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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable George M. McFaddin, Circuit Court Judge

Appellate Case No. 2020-000631

CHARLES DAVENPORT……Petitioner,

v.

STATE OF SOUTH CAROLINA……Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the trial court judge abused his discretion by sentencing C.J. Davenport to 25 years, suspended on the service of 20 years, when he failed to meaningfully consider the significant mitigation offered by Davenport in support of a lesser sentence.

II. Whether South Carolina law regarding sentencing does not give adequate notice to a criminal defendant what factors will be considered by the court in imposing a sentence. Within the context of South Carolina's indeterminate sentencing structure, this results in a denial of due process.

STATEMENT OF THE CASE

Charles Davenport (C.J.) was indicted by the Richland County grand jury of felony DUI resulting in death, 2018-GS-40-8199. He pleaded guilty to this offense on November 8, 2018 before the Honorable George M. McFaddin. C.J. was represented by Joe McCulloch and Kathy Schillaci. The State was represented by Josh Golson. C.J. was sentenced to 25 years, suspended on the service of 20 years in prison. On November 16, 2018, counsel filed a Motion to Reconsider Sentence. Counsel filed a Supplemental Motion to Reconsider Sentence on December 5, 2018. On April 12, 2020, the court denied the motion.

Davenport then filed a notice of appeal. The final briefs, including a reply brief, were filed with the Court of Appeals on March 22, 2021. The Court of Appeals filed its opinion on March 15, 2023. Counsel timely filed a petition for rehearing on March 24, 2023. That petition was denied on April 20, 2023. The remittitur was issued on June 12, 2023. Counsel did not receive notification of either the petition for rehearing denial nor the issuance of the remitter. On September 20, 2023, counsel filed a motion to recall the remittitur. The Attorney General's Office has no objection to this request. The motion is still pending in the Court of Appeals.

This petition for a writ of certiorari follows.

ARGUMENTS

I. **The trial court judge abused his discretion by sentencing C.J. Davenport to 25 years, suspended on the service of 20 years, when he failed to meaningfully consider the significant mitigation offered by Davenport in support of a lesser sentence.**

The facts of this case are tragic and, unfortunately, all too common. C.J. Davenport was grossly intoxicated and speeding in the Rosewood area of Columbia, South Carolina when he hit the victim, David Newell, who was riding on his moped. The victim died. By all accounts, both young men were exceptional human beings.

A number of Newell's roommates from the University of South Carolina told the court during C.J.'s sentencing hearing how much he meant to them. David's cousin explained to the court that David was passionate about the drunk driving laws. David's hometown community suffered a tragedy in 2003 when several young people were killed in a drunk driving accident. The Happiness Foundation was started by one of David's late friends' wives to address the problem of drinking and driving.[1] ROA 28,32. David pledged not to drink and drive. He wrote a paper on the subject in school, according to his cousin. ROA. 28.

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[1] The victim and his family are from Maryland. There are a number of area media sources that refer to the Happiness Foundation and the deaths of Magruder High School students, Haeley McGuire, Spencer Datt, and Johnny Hoover. *See* https:// https://theblackandwhite.net/25019/feature/photo-of-the-day-90/ (last visited 5/22/20); https://foxbaltimore.com/news/cover-story/the-happiness-foundation-taking-a-pledge-against-drunk-driving (last visited 5/22/30); We Are Happiness.org at http://wearehappiness.org/?fbclid=IwAR1PZynEx3O8gh4Zzu0gLrilYQNj86qKW_jwrWv1_PbjwBHZPe_P7QLAhCU (last visited 7/22/20)

David's two older sisters also attended, and graduated from, the University of South Carolina. Both David's mother and father addressed the court to express their profound grief. David was an organ donor. Tr. 49. David and his sister prepared food for the homeless. Tr. 53.

C.J. Davenport is also an extraordinary young man. At his sentencing, C.J. expressed his deep remorse for the pain he caused:

> I'm imprisoned by this decision in my mind every day. I'm here to accept the responsibility of my actions, and again, tell Mr. Newell's family and his friends and his siblings and his ex-girlfriend that I'm just deeply sorry and so remorseful for my actions.
>
> It is something that I don't know I'll ever be able to cope with knowing that I injured another human being who had such a promising life, and that's—that's been the toughest part for me.

ROA. 59, l. 24- 60, l. 7.

C.J. was a camp counselor at Camp Cherokee in Blacksburg, South Carolina where he worked with children for many summers. He was a solid soccer player. He was active in his church. His mother informed the court about some of C.J.'s family's challenges—not to excuse C.J.'s behavior—but to explain some of the difficulties he experienced in the time leading up to this horrible accident.

C.J.'s parents divorced in 2015 and his mother had to sell the family's home. As his mother told the court: "Our family fell apart and broke apart in 2015, and C.J. took a lot of responsibility on his shoulders. Unfortunately, I see that now, a lot more than what we should have put on his shoulders." ROA 66.

When C.J. was a sophomore in college at the University of South Carolina, he underwent a number of surgeries. His gall bladder was removed and his liver was nicked. He became septic. His mother told the court he was in and out of the hospital numerous times due to these illnesses.

ROA 66. C.J. was in an extraordinary amount of pain. Because of his illness, he had to withdraw from college. ROA 68. C.J.'s mother told the court that they almost lost him on several occasions. ROA 66. They took him to numerous specialists, but nothing seemed to adequately treat C.J.'s pain. ROA 66-67. She said there were times that she was afraid to leave him, and that C.J. spent many hours crying, not sleeping, and praying. ROA 67.

Also, during this already challenging time, C.J.'s mother was also very ill. C.J. became the caretaker for both her and her father. Eventually, C.J.'s mother made C.J. go back to college, even though he was still struggling with his pain. ROA 68. She told the court she had not realized how much pressure her son had been under. C.J. started self-medicating with alcohol. ROA 69.

C.J.'s father spoke to the court about C.J.'s work at the camp for years, and that he taught junior varsity soccer. ROA 71.

C.J.'s childhood best friend, Orlantrez Snipes, also addressed the court. ROA 72. Snipes explained that he had been a troubled child, but that C.J. supported him. At one point, Orlantrez contemplated suicide, but C.J. joined him in a closet, crying, and told him that Orlantrez couldn't leave him. ROA 73. Then Orlantrez related this story:

> A little while later, I started living with C.J. and them. I don't think C.J. knows this, but I heard C.J. in the room with this parents, and he told his parents that he wanted nothing for Christmas. He wanted me to have a great Christmas. He wanted his parents to give me presents.

ROA 73.

Prior to this tragic event, C.J. did not have any prior criminal record.

The judge then sentenced C.J.:

> THE COURT: Like many of you, your thoughts are varied. I'm afflicted with the same situation right now. So I'm going to try to keep it short.

> First of all, I read everything that was given to me, everything. I read my notes from those who spoke. Cases like this are so hard to work with. I probably could have figured out a reason to pass it off to another judge for another day. I'm not hired to dodge work . . .
>
> I realize clearly that Mr. Davenport never intended to cause the death of Mr. Newell, and he's not a monster. It's a terrible mistake. But I'm here today working within the confines of the statute.
>
> And while Mr. Davenport didn't choose the outcome of what happened, he did choose to operate a vehicle under the influence of a high level of alcohol and with THC and add to that the aggravating factor of high-speed driving almost twice the speed limit.
>
> Mr. Davenport has no prior record. He didn't intend for the death to occur, and I think he's sorry, but the aggravating factors are those I just mentioned, consumption of alcohol, use of marijuana, and as the device on the truck indicated, driving about twice the speed limit on the city street.
>
> The sentence of this Court is that Mr. Davenport shall be incarcerated at the Department of Corrections for a period of 25 years suspended to 20 years and with a fine of $10,100, and that's my sentence.

ROA 81-82.

Trial counsel promptly filed a motion to reconsider the sentence. ROA 86.

Denying the motion, the court indicated:

> I did not see this crime as the result of a mere accident where Defendant was slightly intoxicated and pulled in front of another driver, for example. I considered Defendant's blood alcohol level, his THC level, and his driving at 76 miles per hour on a city street in a 35 miles per hour zone at or shortly before the impact….
>
> I considered the ages of the Defendant and the victim, David Newell, along with the facts of this case. Mr. Newell was lawfully on the roadway. Defendant was knowingly engaging in unlawful acts while on the roadway.
>
> I considered the awful pain of the victim's family and the remorse of Defendant and his family.
>
> I read the anecdotal information Defendant provided about sentencing across South Carolina in similar felony death DUI cases. I do not accept the

> assertion that because other judges have issued shorter sentences in similar cases my sentence is therefore improper or an abuse of discretion . . .
>
> Defendant offered in his motion "GOALS OF SENTENCING AND CHARLES DAVENPORT" wherein Defendant's character and rehabilitative potential are noted. Offered also is information related to the seriousness of the offense, the need to protect society and the need for deterrence and punishment. However, all of it comes back to the length of the sentence, and I have offered my reasons for the sentence.

ROA 321-323.

The court also noted in its order denying reconsideration that "[t]he statute does not provide a list of aggravating or mitigating factors that a judge shall consider."

ROA 322.

There is no question but that a trial judge has broad discretion in sentencing within statutory limits. *Brooks v. State*, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997). A judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant. *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support. *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

The circuit court judge erred in this case by rendering a sentence that was too punitive under the tragic facts of this case, and in light of the significant mitigation that C.J. offered to the court to justify a lesser sentence.

In a case from the Supreme Court of Indiana, *Cardwell v. State*, 895 N.E.2d 1219 (2008), the Court there found that the trial court's sentence of 34 years for intentionally burning the hands of a 3 year old child and then delaying medical care was too punitive even though the sentence fell

within the statutory guidelines. The Court revised the sentence to 17 years finding the "the thirty-four years imposed by the trial court is sufficiently out of the range of appropriate results." *Id.* at 1226. It remanded the case back to the trial court to impose that sentence.

In *Commonwealth v. Dodge*, 957 A.2d 1198 (2008), the Superior Court of Pennsylvania remanded to correct an overly-harsh sentence when the sentencing court took account of the sentencing guidelines and factors enumerated in the statute, that the court had ample opportunity to observe the appellant and had the benefit of a pre-sentence report. The sentencing court also noted that the appellant had been a career criminal despite prior attempts at rehabilitation, and noted its lack of regard for the victims and family members. Still, the court found that the judge's essentially ensuring a life sentence for the defendant constituted an abuse of discretion under the facts of the case.

The Court of Appeals in Michigan, in *People v. Curry*, 371 N.W.2d 854 (1985) articulated a number of considerations to be taken into account in sentencing an offender:

> When sentencing a defendant, the trial court may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information considered or the source of such information. Proper criteria for determining an appropriate sentence include: (1) the disciplining of the wrongdoer; (2) the protection of society; (3) the potential for reformation of the offender; and (4) the deterring of others from committing like offenses. Other appropriate considerations are the nature and severity of the crime committed, behavior by the defendant which demonstrates a disrespect for legal processes and a lack of respect for the law, and defendant's criminal record. The modern view of sentencing is that the sentence should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential.

Id. at 857.

The court, in this case, remanded for resentencing because the trial court judge focused on the defendant's status as a habitual offender and not on the crime itself. The defendant was given a life sentence for stealing, a sentence authorized by statute.

In *Eiler v. State*, 938 N.E.1235 (Ct. App. 2010) the Indiana Court of Appeals revised a sentence for a defendant who pleaded guilty to dealing cocaine, a class A felony, initially sentenced to 22 years, with four years suspended, to 22 years with 10 years suspended. The court found the longer sentence was inappropriate in light of the defendant's age, his minimal criminal history, his ability to maintain a job, his taking responsibility for his actions, that he was the family's main financial provider and that he only sold cocaine to the same people with whom he used and that he did not profit financially from doing so.

Like these other sentences, C.J.'s sentence is disproportionate to his crime, especially in light of the tremendous amount of mitigating evidence that was offered on his behalf. C.J. was a college student with some mental health issues due to his family's situation and his personal health. He is profoundly remorseful and readily accepted responsibility for his actions. C.J. had never been in trouble with the law before. He worked with children at a camp and played sports. By all objective measures, C.J. is a law-abiding young man with a bright future. But one night, this horrible tragedy occurred and C.J.'s was responsible for it. Still, there is no societal value in incarcerating C.J. for the next 20 years of his life.

In its argument before the court of appeals, the State relied on State v. White, 311 S.C. 289, 428 S.E.2d 740 (Ct. App. 1993) to make its case that the sentence imposed in this case was appropriate. The case, frankly, illustrates why C.J. Davenport's sentence is disproportionate to his crime and suggests why the South Carolina appellate courts should provide more guidance to

the bench and bar about appropriate sentences in difficult cases. White's 21-year sentence is much more appropriate for his case given the significant aggravating factors present. As the opinion notes, upon his first contact with law enforcement, White lied to the police about what happened. He told the Trooper he had been in a fight. Then, at the hospital, he informed medical personnel that he had been hit by a truck he was trying to flag down. Then, after becoming verbally abusive, White had to be placed in "four-point restraints" for the night. Only then, after having been at the hospital for over 3 hours, did he tell the nurse that he had been in a driving accident and he expressed fear that his passenger had been killed. Troopers finally found the passenger who had sustained fatal chest and neck injuries. Under these facts, the Court found that White's claim that his 21-year sentence was "excessive as a matter of law" had no merit since it was still below the statutory maximum of 25 years. Petitioner agrees.

Davenport's claim is not that a 20-year sentence for felony DUI with death is "excessive as a matter of law." Rather he argues that the circuit court judge did not adequately consider the extensive mitigation that was offered on his behalf by family, friends, and his lawyers. As detailed in the initial brief, Davenport offered extraordinary mitigation on his own behalf. This tragedy was not the nadir of an otherwise troubled life. Instead, C.J. has had many accomplishments and has shown himself to be a consummately decent person who made a horrible and devastating mistake.

According to the State, a sentencing judge does not have to consider any particular factors in determining an appropriate sentence for a criminal defendant. In its briefing to the Court of Appeals, the State argued, "[a]nd, while Appellant may have preferred the plea judge focus exclusively on Appellant's purported potential for rehabilitation or past positive actions, the plea judge was *not* required to do so and, instead, was fully permitted to consider other penological

goals, such as deterrence or incapacitation, when deciding upon an appropriate punishment for Appellant's offense." Resp't's Brief, p. 15 (emphasis in original). To be clear, Davenport has never suggested that the circuit court should have discounted the very real and tragic loss associated with Newell's death. But also, the State's argument appears to be that a circuit court has absolutely no duty to consider mitigation evidence at all. The State's position here would leave criminal sentencing in South Carolina without any meaningful guardrails. It is this free-for-all view of criminal sentencing that promotes continued "judge-shopping" issues and ultimately undermines faith in our criminal justice system. Given the extraordinary growth in guilty pleas over the past several decades, this Court should take the opportunity to revisit its sentencing jurisprudence to make the system more equitable and just. Respectfully, Davenport asks this Court to begin that process by finding the sentence in this case to be unduly harsh in light of C.J.'s significant mitigation. Respectfully, the circuit court judge abused his discretion in imposing this overly punitive sentence, and C.J. Davenport asks this Court to remand for a new sentencing hearing.

II. South Carolina law regarding sentencing does not give adequate notice to a criminal defendant what factors will be considered by the court in imposing a sentence. Within the context of South Carolina's indeterminate sentencing structure, this results in a denial of due process.

When Charles Davenport entered his guilty plea and prepared to be sentenced before the Honorable George McFaddin on November 8, 2018, he did not have any clear idea of what factors the judge would consider in rendering his sentence; he just understood that his sentence would be somewhere between 1 and 25 years in prison according to *South Carolina Code* §56-5-2945(A)(2).

As the judge pointed out in his order denying reconsideration, he was not mandated to consider any particular aggravating or mitigating factors. ROA 322.

Most recently, the South Carolina Supreme Court has outlined how broad this judicial discretion is in *State v. Quinn*, 430 S.C. 115, 843 S.E.2d 355 (2020)*:*

> Generally, a sentencing judge has great discretion in the kind of evidence she may use to assist her in determining the punishment to be imposed… Indeed, she is obligated to consider information material to punishment and may "exercise a wide discretion in the sources and types of evidence used to assist [her] in determining the kind and extent of punishment to be imposed within limits fixed by law.

Id. at 125 (internal citations omitted).

South Carolina is one of the few remaining states that has a pure indeterminate sentencing structure, as opposed to a determinate or structured sentencing system. We share this universe with Massachusetts, Connecticut, New Hampshire, Vermont, West Virginia, Kentucky, Georgia, Iowa, Oklahoma, Texas, Nebraska, South Dakota, North Dakota, Montana, Wyoming, Idaho, and Nevada. *See Making Sense of Sentencing: State Systems and Policies*. *See* https:// https://www.ncsl.org/documents/cj/sentencing.pdf (*last visited* 5/18/20). What this means in South Carolina is that judges are free to impose sentences within very wide discretionary ranges, and our appellate courts have very rarely reviewed those sentences. Indeed, since 2008, in South Carolina, criminal defendants may no longer appeal their facially valid pleas, even though 97% of federal convictions and 94% of state convictions are the result of guilty pleas. *See Missouri v. Frye*, 566 U.S. 134 (2012) (citing Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, http://www.albany.edu/sourcebook/pdf/ t5222009.pdf.

The consequence of this is that there is virtually no appellate oversight of criminal sentences that are being imposed in South Carolina's courts of general sessions. Without appellate review, there are no opinions providing guidance to the judges in this state about factors to consider in sentencing, nor are there instructive cases for practitioners to review to provide meaningful guidance to criminal defendants as to the likelihood of a particular range of sentences given facts present in their cases. Instead, as every state practitioner knows, it is often a crap shoot what a particular sentence a defendant will receive, and practitioners continue to play the "judge lottery" by trying to plead their clients' cases before judges deemed to be "more favorable" for their clients. The current situation in our courts of general sessions is deeply unfair to criminal defendants and reflects the former situation in the federal criminal justice system.

In *Mistretta v. United States*, 488 U.S. 361 (1989), the United States Supreme Court details some of the conditions that existed prior to the enactment of the Federal Sentencing Guidelines. It notes, from its analysis of the Senate Report on the 1984 legislation, S. Rep. No. 98-225 (1983), U. S. Code Cong. & Admin. News 1984, the observation that the previous indeterminate sentencing structure, then used by the federal courts, had two "unjustifie[ed] and "shameful" consequences. *Id.* at 38, 65. "The first was the great variation among sentences imposed by different judges upon similarly situated offenders. The second was the uncertainty as to the time the offender would spend in prison. Each was a serious impediment to an evenhanded and effective operation of the criminal justice system. *Mistretta* at 652. *See Apprendi v. New Jersey*, 530 U.S. 466, 549-550 (2000) (J. O'Connor, Kennedy, and Breyer dissenting) ("Studies of indeterminate-sentencing schemes found that similarly situated defendants often received widely disparate sentences" and noting that the data shows that in those jurisdictions where the sentencing

structure is more indeterminate, judicially imposed sentences tend to be longer); *Koon v. United States*, 518 U.S. 81, 113 (1996) (noting the need "to reduce unjustified disparities" in criminal sentencing "and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice"); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 505 (2008) ("The importance of this for us is that in the old federal sentencing system of general standards the cohort of even the most seasoned judicial penalty-givers defied consistency). Plea counsel, in this case, attempted to convince the judge that C.J.'s sentence was longer than those of similarly situated individuals, but the judge was unmoved. ROA 321-324.

As a matter of fundamental fairness, a criminal defendant should be allowed to plead guilty and be sentenced by a judge who is committed to meaningfully assessing all of the mitigation evidence he has marshalled on his behalf. *See Marchant v. Pennsylvania R.R.*, 153 U.S. 380, 386 (1894) (Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power). As it stands now, there are absolutely no assurances that judges are considering these factors. And this Court has abdicated its duty to ensure some fairness in the system by not requiring judges to put their sentencing reasoning on the record to facilitate meaningful appellate review of these sentences. In a system that is so overwhelmingly reliant on guilty pleas, this Court should exercise its inherent discretion and provide more oversight of criminal sentences. Respectfully, this Court should remand this case for resentencing with guidance from the Court as to what mitigating and aggravating factors the court should use to guide his discretion.

CONCLUSION

This Court should grant the writ.

Respectfully submitted,

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October 1, 2023

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CERTIFICATE OF SERVICE

I certify that I have served a copy of this petition for writ of certiorari by depositing a copy of it in the United States Mail, on this date, October 2, 2023, postage prepaid, and addressed to Mark Farthing at the South Carolina Attorney General's Office at P.O. Box 11549, Columbia, South Carolina 29211-1549

/s/ Elizabeth Franklin-Best