ While Humphries does not argue in the abstract that death is an inappropriate

⁶These jurisdictions are Arizona, Arkansas, Colorado, Connecticut, Kansas, Montana, Nebraska, New Hampshire, New Mexico, Oklahoma, Oregon, South Dakota, Texas, Virginia, Washington, and the United States government. *See* Ariz. Rev. Stat. Ann. §§ 13-703 & 13-1105; Ark. Code Ann. §§ 5-4-604 & 5-10-101; Colo. Rev. Stat. §§ 18-1.3-1201 & 18-3-102; Conn. Gen. Stat. §§ 53a-46a & 53a-54b; Kan. Stat. Ann. §§ 21-3401 & 21-4625; Mont. Code Ann. §§ 45-5-102 & 46-18-303; Neb. Rev. Stat. § 29-2523; N.H. Rev. Stat. Ann. § 630:1-a (Murder); N.H. Rev. Stat. Ann. § 630:5; N.M. Stat. §§ 30-2-1 & 31-20A-5; Okla. Stat. tit. 21, §§ 701.7 & 701.12; Or. Rev. Stat. §§ 163.095 & 163.115; S.D. Codified Laws §§ 22-16-4 & 23A-27A-1; Tex. Penal Code Ann. § 19.02 (Murder); Tex. Code Crim. Proc. Ann. § 37.071; Va. Code Ann. §§ 18.2-31 & 19.2-64.2; Wash. Rev. Code §§ 9A.32.030 & 10.95.020; 18 U.S.C. §§ 1111 & 3592.

⁷In addition to South Carolina, these jurisdictions are Alabama, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New York (although death penalty statutes found unconstitutional and have not yet been reinstated), North Carolina, Ohio, Pennsylvania, Tennessee, Utah, Wyoming, and the United States military. *See* Ala. Code §§ 13A-5-49 & 13A-6-2; Cal. Penal Code §§ 189 & 190.2; Del. Code Ann. tit. 11, §§ 636 & 4209; Fla. Stat. §§ 782.04 & 921.141; Ga. Code Ann. § 17-10-30; Idaho Code Ann. § 19-2515; 720 Ill. Comp. Stat. 5/9-1; Ind. Code § 35-50-2-9; Ky. Rev. Stat. Ann. § 532.025; La. Rev. Stat. Ann. §§ 9:05 & 14:30; Md. Code Ann., Crim. Law §§ 2-201 & 2-205; Miss. Code Ann. §§ 97-3-19 & 99-19-101; Mo. Rev. Stat. § 565.032; Nev. Rev. State. § 200.033; N.J. State. Ann. § 2C:11.3; N.Y. Penal Law § 125.127; N.C. Gen. State. §§ 14-17 & 15A-2000; Ohio

punishment based just on an aggravating factor that the murder was committed during the commission of an “attempted” felony, Humphries does assert that the death sentence in his case is excessive. In other words:

The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions.

Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

IN *FURMAN*, THE COURT FOUND THAT ALL EXISTING CAPITAL PUNISHMENT SCHEMES VIOLATED THE EIGHTH AMENDMENT. WHILE THE *FURMAN* COURT “DID NOT HOLD THAT THE INFLECTION OF THE DEATH PENALTY *PER SE* VIOLATES THE CONSTITUTION’S BAN ON CRUEL AND UNUSUAL PUNISHMENTS,” *GREGG V. GEORGIA*, 428 U.S. 153, 188 (1976), IT DID RECOGNIZE THAT “THE PENALTY OF DEATH IS DIFFERENT IN KIND FROM ANY OTHER PUNISHMENT IMPOSED UNDER OUR SYSTEM OF CRIMINAL JUSTICE.” *ID.* BECAUSE OF ITS UNIQUENESS, THE DEATH PENALTY CAN NOT BE IMPOSED UNDER SENTENCING PROCEDURES THAT “CREATE A SUBSTANTIAL RISK THAT IT WILL . . . BE INFLECTED IN AN ARBITRARY AND CAPRICIOUS MANNER.” *ID.* BECAUSE THE COURT FOUND THAT THE CAPITAL SENTENCING PROCEDURES THEN BEING UTILIZED DID CREATE SUCH A RISK, THE *FURMAN*

Rev. Code Ann. §§ 2903.01 & 2929.04; 42 Pa. Cons. Stat. § 9711; Tenn. Code Ann. § 39-13-204; Utah Code Ann. § 76-5-202; Wyo. Stat. Ann. § 6-2-102; 10 U.S.C. § 918(4); Rule for Courts-Martial 1004(c).

COURT INVALIDATED THOSE PROCEDURES AS INCOMPATIBLE WITH CONTEMPORARY STANDARDS OF DECENCY.

Four years later in *Gregg* and its companion cases,⁸ THE COURT HELD THAT THE DEATH PENALTY IS NOT UNCONSTITUTIONAL *PER SE*, BUT IS INSTEAD “an extreme sanction, suitable to the most extreme of crimes.” *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.). IN SO HOLDING, THE COURT DECLARED THAT

THE DECISION THAT CAPITAL PUNISHMENT MAY BE THE APPROPRIATE SANCTION IN EXTREME CASES IS AN EXPRESSION OF THE COMMUNITY’S BELIEF THAT CERTAIN CRIMES ARE THEMSELVES SO GRIEVOUS AN AFFRONT TO HUMANITY THAT THE ONLY ADEQUATE RESPONSE MAY BE THE PENALTY OF DEATH.

ID. AT 184. THE COURT HELD THAT THE DEATH PENALTY COULD BE CONSTITUTIONALLY APPLIED UNDER CAPITAL SENTENCING SCHEMES THAT ENCOMPASSED “TWIN OBJECTIVES:” TO BE “AT ONCE CONSISTENT AND PRINCIPLED BUT ALSO HUMANE AND SENSIBLE TO THE UNIQUENESS OF THE INDIVIDUAL.” *EDDINGS V. OKLAHOMA*, 455 U.S. 104, 110 (1982). THESE TWIN OBJECTIVES ARE “BEST MET BY A SYSTEM THAT PROVIDES FOR A

⁸*Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

BIFURCATED PROCEEDING AT WHICH THE SENTENCING AUTHORITY IS APPRISED OF THE INFORMATION RELEVANT TO THE IMPOSITION OF SENTENCE AND PROVIDED WITH STANDARDS TO GUIDE ITS USE OF THE INFORMATION.” 428 U.S. AT 195. THE GUIDANCE IS SUFFICIENT ONLY IF IT “CHANNELS THE SENTENCER’S DISCRETION BY ‘CLEAR AND OBJECTIVE STANDARDS’ THAT PROVIDE ‘SPECIFIC AND DETAILED GUIDANCE,’ AND THAT ‘MAKE RATIONALLY REVIEWABLE THE PROCESS FOR IMPOSING A SENTENCE OF DEATH.’” *GODFREY V. GEORGIA*, 446 U.S. 420, 428 (1980) (QUOTING *GREGG*, 428 U.S. AT 198).

AS THE SUPREME COURT INDICATED IN *GREGG*, “WHERE DISCRETION IS AFFORDED A SENTENCING BODY ON A MATTER SO GRAVE AS THE DETERMINATION OF WHETHER A HUMAN LIFE SHOULD BE TAKEN OR SPARED, THAT DISCRETION MUST BE SUITABLY DIRECTED AND LIMITED SO AS TO MINIMIZE THE RISK OF WHOLLY ARBITRARY AND CAPRICIOUS ACTION.” *GREGG*, 428 U.S. AT 189. *SEE ALSO Gardner v. Florida*, 430 U.S. 349, 358 (1977) (“It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion”). FOR THE MOST PART, THIS GUIDED DISCRETION IS APPLIED THROUGH STATUTORY AGGRAVATING CIRCUMSTANCES, WHICH MUST “GENUINELY NARROW THE CLASS OF

DEATH-ELIGIBLE PERSONS" IN A WAY THAT REASONABLY "JUSTIFIES THE IMPOSITION OF A MORE SEVERE SENTENCE ON THE DEFENDANT COMPARED TO OTHERS FOUND GUILTY OF MURDER." *ZANT V. STEPHENS*, 462 U.S. 862, 877 (1983). IN OTHER WORDS-AND ON A MORE PRACTICAL LEVEL-THE DEATH PENALTY IS NOT PERMITTED FOR ANY AND ALL MURDERS. *SEE CLEMONS V. MISSISSIPPI*, 454 U.S. 738, 758 (1990) (A STATUTORY AGGRAVATING CIRCUMSTANCE MUST PROVIDE A "PRINCIPLED WAY TO DISTINGUISH THE CASE IN WHICH THE DEATH PENALTY IS IMPOSED, FROM THE MANY CASES IN WHICH IT WAS NOT").

IN ADDITION TO GUIDING THE JURY'S DISCRETION, THE COURT DECLARED IN *GREGG* THAT

[w]here the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

Id. at 195. Georgia's capital sentencing scheme, approved in *Gregg*, included a requirement that the state appellate court determine whether the death sentence imposed was excessive or disproportionate to the sentence imposed in similar cases. *See* Ga. Code Ann. § 17-10-35. The Court recognized that "the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty." *Gregg*, 428 U.S. at 203.

SOUTH CAROLINA'S CAPITAL SENTENCING SCHEME IS PATTERNED AFTER GEORGIA'S SCHEME AS APPROVED

IN *GREGG. STATE V. SHAW*, 273 S.C. 194, 199, 255 S.E.2D 799, 801 (1979). AS SUCH, THE SOUTH CAROLINA STATUTES, LIKE THOSE OF GEORGIA, NEVER REQUIRE IMPOSITION OF A DEATH SENTENCE EVEN IF AN AGGRAVATING CIRCUMSTANCE IS FOUND AND, IF A DEATH SENTENCE IS IMPOSED, THIS COURT IS REQUIRED TO DETERMINE "AWAHETHER THE SENTENCE OF DEATH IS EXCESSIVE OR DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES, CONSIDERING BOTH THE CRIME AND THE DEFENDANT." S.C. CODE § 16-3-25(C)(3).

THE DETERMINATION OF WHETHER A SENTENCE IS EXCESSIVE IS ALSO REQUIRED BY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.

Coker v. Georgia, 433 U.S. 584, 592 (1977). See also *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987) ("a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense"); *Enmund v. Florida*, 458 U.S. 782, 788 (1982) ("The Cruel and Unusual Punishments Clause of the

Eighth Amendment is directed, in part, ‘against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged’”).⁹

In *Enmund*, the Court reviewed an Eighth Amendment challenge to a death sentence imposed on a person who was an accomplice in a felony murder but who did not himself kill or intend to kill. In its analysis, the Court considered reported decisions of cases in which an execution had taken place and found “only 6 cases out of 362 where a nontriggerman felony murderer was executed.” *Id.* at 794. The Court also considered the cases of the persons on death row at that time and found a similarly small number of nontriggermen on the row. *Id.* at 795. Finally, the Court considered other Florida cases. *Id.* at 796. Ultimately, the Court concluded, “we are not aware of a single person convicted of felony murder over the past quarter century” executed under circumstances similar to *Enmund*’s. *Id.* Thus, the Court held “the death penalty is disproportionate as applied to him, and the statistics he cites are

⁹In the context of capital punishment, after reviewing objective factors such as legislation and sentencing practices in the various states, the Court has held that the death penalty is “excessive” and unconstitutional for: (1) the rape of an adult who was not killed, *Coker, supra*; (2) offenders who were accomplices and did not intend to kill, *Enmund, supra*, and were not major participants in a felony acting with reckless disregard to the value of human life, *Tison v. Arizona*, 481 U.S. 137 (1987); (3) offenders who are mentally retarded, *Atkins v. Virginia*, 536 U.S. 304 (2002); and (4) offenders who were under 18 years of age at the time of their crimes, *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

adequately tailored to demonstrate that juries—and perhaps prosecutors as well—consider death a disproportionate penalty for those who fall within his category.” *Id.*

Here, as discussed previously, Humphries, who was 22 years old at the time of the crimes, was found to be eligible for the death penalty based on the single statutory aggravating circumstance of attempted armed robbery. The evidence shows that he had been drinking for hours before the crime. He stole a weapon during that time and only hatched the plan to commit a robbery shortly before entering the convenience store. *See* Attachment 1 (Humphries’ Statement). His intent was only to commit a robbery. He had no intent to kill anyone. *See State v. Stokes*, 352 S.E.2d 653, 666-67 (N.C. 1987) (death disproportionate where the defendant and three other men “planned to rob [the victim], not to kill [him],” but during the robbery the victim was beaten severely with “sticks” and died later from fractures to his skull and other head injuries); *Biondi v. State*, 699 P.2d 1062, 1067 (Nev. 1985) (death disproportionate for killing during a drunken barroom brawl where there was “no evidence that the murder had been planned in advance”).

When he and Blackwell actually entered the store, their “plan” was so poorly hatched that it apparently still took them some time to figure out what they were going to do, as evidenced by the other store clerk’s testimony that they talked and Humphries’ kept saying “shit.” App. 1232-35. Even when Humphries approached the counter, he did not take the gun out of the waistband of his pants until he saw the victim reach for a weapon. Attachment 1 (Humphries’ Statement). Since a handgun was found underneath the victim’s body, the evidence also suggests that the victim did pull out a weapon before Humphries pulled out his gun and fired a single shot in the victim’s direction and ran out of the store not knowing

whether his shot had hit the victim or not. *Id.* In short, Humphries fired only in the direction of the victim for self-protection and not with the intent to kill. *Compare Harvey v. State*, 682 P.2d 1384, 1386 (Nev. 1984) (death disproportionate in light of “the apparent suddenness of the decision to kill” a security guard as defendant fled from the scene of an armed robbery in which no one was injured and then encountered the armed officer in trying to steal a car).

Humphries’ panic and lack of any intent to kill is also evidenced by the fact that Humphries made no attempt to harm the other employee of the convenience store, although she was an eyewitness to the crime. *See Proffitt v. State*, 510 So. 2d 896 (Fla. 1987) (death was disproportionate sentence where the victim was stabbed one time during a burglary and the defendant “made no attempt to inflict mortal injuries” on her husband who was also present); *Coleman v. State*, 378 So. 2d 640, 650 (Miss. 1979) (death sentence found to be disproportionate under facts similar to this case where the defendant shot “[o]nly after being fired upon” and he “had the opportunity to shoot . . . an eyewitness, but did not. He fled the scene instead”).¹⁰ Instead of causing additional harm, Humphries, in his sheer panic, took off and even left his accomplice at the store. He had driven some distance before he even remembered that Blackwell had been with him and he drove back past the store to look for him. *Id.*

¹⁰In *Coleman*, the defendant was sentenced to death for a murder that occurred in the commission of a burglary. The defendant and a co-defendant broke into the victim’s home and then a vehicle parked outside. During the burglary, the victim and his wife drove up. The defendant and his cohort attempted to hide. The victim noticed the co-defendant and started firing his pistol at him. The co-defendant ran and escaped. While the victim was shooting, the defendant fired two shots at him and the victim was killed. The victim’s wife ran out of the home and the defendant pointed the gun at her and had the opportunity to shoot, but instead ran away.

While Humphries' murder conviction is proper despite the lack of any intent to kill because he was engaged in a felony at the time, this Court should consider the lack of any intent to kill in determining whether the death sentence is excessive under these circumstances. In addition to these circumstances, this Court must consider THE "RELEVANT FACTS OF THE CHARACTER AND RECORD OF THE INDIVIDUAL OFFENDER," ESPECIALLY THE "COMPASSIONATE OR MITIGATING FACTORS STEMMING FROM THE DIVERS-FRAILTIES OF HUMAN KIND," *WOODSON*, 428 U.S. AT 304, WHICH IS A NECESSARY ELEMENT OF THE REQUIRED "MORAL INQUIRY INTO THE CULPABILITY OF THE DEFENDANT," *CALIFORNIA V. BROWN*, 479 U.S. 538, 544 (1987).

Here, Humphries cooperated during his arrest. Even though he still had the pistol on him, he made no attempt to harm the arresting officers and told them that the pistol was in his waistline. He also immediately confessed and remained cooperative with officers throughout the pretrial and trial proceedings. During the trial, he conceded his participation in the attempted armed robbery and the shooting.

In sentencing, the State presented only two witnesses to testify concerning victim impact, which this Court declared in this case is not aggravation evidence. *Humphries*, 325 S.C. at 35, 479 S.E.2d at 56. Thus, the State's evidence in aggravation was only a few crime scene photos and documents reflecting Humphries' criminal history, which consisted entirely of non-violent offenses.

Humphries, 351 S.C. at 366, 570 S.E.2d at 162. The defense also presented substantial mitigation evidence of “the brutal circumstances in which he was raised.” 351 S.C. at 365, 570 S.E.2d at 162.¹¹

¹¹This evidence revealed that Humphries’ parents separated about the time of his birth and he and his older brother lived with his mother and grandmother for a while, but his mother, who was on welfare at times, was unable to adequately feed them or care for them. She even abandoned Humphries’ to a friend when he was only a baby. When he was around two years old, he and his older brother were taken into the home of his alcoholic grandparents, who grew marijuana in their backyard and had the children to assist them. Humphries’ father drank alcohol and huffed paint in front of his children daily and encouraged them to do the same. He was extremely mentally abusive to his children and physically abusive even to his own parents. They lived in extreme poverty and mostly ate beans and “poke salad.” By the time Humphries and his brother were seven to eight years old, their grandparents would have the children dig in dumpsters looking for things they could use or sell. They got clothes, shoes, and even food to live on in from other people’s trash. When Humphries was twelve, his grandfather, who was afraid at times to leave his son alone with

his wife and the children, took Humphries and his brother back to live with their mother due to the increasing violence by Humphries' father. By that time, Humphries was getting in trouble with the law and using substantial quantities of alcohol and drugs, including huffing paint. His mother sent him to a drug rehabilitation center in Texas when he was 17 because of the seriousness of the problem. While Humphries was previously confined following a juvenile adjudication, a counselor described him as pleasant, respectful, and passive. On the basis of the evidence presented, the trial court instructed the jury to consider two statutory mitigating circumstances: (1) the defendant has no history of prior criminal conviction involving the use of violence against another person; and (2) the age or mentality of the defendant at the time of the crime.

Considering the nature of the crime and the sole statutory aggravating circumstance in this case, the undersigned counsel have been unable in extensive research of published appellate court opinions to find many cases in which a death sentence was imposed or actually carried out for a crime and an offender similar to the circumstances of this case and to Humphries' background. Beginning with cases in which an execution has occurred, as the Supreme Court did in *Enmund*, as of September 28, 2005, there have been 985 executions in this country since 1976. Of this total number, 398 executions have been carried out by jurisdictions in which it is possible for a person to be sentenced to death based only on an aggravating factor of attempted felony, without any additional findings required for death eligibility.

The undersigned counsel have reviewed the published opinions related to these 398 executions and have found only two cases that involved only an attempted armed robbery (or possibly only attempted) as the sole statutory aggravating circumstance where the death-sentenced inmate has actually been executed. See *Solomon v. Kemp*, 735 F.2d 395 (11th Cir. 1984) (inmate executed by Georgia on 2/20/85);¹² *State v. Scott*, 1985 WL 9047 (Ohio Ct. App. May 23, 1985), *aff'd*, 497 N.E.2d 55 (Ohio 1986) (inmate executed on 6/19/01).¹³

¹²Solomon, who had three prior convictions (although the opinion did not state what the convictions were), and a codefendant murdered a gas station attendant in Cobb County, Georgia. The attendant was shot five times before the assailants were discovered by a police officer, who entered the station while the crimes were still in progress. The cash register drawer was discovered in a garbage bag, along with two bullets and two guns, near the body. Swabbings for gun powder residue revealed that both the defendant and codefendant had recently fired guns.

¹³Scott and three other men were drinking wine and beer as they rode around in a car. They went to get more beer, but the first store they tried was closed so they went to a delicatessen. Scott and another man entered the store. Scott pulled out his pistol, pointed it

Counsel found one additional case, in which the inmate was ultimately executed, where the murder occurred during only an “attempted” armed robbery, but the jury found two additional aggravating circumstances. *See State v. Berry*, 391 So. 2d 406 (La. 1980) (inmate executed on 6/7/87).¹⁴ Finally, looking at all “attempted” felonies as the sole underlying aggravating circumstance, counsel located one case involving attempted sexual assaults where an execution has been carried out. *See People v. Free*, 522 N.E.2d 1184 (Ill. 1988) (inmate executed on 3/22/95).¹⁵

at the victim, and told her to “freeze.” When she cried out, he shot and killed her. While Scott claimed that the victim reached for a gun, the codefendant present, who testified for the state, did not see this happen and there apparently was no weapon found in the store. The victim was shot in the chest from only 12 inches away. Although Scott claimed complete innocence during the trial and sentencing, he was convicted of “aggravated murder while committing or attempting to commit aggravated robbery.” While it did not appear to matter for the conviction whether the robbery was completed or not, the cash register was open and dollar bills were on the floor when police arrived. There was no additional evidence presented in sentencing by either side. The court did not find that the death sentence was disproportionate under these circumstances, especially in light of Scott’s expressed lack of remorse for shooting the victim.

¹⁴Berry, whose co-defendant had entered first and reported about the number of people in the bank and other factors, entered a bank with seven to ten customers present with his pistol drawn in order to commit an armed robbery. According to the co-defendant, who waited outside during the crimes and testified for the state, Berry was aware when he entered the store that an armed security guard was also present in the bank. The armed security guard, who was actually a Sheriff’s Deputy in uniform, fired at the defendant one time (wounding him) before he was fatally wounded. The state’s evidence revealed that Berry shot first and also fired the fatal shot at close range after the victim had dropped his gun upon first being hit. Berry then fled from the bank and was later arrested when he sought treatment for his wound. The jury found three aggravating circumstances in sentencing: (1) murder of a peace officer who was engaged in his lawful duties at the time he was shot; (2) attempted armed robbery; and (3) the risk of death or great bodily injury to several other persons who were either in the bank as customers or working there as tellers. Berry had four prior arrests for nonviolent offenses and a conviction for simple burglary.

¹⁵Free was convicted of murder, attempted murder, and two counts of attempted rape. The evidence established that the defendant entered an office and threatened to rape two

women. He ordered one to undress and tied her up. He took the other to another room and forced her to undress. When he returned to check on the first woman, he discovered that she had managed to loosen her bindings. As he was retying her binds, the second woman ran. Free chased her and shot and killed her. He returned and shot the first woman, but she survived.

Considering next, as the Court did in *Enmund*, the cases of the 3,400 men and women who remain on death row in this country, the undersigned counsel, considering only the jurisdictions that allow a sole aggravating circumstance based on an “attempted” underlying felony, have identified two cases involving only an “attempted” armed robbery aggravator where the death penalty has been affirmed, but these cases are still pending in post-conviction litigation. *See Zebroski v. State*, 715 A.2d 75 (Del. 1998); *State v. Williams*, 708 So. 2d 703 (La. 1998).¹⁶

In addition to these cases, counsel were also able to identify seven cases in which a death sentence was imposed based only on an “attempted” felony aggravator, but the sentence was ultimately reversed and was not then reimposed. *See State v. Rodriguez*, 656 A.2d 262 (Del. 1994) (vacated because there was no evidence that demonstrated beyond a reasonable doubt that the defendant fired the fatal shots or expected that violence would erupt in the course of an attempted robbery during which death occurred); *Garden v. State*, 844 A.2d 311 (Del. 2004) (jury recommended life and judge imposed death; vacated because the judge had no authority to override the jury’s decision and impose death); *Van Cleave v. State*, 517 N.E.2d 356 (Ind. 1987) (death sentence affirmed on direct appeal but was subsequently vacated due to ineffective assistance of counsel in sentencing, 674 N.E.2d 1293 (Ind. 1996),

¹⁶Counsel makes no assertion that these are the only cases in this category. While counsel have attempted to thoroughly research this issue through Westlaw, due to the sheer volume of the numbers and because many of these cases involve no opinions or only unpublished opinions at this time, counsel could not individually review each case.

and not reimposed); *People v. Walker*, 440 N.E.2d 83 (Ill. 1982) (sentence reversed due to cumulative error and not reimposed); *Jacobs v. Commonwealth*, 870 S.W.2d 412 (Ky. 1994) (reversed due to failure to grant a change of venue; defendant was resentenced to death based on a single aggravating circumstance of kidnaping, which was not a proper statutory aggravating circumstance under Kentucky law so the defendant was resentenced non-capitally, 58 S.W.3d 435 (Ky. 2001)); *White v. State*, 481 A.2d 201 (Md. 1984) (death sentence affirmed on direct appeal but subsequently vacated in post-conviction relief proceedings, 589 A.2d 969 (Md. 1991) and not reimposed); *State v. May*, 656 A.2d 1335 (Pa. 1995) (death sentence set aside because the jury was instructed on the aggravating circumstance of attempted rape but returned with a finding of rape which was not supported by the evidence; the defendant was subsequently resentenced to death based on the aggravating circumstance that he had a significant history of violent felony convictions, 710 A.2d 44 (Pa. 1998)).

While these national figures may not be completely accurate, it is clear that very few people are sentenced to death in this country based solely on a single aggravating factor of an attempted felony. It is also clear that out of the extraordinarily small percentage of people actually sentenced to death on this basis even fewer of them are actually executed. Indeed, only a hand full of the almost 1,000 executions in this country have been based solely on this factor or in circumstances even remotely similar to this case.

The figures in South Carolina, based on reported opinions and the trial court's report required in each case where death is imposed, S.C. Code § 16-3-25(A), also support such a finding. The undersigned counsel have been able to identify 165 persons sentenced to death

since 1976. *See* Chart at Attachment 2.¹⁷ Not one of the other 164 death-sentenced prisoners, either before or after Humphries, has been sentenced to death based only on an “attempted” felony as the sole aggravating circumstance. *See* Chart at Attachment 3.

While this Court restricts its proportionality review **TO ONLY THOSE CASES IN WHICH THE DEFENDANT WAS CONVICTED AND SENTENCED TO DIE BY THE TRIAL COURT AND THIS COURT AFFIRMED THE DEATH SENTENCE, STATE V. COPELAND, 278 S.C. 572, 591-92, 300 S.E.2D 63, 74-75 (1982)**, in the “excessiveness” review this Court must consider “the gravity of the offense and the severity of the penalty,” the sentences imposed for other crimes, and the sentencing practices in other jurisdictions. *Pulley*, 465 U.S. at 42-43. Here, while Humphries’ crimes were certainly grave, “the circumstances present in this case [do not] ‘bespeak a man with a malignant heart who must be permanently eliminated from society.’” *People v. Buggs*, 493 N.E.2d 332, 336 (Ill. 1986) (death disproportionate for murder of wife during domestic dispute concerning her infidelity). There was no evidence before the jury that Humphries had ever committed another violent act. Furthermore, this single act of violence was not planned and was committed in a matter of seconds after the victim reached for a gun. *See State v. Godsey*, 60 S.W.3d 759, 791 (Tenn. 2001) (death disproportionate for “a single act of

¹⁷**FOUR MEN (RONALD WOOMER, LARRY GENE BELL, JAMES TUCKER, AND THOMAS IVEY) RECEIVED DEATH SENTENCES IN TWO DIFFERENT CASES, BUT ARE COUNTED ONLY ONCE AS AN ADMISSION TO DEATH ROW.**

violence that occurred in a matter of minutes” and resulted in the death of a child under the age of twelve, which was the sole aggravating circumstance).

In considering the sentences imposed in other cases in this state, the undersigned counsel do not have information available to address the total number of attempted armed robbery or armed robbery murder cases in this state each year, which are resolved by plea agreements, in which the state does not seek the death penalty, or cases in which the death penalty is sought but not imposed. If the information is in any way consistent with our neighboring state of North Carolina, however, then the “overwhelming percentage of robbery murder/cases, especially those not involving multiple murders or additional aggravating circumstances . . . [do] not result in a death sentence. *State v. Benson*, 372 S.E.2d 517, 523 (N.C. 1988). *See also Stokes*, 352 S.E.2d at 666 (“[i]n robbery murder cases where conviction rests solely on a felony murder theory, juries in [North Carolina] almost invariably have recommended life imprisonment rather than death”).

Regardless of the total numbers for South Carolina, it is clear that no other person has been sentenced to death for only an attempted robbery “gone bad” that resulted in a death. Likewise, this Court’s published opinions reveal numerous attempted armed robbery or armed robbery/murder cases with similar or far worse facts than this case where the defendant was allowed by the prosecutor to plead guilty in exchange for a sentence less than death, death was not sought, or the jury did not return a death sentence. *See, e.g., State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001) (defendant convicted of three execution-style murders during an armed robbery using the same gun that had been used to murder a cab driver only weeks before and only weeks after he had been released from prison). *See also Thompson v.*

State, 357 S.C. 192, 593 S.E.2d 139 (2004); *State v. Frazier*, 357 S.C. 161, 592 S.E.2d 621 (2004); *State v. Harvin*, 345 S.C. 190, 547 S.E.2d 497 (2001); *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464 (2000); *State v. Griffin*, 339 S.C. 74, 528 S.E.2d 668 (2000); *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *State v. Timmons*, 327 S.C. 48, 488 S.E.2d 323 (1997); *State v. McKnight*, 321 S.C. 230, 467 S.E.2d 919 (1996); *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994); *State v. Livingston*, 282 S.C. 1, 317 S.E.2d 129 (1984); *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984); *State v. Hiott*, 276 S.C. 72, 276 S.E.2d 163 (1981).

Finally, in considering the sentencing practices in other jurisdictions, this Court should consider the out-of-state cases cited previously. In addition, this Court should consider the practices in other states in conducting similar excessiveness and proportionality review in capital cases.

The Florida Supreme Court has held that, “[a]s a general rule, ‘death is not indicated in a single-aggravator case where there is substantial mitigation.’” *Almeida v. State*, 748 So. 2d 922, 933 (Fla. 1999). *See also Jones v. State*, 705 So. 2d 1364, 1367 (Fla. 1998) (“[u]nder Florida’s capital sentencing scheme, death is not indicated in a single-aggravator case where there is substantial mitigation”);¹⁸ *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996) (death disproportionate, even when there was “not a great deal of mitigation,” because the evidence “support[ed] the theory that this was a ‘robbery gone bad’” and, thus, “this

¹⁸In *Jones*, the 19-year-old defendant, who had been drinking and smoking marijuana, approached a 14-year-old with a gun and asked for money. When the victim said he had no money, the defendant shot him in the leg and then, when the victim bent over, in the top of the head.

homicide, though deplorable, does not place it in the category of the most aggravated and least mitigated for which the death penalty is appropriate”).

The North Carolina Supreme Court has also been reluctant to approve death sentences based on felony murder with only a single aggravating circumstance. *See, e.g., Benson*, 372 S.E.2d at 522-23 (death sentence vacated in robbery/murder case, where there was substantial mitigation, the defendant confessed and cooperated during and after his arrest, and the defendant fired his shotgun only at the victim's legs when the victim hesitated in handing over his money). Although the defendant in *Benson* did not intend to kill, the North Carolina Supreme Court has also vacated the death sentence in other more egregious robbery/murder cases. *See Stokes, supra* (the victim was beaten severely with “sticks” and died from fractures to his skull and other head injuries incurred during an armed robbery); *State v. Jackson*, 305 S.E.2d 703 (N.C. 1983) (death was disproportionate sentence for murder committed during an armed robbery where the victim was shot twice in the head at close range after refusing to hand over his money).

While other courts have announced no general rule about the appropriateness of a death sentence in robbery/murder cases without additional aggravation, the courts in Arizona and New Jersey have also on at least one occasion found that a death sentence in similar circumstances was disproportionate. *See, e.g., State v. Stevens*, 764 P.2d 724, 729 (Ariz. 1988) (death disproportionate where the defendant had been drinking heavily prior to committing an armed robbery and shooting the victim in the head after the victim handed over his money and there was nothing in the defendant's “record which revealed a tendency toward

the kind of violent crime he committed”); *State v. Papasavvas*, 790 A.2d 798 (N.J. 2002) (death was disproportionate sentence for murder committed during a robbery).

This Court must vacate Humphries' death sentence 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.” *Godfrey*, 446 U.S. at 433. Under these circumstances, “the death penalty is disproportionate as applied,” *Enmund*, 458 U.S. at 796, to Humphries. The sentence is thus cruel and unusual in violation of the Constitutions of the United States and South Carolina and must be set aside. At minimum, this Court should stay Humphries' execution, grant review, and carefully examine this issue.

II. Since under the facts of this particular case, a sentence of death is “disproportionate to the punishment imposed on others convicted of the same crime” the sentence is unconstitutional.

PURSUANT TO S.C. CODE § 16-3-25(C)(3), THIS COURT
“SHALL DETERMINE . . . AWAKHETHER THE SENTENCE OF
DEATH IS . . . DISPROPORTIONATE TO THE PENALTY
IMPOSED IN SIMILAR CASES, CONSIDERING BOTH THE
CRIME AND THE DEFENDANT.”

This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime.

Pulley, 465 U.S. at 42-43. IN CONDUCTING THIS PROPORTIONALITY
REVIEW, THIS COURT HAS HELD THAT “SIMILAR CASES”
INCLUDE ONLY THOSE IN WHICH THE DEFENDANT WAS
CONVICTED AND SENTENCED TO DIE BY THE TRIAL
COURT AND THIS COURT AFFIRMED THE DEATH

SENTENCE. *COPELAND*, 278 S.C. AT 591-92, 300 S.E.2D AT 74-75. WITHIN THIS UNIVERSE, HUMPHRIES' DEATH SENTENCE IS EXCESSIVE AND DISPROPORTIONATE AND MUST BE COMMUTED TO LIFE IMPRISONMENT.

THIS COURT HAS NEVER BEFORE COMMUTED A DEATH SENTENCE ON THE BASIS OF PROPORTIONALITY REVIEW, BUT THIS CASE WARRANTS RELIEF. AS NOTED PREVIOUSLY, THIS COURT HAS NEVER BEFORE OR SINCE EVEN REVIEWED A CASE INVOLVING ONLY AN ATTEMPTED ARMED ROBBERY (OR OTHER ATTEMPTED FELONY) AS THE SOLE AGGRAVATING CIRCUMSTANCE. THE UNDERSIGNED COUNSEL IS ALSO NOT AWARE OF ANY OTHER CASE INVOLVING AN ARMED ROBBERY WHERE DEATH WAS IMPOSED WHERE THE VICTIM WAS KILLED ONLY AFTER THE VICTIM REACHED FOR OR OBTAINED A WEAPON AND THE DEFENDANT'S RESPONSE WAS FOR SELF-PROTECTION.

THE ONLY CASE IN WHICH DEATH HAS BEEN IMPOSED AND APPROVED UNDER EVEN REMOTELY SIMILAR CIRCUMSTANCES IS THE CASE OF CHRIS TENCH, WHICH IS THE ONLY ONE IN WHICH THIS COURT HAS CITED *HUMPHRIES* IN FINDING ANOTHER DEATH SENTENCE PROPORTIONATE. *STATE V. TENCH*, 353 S.C. 531, 537, 579 S.E.2D 314, 317 (2003). IN *TENCH*, THE DEFENDANT COMMITTED BURGLARY BY ENTERING A HOME DURING THE NIGHT AND APPARENTLY HAD A SHOOTOUT WITH

THE OCCUPANT OF THE HOUSE, WHO WAS KILLED. THE FACTS IN THAT CASE, HOWEVER, DIFFER FROM THE FACTS IN HUMPHRIES' CASE, IN THAT IN TENCH THE JURY FOUND TWO STATUTORY AGGRAVATING CIRCUMSTANCES: BURGLARY AND ARMED ROBBERY.

THE DEATH SENTENCE IN THIS CASE IS ALSO DISPROPORTIONATE IN LIGHT OF THE FACTS OF THE CASES THIS COURT CITED IN ITS EARLIER PROPORTIONALITY REVIEW IN THIS CASE. *Humphries*, 325 S.C. at 37, 479 S.E.2d at 57 (citing *State v. Young*, 319 S.C. 33, 459 S.E.2d 84 (1995); *State v. Thompson*, 278 S.C. 1, 292 S.E.2d 581 (1982)).

In *Young*, Young and two co-defendants, who had been drinking heavily, were in a school parking lot looking for something to steal from a car when they encountered the school principal. According to Young's testimony, he pointed a pistol at the victim while a co-defendant grabbed the victim's necklace and demanded his wallet. The victim allegedly threw his wallet at the co-defendant and "swung" on Young, who allegedly stumbled backwards and accidentally fired his pistol into the victim's chest, which was the fatal wound. A co-defendant then picked up the pistol and shot the victim in the head. Young had previously plead guilty to two counts of assault and battery of a high and aggravated nature for shooting two men. This Court affirmed the death sentence.

IN THOMPSON, THIS COURT AFFIRMED THE DEATH SENTENCE WHERE THE DEFENDANT AND TWO ACCOMPLICES ROBBED AND MURDERED A GAS STATION ATTENDANT. THIS COURT HELD THAT DEATH WAS AN

APPROPRIATE PUNISHMENT, IN PART, BECAUSE THE EVIDENCE REVEALED THAT THE VICTIM HAD BEEN SHOT TWICE AT CLOSE RANGE WITH ONE SHOT BEING TO THE FACE. NO MITIGATION EVIDENCE WAS PRESENTED. SEE *COPELAND*, 278 S.C. AT 593-94, 300 S.E.2D AT 76.

WITHIN THIS UNIVERSE, HUMPHRIES' DEATH SENTENCE IS DISPROPORTIONATE IN LIGHT OF THE OFFENSES COMMITTED AND THE OVERWHELMING MITIGATION EVIDENCE. THIS FACT IS ESPECIALLY CLEAR IN LIGHT OF THIS COURT'S STATEMENT IN *STATE V. GASKINS*, 284 S.C. 105, 130, 326 S.E.2D 132, 147 (1985), WHICH IS ARGUABLY THE MOST FACTUALLY ATROCIOUS OF ALL CAPITAL CASES TO BE REVIEWED BY THIS COURT:

CASES TRIED IN THIS STATE UNDER THE DEATH PENALTY STATUTE RESULTING IN CAPITAL PUNISHMENT HERETOFORE, INVOLVED FACTUAL SITUATIONS, AND ACCUSED PERSONS, SIMILARLY ATROCIOUS TO THOSE INVOLVED IN THIS CASE. IT IS OUR OBSERVATION THAT AN UNANIMOUS JURY IN SOUTH CAROLINA HAS ORDERED THE DEATH PENALTY IN ONLY THOSE CASES WHERE THE PROOF OF FACTS IS VIRTUALLY UNDEBATABLE AND THE NATURE OF THE WRONGFUL KILLING IS SUCH AS TO SHAKE THE CONSCIENCE OF THE COMMUNITY. THE FACTS ARE NOT THE SAME IN ANY TWO CASES AND, ACCORDINGLY, OUR REVIEW OF THE FACTS RELATE LARGELY TO DEGREE OF CULPABILITY OF THE DEFENDANTS AND THE VICIOUSNESS OF THE KILLING.

THERE IS NOTHING IN THE FACTS OF HUMPHRIES' CASE TO "SHAKE THE CONSCIENCE OF THE COMMUNITY." LIKEWISE, CONSIDERING HIS DEGREE OF CULPABILITY

AND THE NATURE OF THE KILLING, THERE IS NOTHING ABOUT THIS CASE WHICH WARRANTS THE DEATH PENALTY. HE DID NOT INTEND TO KILL AND FIRED ONLY IN THE "DIRECTION" OF THE VICTIM AFTER THE VICTIM PULLED OUT A GUN. WHILE HE WAS PROPERLY CONVICTED OF MURDER IN LIGHT OF THE UNDERLYING FELONY, THESE CIRCUMSTANCES SIMPLY DO NOT WARRANT A SENTENCE OF DEATH.

THE DEATH PENALTY SHOULD BE RESERVED FOR THE MOST HEINOUS AND AGGRAVATED MURDERS. AFFIRMING THE DEATH PENALTY IN THIS CASE, HOWEVER, WILL MEAN THAT THE DEATH PENALTY IS APPROPRIATE FOR ANY HOMICIDE-EVEN AN UNINTENDED ONE-COMMITTED DURING THE COMMISSION OF AN ATTEMPTED FELONY IRRESPECTIVE OF THE LACK OF ANY OTHER STATUTORY OR NON-STATUTORY AGGRAVATING CIRCUMSTANCES AND SUBSTANTIAL MITIGATION EVIDENCE. IF THE PROPORTIONALITY REVIEW REQUIRED BY S.C. CODE § 16-3-25(C) IS TO HAVE ANY MEANING AT ALL THEN HUMPHRIES' DEATH SENTENCE MUST BE COMMUTED TO LIFE IMPRISONMENT. At minimum, this Court should stay Humphries' execution, grant review, and carefully examine this issue.

III. Given (a) the deep but closely reasoned differences on the Fourth Circuit over the propriety of the State's jury argument in this case, (b) the fact that a federal court has limited review and can set aside a state court determination only if it is not only

“wrong” but also “objectively unreasonable,” (c) the residual uncertainties that have arisen because of the Court’s decision in this case and its later decision in *Hall*, and (d) the urgent need for clarification of the law in this State, this Court should grant review and find that the Solicitor’s argument injected an arbitrary and inherently prejudicial element into the case and that defense counsel’s failure to make a timely objection was a violation of Humphries’ constitutional right to adequate representation of counsel.

Although this Court previously addressed Humphries’ argument on this issue, review in this Court’s original jurisdiction is appropriate for several reasons. First, while “not every intervening decision, nor every constitutional error at trial will justify issuance of the writ” in this Court’s original jurisdiction, *Butler*, 302 S.C. at 468, 397 S.E.2d at 88, this Court should reconsider this issue based on the apparent contradictions between this Court’s prior opinion in this case and its subsequent decision in *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004). Second, given the deferential standard required in federal habeas proceedings, the 10-4 split in the Fourth Circuit with the dissenting judges’ explicit, carefully reasoned, and deeply felt disagreement with this Court’s findings, this Court should grant review to address the findings of both the majority and dissenting judges in the Fourth Circuit. Unlike the federal Fourth Circuit court, which was constrained by statute in its review and not permitted a *de novo* review, *Humphries*, 397 F.3d at 225, this Court is the final arbiter of the appropriateness of victim impact evidence and argument in South Carolina courts. This Court alone has the “ability [unconstrained by deferential standards] to provide relief to those who have, for

whatever reason, been utterly failed by our criminal justice system.” *Torrence*, 305 S.C. at 69, 406 S.E.2d at 328.

A. The prior rulings on this issue in *Humphries* and *Hall*.

During direct appeal, Humphries asserted that

the State’s use of victim impact evidence at sentencing, both in its quality and quantity, and the solicitor’s exploitation of that evidence in his comparative worth arguments, violated appellant’s rights to notice of the state’s evidence in aggravation under S.C. Code § 16-3-20(B), to a reliable sentencing determination under the Eighth Amendment and to a fundamentally fair trial under the Due Process Clause of the Fourteenth Amendment.

Brief of Appellant.

With respect to the lack of notice, this Court held that no notice was required under 16-3-20(B), in part, because “victim impact [evidence] is neither an aggravating nor a mitigating circumstance, but simply relevant evidence that the jury may consider in determining an appropriate penalty.” *Humphries*, 325 S.C. at 35, 479 S.E.2d at 56. With respect to the remaining arguments concerning the victim impact evidence and argument, this Court declined to consider any claim of error relating to “the prosecution’s use of . . . [the victim-impact] evidence during closing arguments” because “no contemporaneous objections” had been made. 325 S.C. at 35, 479 S.E.2d at 56.

In its review following the denial of post-conviction relief, this Court acknowledged that the prosecutor “compared the lives of Smith and . . . [Humphries] based on the evidence presented,” *Humphries*, 351 S.C. at 374, 570 S.E.2d at 167, but found that *Payne v. Tennessee*, 501 U.S. 808 (1991), does not forbid “comparisons between the defendant and the

victim,”¹⁹ *Humphries*, 351 S.C. at 374, 570 S.E.2d at 167. This Court also concluded that the prosecutor’s arguments were not “so prejudicial (if prejudicial at all) that they rendered . . . [Humphries’] death sentence fundamentally unfair under the Due Process Clause.” 351 S.C. at 376, 570 S.E.2d at 168.

Following the Fourth Circuit’s panel decision finding that this Court’s ruling was objectively unreasonable under *Payne* and the Fourth Circuit’s grant of rehearing en banc, this Court issued its opinion in *Hall* where the solicitor explicitly “directed the jury to weigh the worth of Hall’s life against the lives of Hall’s victims: ‘[w]hat are the lives of these two girls worth? Are they worth at least the life of a man, the psychopath, this killer, who stabs and stabs and kills and rapes and kidnaps?’” *Hall*, 360 S.C. at 357, 601 S.E.2d at 338. This Court held that this argument was improper.

While the Court acknowledged that *Humphries* “appears to allow a solicitor to compare the lives of a criminal defendant with that of the defendant’s victim,” the Court declined to “extend *Humphries* to permit the state to encourage the jury to compare the worth of a defendant’s life with that of his victims.” *Hall*, 360 S.C. at 362, 601 S.E.2d at 340. While the Court stated in *Hall* that “[i]n *Humphries* we recognized that it is more prejudicial for the state to compare the worth of the life of the defendant with that of his victim than it is

¹⁹In its opinion, this Court extensively cited the evidence presented in sentencing and extensively quoted from the portions of the solicitor’s argument challenged as improper. *Humphries*, 351 S.C. at 365-71, 570 S.E.2d at 161-65. *Humphries* accepts as accurate this Court’s recitation of the relevant evidence and argument and will not restate the facts here.

to compare their lives based on the evidence presented.” *Hall*, 360 S.C. at 363, 601 S.E.2d at 341. Upon careful review of *Humphries*, the undersigned counsel must respectfully submit that the opinion in *Humphries* does not in fact expressly recognize or apply that legal principle.

In *Hall*, this Court vacated the death sentence, continuing to distinguish *Humphries*, because

the solicitor not only suggested that Hall’s life was worth less than his victims’, he developed an arbitrary formula whereby if the jury [found] Hall’s life worth less than his victims’, then the jury could reach no other conclusion than that the death penalty is justified.

Further, while the solicitor in *Humphries* compared the histories of Humphries’s and his victim’s lives, the solicitor in *Hall* asked the jury to compare the worth of Hall’s life with that of his victims’.

Hall, 360 S.C. at 363, 601 S.E.2d at 341. In *Hall*, this Court also explicitly declared:

We continue to distinguish the facts of *Humphries* with that of the present case and maintain that these factual differences yield a different result as a matter of law. . . . We recognize that those victim-to-defendant comparisons that render a trial fundamentally unfair and those victim-to-defendant comparisons that are permissible are not always clearly distinguishable. A comparison that constitutes permissible victim-impact evidence is not as prejudicial to a defendant as a comparison that imposes, what in effect is, an arbitrary, unfounded jury charge.

Hall, 360 S.C. at 363 n.4, 601 S.E.2d at 340 n.4.

Following *Hall*, the majority of the en banc Fourth Circuit apparently accepted this Court’s view that the solicitor in this case only compared the “lives” of Humphries and his victim and “simply did not invite the jury to return a sentence based on the relative worth of the lives.” *Humphries*, 397 F.3d at 221. The Fourth Circuit also found that this Court “gave a principled explanation” of the distinctions between *Hall* and *Humphries*. *Id.* at 223.

Nonetheless, the court disavowed deciding any issue *de novo* and acknowledged the “shortcomings” of the *Payne* framework that include “a consequence . . . that a defendant can be put to death for the murder of a person more ‘unique’ than another, even though the defendant was, in fact, unaware of the victim’s uniqueness at the time of the crime.” *Id.* at 225 n.9.

The four dissenting judges, however, rejected this Court’s finding that the solicitor here only compared “lives” and not “worth”:

The prosecutor made no bones about what he did. He baldly compared the general worth of the victim’s existence with that of the defendant and urged the jury to impose a death penalty on that basis.

Id. at 235. *See also id.* at 238 (“the prosecution sought point-by-point, side-by-side, and year-by-year to demonstrate to the jury that at the very instant one life was being put to worthwhile use, the other was not”). Likewise, while acknowledging this Court’s finding that victim-to-victim comparisons are improper under *Payne* while victim-to-defendant comparisons are not, the dissenting judges declared that “distinguishing these two types of human worth comparisons splits an awfully thin hair.” *Id.* at 243. The dissenting judges also proclaimed that this was “the only argument in the country to indulge such an extended and explicit weighing of the relative worth of human life.” *Id.* at 244. In their view, this was “the essence of an arbitrary and capricious circumstance,” which is impermissible in a capital sentencing determination. In short, the dissenting judges declared, “[a] defendant may not be condemned simply for being deemed, over the long trajectory of life, a less estimable human being than his victim.” *Id.* at 245.

B. The relevant *Payne* precedent.

In light of all of the controversy in this case about what *Payne* and the holdings of this Court allow or not, it is appropriate to review the relevant case law.

Even prior to *Payne*, it was clearly established law that the jury in a capital case must make an “individualized determination” of the appropriate sentence based on “the character of the individual and the circumstances of the crime.” *Zant v. Stephens*, 462 U.S. 862, 879 (1983). The ultimate focus must be on the “personal responsibility and moral guilt” of the defendant, *Enmund v. Florida*, 458 U.S. 782, 801 (1982), and must exclude factors that are “totally irrelevant to the sentencing process,” *Zant v. Stephens*, 462 U.S. at 885.

In *Payne*, the defendant was convicted of murdering a mother and her daughter and stabbing her son, whose wounds were not fatal. The state presented very brief testimony from the grandmother that the living victim cried for both his mother and his sister. *Payne*, 501 U.S. at 814-15. The specific holding of the Court in *Payne* was “that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on the subject, the Eighth Amendment erects no *per se* bar,” *id.* at 827, to a brief “glimpse of the life” of the victims and “the loss to the victim’s family and to society” as a result of the crimes, *id.* at 822. The Court based its holding on the recognition that “evidence about the victim and about the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed.” *Id.* at 827.

In reaching its conclusion, the Court acknowledged the concern that admission of victim impact evidence “permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy” *Id.* at 823. In response, the Court declared:

As 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.

Id. Further, the Court declared that while victim impact evidence would serve legitimate purposes in most cases, reversal would be required under the Due Process Clause of the Fourteenth Amendment in those cases where the victim impact evidence or argument is “so unduly prejudicial that it renders the trial fundamentally unfair.” *Id.* at 825.

Following *Payne*, this Court first considered the admissibility of victim impact evidence and argument in *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991). In that case (tried prior to *Payne*), the only relevant issue asserted by the death-sentenced inmate was that the prosecutor argued in sentencing, in response to defense testimony that Johnson's sister would visit him in prison at Christmas, “that the [victim's] family could not go see him, they could only visit him at the grave.” 306 S.C. at 132, 410 S.E.2d at 555. While acknowledging that the Supreme Court merely left the determination of the appropriateness of victim impact evidence and argument to the states, this Court held “that the argument made by the solicitor in this regard is relevant to the jury's decision and proper.” *Id.*

This Court next considered the admissibility of victim impact evidence and argument in *Lucas v. Evatt*, 308 S.C. 31, 416 S.E.2d 646 (1992), which again was tried prior to *Payne* and challenged only portions of the prosecutor's argument “referenc[ing] the victims and the

impact of their murders upon their family, *id.*. In that case, this Court declared that in *Johnson*, the Court “adopted as state law the *Payne* decision.” 308 S.C. at 33, 416 S.E.2d at 647. The Court then declared that “*Payne* holds” that victim impact evidence is admissible. *Id.*

Following *Lucas*, this Court has approved of victim impact testimony and evidence in a number of cases without a single reversal. *See, e.g., State v. Rocheville*, 310 S.C. 20, 425 S.E.2d 32 (1993); *State v. Riddle*, 314 S.C. 1, 443 S.E.2d 557 (1994); *State v. Powers*, 331 S.C. 37, 501 S.E.2d 116 (1998); *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998); *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998); *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000); *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998); *State v. Shuler*, 353 S.C. 176, 577 S.E.2d 438 (2003).

At the same time, this Court considered one case in which the defense sought to present evidence of the victim’s “bad character.” *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994). In *Southerland*, this Court held that this evidence was inadmissible because it “encourage[s] comparative character analysis” which “*Payne* prohibits.” 316 S.C. at 386, 447 S.E.2d at 867.

And, as noted previously, this Court concluded in this case in several opinions that victim impact evidence is not “aggravation evidence,” *Humphries*, 325 S.C. at 35, 479 S.E.2d at 56,²⁰ and it is not improper for the prosecutor to compare the “lives” of the victim and the defendant, *Humphries*, 351 S.C. at 374, 570 S.E.2d at 167.

²⁰*But see Payne*, 501 U.S. at 833 (Scalia, O’Connor, and Kennedy, JJ., concurring) (characterizing victim impact evidence and argument as “aggravating evidence”).

C. Argument.

With all respect to this Court, the undersigned counsel submit that this Court should re-evaluate the “underpinning” of its prior holdings. First, this Court declared victim impact evidence and argument permissible in its first consideration of this issue, based only on a very limited argument by the prosecutor “that the [victim’s] family could not go see him, they could only visit him at the grave.” *Johnson*, 306 S.C. at 132, 410 S.E.2d at 555. Second, in this Court’s second opinion addressing this issue, which again challenged only portions of the prosecutor’s argument “referenc[ing] the victims and the impact of their murders upon their family,” *Lucas*, 308 S.C. at 31, 416 S.E.2d at 646, this Court purported to “adopt[] as state law the *Payne* decision,” 308 S.C. at 33, 416 S.E.2d at 647, without recognizing that *Payne* held nothing more than “that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on the subject, the Eighth Amendment erects no *per se* bar.” *Payne*, 501 U.S. at 827. Indeed, as Justice O’Connor stated in her concurrence:

We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, ‘the Eighth Amendment erects no *per se* bar.’

Id. at 831.

Since that time, despite the concerns raised by the undersigned counsel, this Court has for the most part allowed only a brief “glimpse of the life” of the victims and “the loss to the victim’s family and to society” as a result of the crimes, *id.* at 822, which cannot be faulted under the *Payne* court’s interpretation of the Eighth Amendment. The problem areas from Humphries’ perspective are two-fold: (1) this Court’s view that there is a distinction in impropriety between victim-to-victim comparisons and victim-to-defendant comparisons; and

(2) this Court's view that there is somehow a difference in allowing the prosecutor to argue comparisons between the defendant's and the victim's "life" in sentencing and comparisons of their "worth."

1. There is no real distinction between victim-to-victim comparisons and victim-to-defendant comparisons.

While this Court and the majority of the Fourth Circuit en banc rely heavily on the proposition that *Payne* prohibits human worth comparisons only in the victim-to-victim comparison category but not in the victim-to-defendant category – which the Fourth Circuit dissent calls splitting “an awfully thin hair,” *Humphries*, 397 F.3d at 243– the undersigned counsel submit that there is no real difference between the two.

In short, unlike the Fourth Circuit, this Court is not constrained to a strict reading of *Payne*. While the Fourth Circuit was powerless under the federal habeas standards and as an “inferior court,” *id.*, to resolve this “shortcoming” in *Payne*, this Court is not and should reject any comparison that will allow “a defendant . . . [to] be put to death for the murder of a person more ‘unique’ than another.” *Humphries*, 397 F.3d at 225 n.9. This offends the Constitution and common human morality and decency. A murder that deserves the death penalty should not and must not depend on whether a “worthy” individual or an “unworthy” one (in comparison to the defendant) is killed.

Moreover, it violates this Court's prior holding that victim impact evidence and argument is not aggravation evidence. *Humphries*, 325 S.C. at 35, 479 S.E.2d at 56. If this evidence did not support an argument in favor of the death penalty, i.e., be considered aggravating, the state would not seek to present it. And, if the evidence were only that the

victim was a person of bad character, the law of this state would prohibit its admission. *Southerland, supra*. See also *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985).

2. There is no real distinction between an argument by the State comparing the defendant's and the victim's "lives" and their "worth."

While this Court previously has purported to draw a distinction between a comparison of "lives" and comparison of "worths," the undersigned counsel respectfully submit that there is no real difference. While there may be a superficial appeal to this analysis, in the end, either of these arguments encourages a "comparison" of the victim to the defendant, which is outside the scope of what *Payne* even contemplated as admissible: (1) evidence of the victim's "uniqueness as an individual human being," and (2) evidence of the "loss to the community resulting from his death." 501 U.S. at 823.

For example, as this Court already found in this case, the State compared the "lives" of Humphries and the victim. Regardless of whether the solicitor expressly invited a comparison of "worth" as happened in *Hall*, a comparison of "lives" in the manner employed in the solicitor's argument in this case was clearly designed to compare "worth." There is no other legitimate explanation for the prosecutor's side-by-side comparisons.

As the dissenting judges of the Fourth Circuit declared, any sort of comparison (whether of "lives" or "worth") between the defendant and the victim urged as a part of a capital sentencing determination injects an arbitrary factor into the sentencing decision. Thus, the prosecutor's argument was improper and counsel was ineffective in failing to object.

Humphries was also prejudiced. As addressed previously, under the facts and circumstances of this case, even if the prosecutor seeks death, very few juries actually impose

a death sentence. In this case, however, the prosecutor was allowed to turn Humphries' mitigation evidence and the victim impact evidence into a comparison of lives. In short, Humphries was sentenced to death, in part, simply because his life and worth paled in comparison to Smith.

It is irrelevant that the differences between Humphries and Smith were already "readily apparent to the jurors" even before the arguments. *Humphries*, 351 S.C. at 376, 570 S.E.2d at 168. Being aware of differences and being encouraged to weigh those differences in determining whether a death sentence is imposed are two different things. For example, in an inter-racial capital murder case the jury will clearly be aware of the "differences" in race. No one could doubt, however, that it would be improper to argue that this "difference" should be considered in determining the appropriate punishment. *Zant v. Stephens*, 462 U.S. at 885.

However it is parsed out, whether a comparison of "lives" or a comparison of "worths," such an argument can only encourage a death sentence on an improper basis that is irrelevant to "the character of the individual and the circumstances of the crime." *Id.* at 879. This Court should therefore grant review and vacate Humphries' death sentence.

Conclusion

For the reasons stated above, Humphries is entitled to a writ of habeas corpus vacating his sentence of death and imposing a life sentence as required under these circumstances by S.C. Code § 16-3-20(c). Alternatively, this Court should order a new sentencing hearing in this matter.

Respectfully submitted,

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