

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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.

APPENDIX

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The State of South Carolina.....Respondent,

v.

Charles Davenport.....Appellant.

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STATEMENT OF THE ISSUES ON APPEAL

- 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 gives 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, does this result 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.

This appeal timely 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.

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. ROA 49. David and his sister prepared food for the homeless. ROA 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.

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://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)

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 an 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. The circuit court judge abused his discretion in imposing this overly punitive sentence, and respectfully C.J. 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 not 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

For these reasons, the Court should remand this case for resentencing.

Respectfully submitted,

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I. The plea judge did not abuse his broad sentencing discretion or commit any other error of law by sentencing Appellant to a twenty-five-year term of imprisonment that was suspended to twenty years’ imprisonment and a fine after Appellant knowingly and voluntarily pled guilty to felony driving under the influence resulting in a death because the sentence imposed fell within the permissible statutory sentencing limits for Appellant’s offense and nothing appearing in the record established it was imposed as the result of any partiality, prejudice, corrupt motive, or improper considerations on the part of the plea judge.9

II. To the extent Appellant appears to be asserting the manner in which he was sentenced violated his due process rights, that particular constitutional claim was not properly preserved for appellate review because it was neither raised to nor ruled upon by the plea judge. Furthermore, even if that constitutional claim could somehow appropriately be raised and considered for the first time on appeal, Appellant’s due process rights were not violated by the manner in which he was sentenced because he was fully on notice of the applicable sentencing limits for his offense before he pled guilty and was sentenced to a term of imprisonment falling squarely within those limits.19

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United States v. Booker, 543 U.S. 220 (2005).23

Other State and Federal Cases:

People v. Cruz, 141 N.E.3d 1119 (Ill. App. Ct. 2019).17

Reina-Rodriguez v. United States, 655 F.3d 1182 (9th Cir. 2011).15

State v. Grant, 483 A.2d 411 (N.J. Super. Ct. App. Div. 1984).12

State v. Helms, 40 P.3d 626 (Utah 2002).17

Constitutional Provisions, Statutes, and Rules:

U.S. Const. amend. V.22

U.S. Const. amend. XIV, § 1.23

S.C. Const. art. I, § 3.23

S.C. Code Ann. § 44-53-370.12

S.C. Code Ann. § 56-5-1520.12

S.C. Code Ann. § 56-5-2933.12

S.C. Code Ann. § 56-5-2945.13, 14

Ind. R. App. P. 7.8

42 Pa. Stat. and Cons. Stat. Ann. § 9781.8

Other Authorities:

Jean Hoefler Toal et al., Appellate Practice in South Carolina (3rd ed. 2016).20

William J. Rauch et al., Risk of Alcohol-Impaired Driving Recidivism Among First Offenders and Multiple Offenders, 100 Am. J. Pub. Health 919 (2010).15

STATEMENT OF ISSUES ON APPEAL

I.

Did the plea judge abuse his discretion by sentencing Appellant to twenty-five years, suspended on the service of twenty years, when he purportedly failed to meaningfully consider the significant mitigation offered by Appellant in support of a lesser sentence?

II.

Does South Carolina law regarding sentencing give adequate notice to a criminal defendant as to what factors will be considered by the court in imposing a sentence, and, within the context of South Carolina's indeterminate sentencing structure, does that result in a denial of due process?

COUNTER-STATEMENTS OF ISSUE ON APPEAL

I.

Did the plea judge abuse his broad sentencing discretion or commit some other error of law by sentencing Appellant to a twenty-five-year term of imprisonment that was suspended to twenty years' imprisonment and a fine after Appellant knowingly and voluntarily pled guilty to felony driving under the influence resulting in a death when the sentence imposed fell within the permissible statutory sentencing limits for Appellant's offense and nothing appearing in the record established it was imposed as the result of any partiality, prejudice, corrupt motive, or improper considerations on the part of the plea judge?

II.

To the extent Appellant appears to be asserting the manner in which he was sentenced violated his due process rights, is that particular constitutional claim properly preserved for appellate review when it was neither raised to nor ruled upon by the plea judge? Furthermore, even if that constitutional claim could somehow appropriately be raised and considered for the first time on appeal, were Appellant's due process rights violated by the manner in which he was sentenced when he was fully on notice of the applicable sentencing limits for his offense before he pled guilty and was sentenced to a term of imprisonment falling squarely within those limits?

STATEMENT OF THE CASE

In November of 2017, Appellant Charles Davenport, Jr. was arrested following an investigation into a truck and moped collision that resulted in the death of the moped's driver. In February of 2018, the Richland County Grand Jury indicted Appellant for felony driving under the influence ("DUI") resulting in a death. On November 8, 2018, Appellant appeared in the Richland County Court of General Sessions and entered a guilty plea to the indicted offense before the Honorable George M. McFaddin, Jr., circuit court judge. During the course of the plea hearing, the plea judge accepted Appellant's guilty plea and sentenced him to a twenty-five-year term of imprisonment that was suspended upon the service of a twenty-year term of imprisonment and a fine of \$10,100. Thereafter, Appellant filed both a motion and a supplemental motion seeking reconsideration of the sentence. Subsequently, through an order dated April 12, 2020, the plea judge declined to reconsider Appellant's sentence. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

Around 7:25 p.m. on the evening of November 15, 2017, David Newell, a twenty-two-year-old college senior attending the University of South Carolina and a staunch advocate against drunk driving, was driving along on his moped in the right-hand lane of Rosewood Drive in the City of Columbia. (R. pp. 7-8; p. 28; pp. 33-34; pp. 39-41; pp. 51-54). At that same time, Appellant, a twenty-three-year-old college junior, was also travelling along Rosewood Drive in his father's full-size pickup truck just behind Newell. (R. p. 7; pp. 57-58). However, unlike Newell, Appellant was not merely lawfully operating a vehicle on the roadway. (R. p. 7). Instead, Appellant was driving at a speed of approximately seventy-six miles per hour, which was more than double the posted speed limit of thirty-five miles per hour, and had his vehicle's accelerator pedal essentially pressed all the way to the floorboard. (R. pp. 12-13). Furthermore, Appellant was grossly intoxicated, had consumed so much alcohol his blood alcohol concentration was 0.154 percent, was also under the influence of recently-used marijuana, and was potentially under the influence of Xanax. (R. pp. 10-12; pp. 15-16).

Tragically, due to his substantial level of impairment from multiple sources combined with his reckless driving, Appellant crashed his truck into the back of Newell's moped, which caused catastrophic injuries to Newell and ejected Newell's body into the left-hand lane of the roadway. (R. p. 8; p. 13). Appellant then lost control of his vehicle and—while dragging Newell's moped along—careened off the roadway into a tree. (R. p. 8; p. 13). Significantly, the collision with the tree brought Appellant's truck to a halt, but Appellant was still depressing the vehicle's accelerator pedal at the time of impact. (R. p. 13).

In the immediate aftermath of those terrible events, multiple witnesses to the collision quickly alerted authorities of what had occurred, emergency personnel rapidly responded to the

scene, and both Newell and Appellant were rushed to the hospital. (R. pp. 8-9). However, by that point, Newell was already unresponsive. (R. p. 9). As to why, Newell had sustained multiple spinal fractures and traumatic brain injuries from the collision, and those injuries were both irreparable and wholly incompatible with life. (R. p. 13; p. 54). Sadly, Newell's time of death was recorded at the hospital not long after the collision, and he was subsequently removed from a life support system that kept his body functioning long enough for his family to get to his side and for arrangements to be made consistent with his previously-expressed desire to be an organ donor. (R. p. 13; p. 33; pp. 36-37; pp. 46-49; p. 51; p. 332).

Meanwhile, blood samples were collected from Appellant at the hospital, and an analysis of those samples revealed the extreme extent of his intoxication along with the presence of the alcohol and other substances in his system. (R. pp. 10-12). Furthermore, law enforcement officers investigating the collision attempted to speak with Appellant once he regained consciousness. (R. pp. 9-10). However, aside from revealing he had been at a friend's house prior to the collision, Appellant declined to make any further statements. (R. p. 10).

Ultimately, as a result of law enforcement's investigation, Appellant was arrested and indicted for felony DUI resulting in a death, and he elected to plead guilty to that offense. (R. pp. 3-4; pp. 13-14; pp. 327-328). During the course of the ensuing plea hearing, Appellant acknowledged he was facing a sentence between one and twenty-five years based on his plea. (R. pp. 5-6). Appellant further agreed the solicitor's summary of his criminal actions was "substantially" correct, and he personally confirmed he was guilty as charged.¹ (R. pp. 7-16).

¹ Notably, the defense's only quibble with the solicitor's account of Appellant's crime was a belief the Xanax detected in Appellant's system "may" have been administered during medical treatment provided after the collision. (R. pp. 15-16). However, Appellant directly affirmed there was no dispute concerning his use of alcohol and marijuana around the time of the collision. (R. p. 16).

Following those remarks, the plea judge accepted Appellant's guilty plea as freely, knowingly, voluntarily, and intelligently entered. (R. p. 17).

After the plea was accepted, a number of Newell's family members and friends addressed the court and provided statements about their profound and lasting grief over the loss caused by Appellant's "indefensible" choices. (R. pp. 18-56). Many of those individuals also requested the imposition of the maximum punishment while pointing to its high potential to serve as a powerful deterrent to other potential offenders. (R. pp. 18-56). In addition to those remarks, Appellant personally addressed the court, indicated he was "truly sorry," and attributed what occurred to his efforts to "self-medicate." (R. p. 59). However, Appellant also denied "just" being "completely reckless." (R. p. 59). Furthermore, many of Appellant's family members and friends spoke on his behalf and discussed his positive attributes. (R. pp. 60-76). Finally, defense counsel addressed the court, affirmed he believed the plea judge was "uniquely equipped to be objective and to consider everything" he heard based on his past experiences, and explicitly called the plea judge's attention to the fact Appellant had no prior record. (R. pp. 76-79).

Thereafter, the plea judge took the matter under advisement for several hours. (R. p. 80). He then returned to the courtroom and confirmed he reviewed everything that had been presented before reaching his sentencing decision. (R. p. 80). As to the basis for that decision, the plea judge explained he recognized Appellant did not intend his victim's death but noted Appellant nonetheless did choose to operate a vehicle under the influence of multiple intoxicating substances. (R. p. 81). He further indicated he gave consideration to Appellant's lack of a prior record and apparent remorse. (R. p. 81). However, the plea judge also indicated he gave consideration to the multiple aggravating factors involved, which included Appellant's consumption of both marijuana and alcohol and the fact Appellant was driving around twice the

posted speed limit on a city street. (R. p. 81). The plea judge then imposed a twenty-five-year sentence that was suspended to a twenty-year term of imprisonment along with a mandated fine of \$10,100. (R. pp. 81-82).

Subsequent to the plea hearing, defense counsel filed a motion seeking reconsideration of Appellant’s sentence.² (R. pp. 86-94). In seeking such relief, defense counsel alleged Appellant’s sentence was not just a “surprise” but a “shock” and argued it was purportedly: (1) greater than necessary to achieve the goals of sentencing; (2) disproportionate in comparison to the sentences imposed in the past upon similarly-situated defendants; and (3) “excessive given the facts of the case.” (R. p. 86). As support for those claims, defense counsel referenced data compiled regarding sentences imposed on offenders in South Carolina between 2014 and 2018 and alleged Appellant’s sentence was above the average sentence imposed for other offenders convicted of felony DUI resulting in a death during that limited time frame. (R. pp. 86-87). Defense counsel also identified several aggravating factors— “prior convictions for others offenses, prior convictions for similar offenses, general lawlessness, and diagnosed or ignored personality or addiction generated misconduct”—that purportedly were of particular significance while maintaining none of those self-selected aggravating factors were present in Appellant’s case. (R. p. 88). Furthermore, defense counsel maintained Appellant’s sentence was “excessive” due to the fact Appellant lacked a prior criminal record, had support in the community, had a lower likelihood to be a repeat offender based on his status as a first-time offender, and had a high potential for rehabilitation based on his lack of “prior DUI convictions or a repeated history of lawlessness.” (R. pp. 90-93). For all those reasons, defense counsel urged the plea judge to

² In addition to the reconsideration motion, defense counsel also submitted a supplemental motion with a partial transcript attached that contained remarks a different plea judge made before sentencing an offender who pled guilty to one count of felony DUI resulting in great bodily injury and one count of felony DUI resulting in death. (R. pp. 308-320).

reconsider Appellant's sentence while noting Appellant had accepted responsibility for his actions and understood he would have to serve a "substantial" sentence as a consequence of them.³ (R. p. 93).

Upon giving the matter due consideration, the plea judge declined to reconsider Appellant's sentence. (R. pp. 321-324). In declining to do so, the plea judge explained he listened to everyone who spoke during the plea hearing, considered what they said, and imposed Appellant's sentence after thoughtfully evaluating the matter. (R. pp. 321-322; p. 324). Additionally, the plea judge noted the sentence he imposed complied with and fell within the limits established by the legislature for Appellant's crime. (R. p. 322). Furthermore, the plea judge indicated he provided an explanation for the sentence when it was imposed and reiterated he considered the following factors to be particularly important to his sentencing decision: (1) Appellant was heavily intoxicated; (2) Appellant had consumed multiple intoxicating substances; (3) Appellant was driving at a speed more than double the speed limit on a city street at or shortly before the point he collided with his victim's vehicle; (4) Appellant's victim was driving lawfully on the roadway at the time of the collision; and (5) Appellant was knowingly engaging in unlawful acts on the roadway at that same time. (R. pp. 322-323). Beyond that, the plea judge noted he considered defense counsel's arguments from the reconsideration motion along with the anecdotal evidence provided. (R. p. 323). However, the plea judge found the sentence imposed was nonetheless warranted. (R. pp. 323-324). For all those reasons, the plea judge denied the reconsideration motion. (R. p. 324).

³ Significantly, defense counsel did *not* allege at any point in the reconsideration motion Appellant's due process rights were violated by the manner in which he was sentenced or raise any arguments as to the adequacy of the notice Appellant had received in regard to sentencing. (R. pp. 86-94).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Palmer, 415 S.C. 502, 511, 783 S.E.2d 823, 827 (Ct. App. 2016). When reviewing a sentencing issue on appeal, an appellate court will only interfere with a circuit court judge’s sentencing decision in rare and unusual circumstances in light of the broad discretion afforded to the circuit court judge on such matters. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952); see State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974) (“A broad discretion is allowed the trial judge in imposing sentence within the legal limits.”); see also State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (“A trial judge generally has wide discretion in determining what sentence to impose.”). Furthermore, appellate courts in South Carolina have “no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by law in the discretion of the [sentencing] judge, and is not the result of partiality, prejudice, oppression or corrupt motive.”⁴ State v. Scates, 212 S.C. 150, 154, 46 S.E.2d 693, 694 (1948); cf. State v. Davis, 88 S.C. 229, ___, 70 S.E. 811, 814 (1911) (“It is excepted that imprisonment for five years in this case is excessive. We have repeatedly held that we have no jurisdiction to correct a sentence on this ground, provided it is within the limits prescribed by law for the discretion of the trial court, and is not the result of partiality, prejudice, oppression, or corrupt motive.”).

⁴ Notably, that limited standard of review differentiates South Carolina appellate courts from some out-of-state appellate courts that have been expressly conferred with wider authority to review sentencing decisions. See, e.g., Ind. R. App. P. 7 (establishing the scope of appellate review of a criminal sentence and permitting Indiana appellate courts to “revise” a statutorily-authorized sentence on appeal “if, after due consideration of the trial court’s decision, the [appellate] [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender”); 42 Pa. Stat. and Cons. Stat. Ann. § 9781(c) (establishing the parameters of appellate review of criminal sentences in Pennsylvania and permitting appellate courts to evaluate sentences for reasonableness pursuant to established guidelines).

ARGUMENT

I.

The plea judge did not abuse his broad sentencing discretion or commit any other error of law by sentencing Appellant to a twenty-five-year term of imprisonment that was suspended to twenty years' imprisonment and a fine after Appellant knowingly and voluntarily pled guilty to felony driving under the influence resulting in a death because the sentence imposed fell within the permissible statutory sentencing limits for Appellant's offense and nothing appearing in the record established it was imposed as the result of any partiality, prejudice, corrupt motive, or improper considerations on the part of the plea judge.

Appellant contends the plea judge reversibly erred by sentencing him to a twenty-five-year term of imprisonment that was suspended to twenty years' imprisonment and a fine after he knowingly and voluntarily pled guilty to felony DUI resulting in a death, which—by Appellant's own admission—was an offense punishable by a term of imprisonment of up to twenty-five years. As support for that claim, Appellant alleges the plea judge abused his broad sentencing discretion by purportedly failing to “meaningfully” consider the “tremendous amount” of mitigating evidence presented and by imposing a sentence that was allegedly “too punitive” for the deadly crime committed. To the contrary, the plea judge did not commit any error whatsoever when sentencing Appellant—or when refusing to reconsider the sentence imposed—because he imposed a sentence that fell within the permissible statutory sentence limits for Appellant's terrible offense after considering *all* the evidence presented to him, and nothing appearing in the record established the plea judge imposed Appellant's statutorily-authorized sentence as the result of any partiality, prejudice, corrupt motive, or improper considerations. Under such circumstances, there is no proper basis upon which Appellant's sentence can be disturbed on appeal. Appellant's conviction and sentence should be affirmed.

In South Carolina, sentencing judges are vested with broad discretion to impose a sentence falling within the statutory limits upon an offender convicted of a crime. Sidell, 262

S.C. at 398, 205 S.E.2d at 3. In exercising that broad sentencing authority, the sentencing judge must be accorded “very wide” discretion to determine the appropriate sentence and can properly consider “any and all information that reasonably might bear upon the proper sentence for the particular defendant, given the crime committed.” State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). Amongst the information that may be considered, the sentencing judge can consider such factors as the conduct or demeanor the defendant and the “atmosphere” of the proceedings if applicable when determining what sentence to impose. See Scates, 212 S.C. at 155, 46 S.E.2d at 695 (“It must be remembered that the demeanor and conduct of the prisoner, and the atmosphere of the trial, are not truly reflected in a cold, written record.”). Likewise, the sentencing judge is fully permitted to consider one or more of variety of legitimate penological justifications—including retribution, incapacitation, deterrence, and rehabilitation—in deciding what sentence is appropriate under the circumstances. See Ewing v. California, 538 U.S. 11, 25 (2003) (plurality opinion) (instructing “[a] sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation[,]” and explaining there is no constitutional mandate requiring adoption of any one penological theory); Jones v. United States, 463 U.S. 354, 368-369 (1983) (“A particular sentence of incarceration is chosen to reflect society’s view of the proper response to commission of a particular criminal offense, based on a variety of considerations such as retribution, deterrence, and rehabilitation.”). Importantly, so long as the sentence imposed falls within the permissible sentencing limits for an offender’s crime, the sentencing judge’s decision regarding the appropriate sentence will not be found to be improper unless it violated the constitutional prohibition against cruel and unusual punishment or resulted from partiality, prejudice, oppression, or corrupt motive.⁵ See Garrett v.

⁵ Perhaps tellingly, aside from making a conclusory statement in the notice of appeal, Appellant

State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995) (“A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against respondent.”); Wood v. State, 257 S.C. 179, 182, 184 S.E.2d 702, 703 (1971) (“It is well settled in this State that this Court has no jurisdiction to disturb, because of alleged excessiveness, a sentence which is within the limits prescribed by statute unless: (a) the statute itself violates the constitutional injunction . . . against cruel and unusual punishment, or (b) the sentence is the result of partiality, prejudice or pressure or corrupt motive.”).

Notably, in State v. White, 311 S.C. 289, 296, 428 S.E.2d 740, 744 (Ct. App. 1993), this Court addressed a challenge to a twenty-one-year sentence imposed following a conviction for felony DUI resulting in a death. In that case, evidence was presented establishing White crashed his vehicle while driving at a speed of approximately seventy-five to eighty miles per hour on an *interstate* highway, and White’s *passenger* was killed as a result of the crash. Id. at 293, 428 S.E.2d at 742. Further evidence was presented establishing White’s blood alcohol concentration was .079 percent several hours after the crash, and the presence of benzodiazepine was also detected in White’s urine. Id. at 292, 428 S.E.2d at 742. White was ultimately convicted of felony DUI in connection to the fatal crash, and the trial judge sentenced him to a twenty-one-year term of imprisonment.⁶ Id. at 296, 428 S.E.2d at 744. Following his conviction, White appealed, arguing his sentence was “excessive as a matter of law.” Id. at 296, 428 S.E.2d at 744. However, on appeal, this Court rejected White’s sentencing challenge as having “no merit whatsoever.” Id. As support for that conclusion, this Court simply noted White’s sentence fell

has not attempted to argue his sentence constituted cruel and unusual punishment on appeal. (App. Br. pp. 1-13; R. pp. 333-334).

⁶ Notably, nothing contained in the opinion in White suggests White had any prior convictions that impacted the trial judge’s sentencing decision. White, 311 S.C. at 296-297, 428 S.E.2d at 744.

squarely within the statutory sentencing range for White’s offense and, based on that alone, affirmed White’s sentence without need for further analysis or discussion. Id.

In the case sub judice, Appellant selfishly chose to operate a motor vehicle on a South Carolina roadway while grossly intoxicated, and that legally-and-morally indefensible choice resulted—predictably—in the death of a blameless victim who did nothing other than attempt to lawfully drive his own vehicle at a time of day in which countless other people routinely do the exact same thing. See State v. Long, 186 S.C. 439, ___, 195 S.E. 624, 627 (1938) (“[T]he driving of an automobile upon the public highway by a person while intoxicated is not only *malum prohibitum*, but *malum in se*.”); see also State v. Grant, 483 A.2d 411, 414 (N.J. Super. Ct. App. Div. 1984) (characterizing a drunk driver as “one of the chief instrumentalities of human catastrophe”). Additionally, Appellant’s blood alcohol concentration was well above the legal limit at that time, and he had also consumed at least one other substance—marijuana—that cannot even be legally possessed in our state. See S.C. Code Ann. § 44-53-370 (outlawing—amongst other things—possession of marijuana); S.C. Code Ann. § 56-5-2933(A) (“It is unlawful for a person to drive a motor vehicle within this State while his alcohol concentration is eight one-hundredths of one percent or more.”). Furthermore, Appellant was unlawfully operating his vehicle—a full-size pickup truck—on a *city* street located in the heart of South Carolina’s capital at a speed—seventy-six miles per hour—more than double the posted speed limit and in excess of the permissible speed limit on *any* South Carolina roadway, including our interstate highways. See S.C. Code Ann. § 56-5-1520(B)(1) (setting the maximum speed limit for interstate highways in South Carolina at seventy miles per hour). Undeniably, Appellant’s actions were exceedingly wrongful and dangerous, which is perhaps best demonstrated by the fact similar actions have been recognized as being sufficiently culpable to warrant a conviction

for *murder*. Cf. State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957) (concluding evidence establishing Mouzon struck and killed a pedestrian while intoxicated and driving a vehicle at a speed of seventy to eighty miles per hour in an area with a posted speed limit of thirty-five miles per hour in the small town of Alcolu supported Mouzon’s conviction for murder along with its accompanying life sentence).

As a consequence of his unjustifiable and illegal actions, Appellant—just like the defendant in White—was convicted of felony DUI resulting in a death. Resultantly, Appellant was facing—as he personally acknowledged during the plea hearing—a mandatory term of imprisonment of no less than one year up to a maximum term of imprisonment of twenty-five years. See S.C. Code Ann. § 56-5-2945(A)(2) (mandating a person convicted of felony DUI be punished “by a mandatory fine of not less than ten thousand one hundred dollars nor more than twenty-five thousand one hundred dollars and mandatory imprisonment for not less than one year nor more than twenty-five years when death results”); see also Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997) (“Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made.”).

Upon considering all the information presented to him concerning both Appellant and Appellant’s crime, the plea judge elected to impose a sentence that would require Appellant to effectively serve a twenty-year term of imprisonment unless he engages in some further misconduct and serve no more than twenty-five years’ imprisonment at the most. See State v. Picklesimer, 388 S.C. 264, 270, 695 S.E.2d 845, 848-849 (2010) (“[U]nder no circumstances shall a defendant be incarcerated, or forced to participate in mandatory CSP or residual probation, stemming from the same conviction, outside of the time given by the trial judge in the

original sentence, which encompasses both the suspended and unsuspended portions of the sentence.”). Thus, the sentence imposed by the plea judge fell squarely within the applicable sentencing limits for Appellant’s offense, and nothing was presented—or even identified by Appellant—suggesting the sentence was imposed as the result of some partiality, prejudice, or corrupt motive on the part of the plea judge. S.C. Code Ann. § 56-5-2945(A)(2); cf. Garrett, 320 S.C. at 356, 465 S.E.2d at 350 (reinstating a sentence originally imposed by a plea judge because “it was within the limits permitted by law” and Garrett did “not assert either a constitutional violation or that the sentencing judge acted with partiality, prejudice or pressure”). Under such circumstances, the plea judge—just like the sentencing judge in White—did not abuse his broad discretion or otherwise err when sentencing Appellant, and there is simply no proper basis upon which the plea judge’s discretionary sentencing decision could be disturbed on appeal. See State v. Bass, 242 S.C. 193, 197, 130 S.E.2d 481, 483-484 (1963) (“This Court has no jurisdiction to correct a sentence alleged to be excessive when it is within the limits prescribed by law.”).

In arguing to the contrary, Appellant maintains the plea judge erred by allegedly failing to “meaningfully” consider the mitigating evidence presented and by purportedly imposing a sentence that was both “disproportionate to his crime” and “too punitive.” Importantly though, the plea judge—and not Appellant himself—was the one tasked with evaluating the evidence presented and selecting an appropriate sentence under the circumstances involved. See State v. Miller, 187 S.C. 271, ___, 197 S.E. 310, 311 (1938) (“Where left to his discretion by the law, the presiding judge, in the exercise of a wise judgment, determines what sentence, within the law, would be just and proper in any particular case.”); see also Solem v. Helm, 463 U.S. 277, 290, n. 16 (1983) (“Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence[.]”);

Reina-Rodriguez v. United States, 655 F.3d 1182, 1193 (9th Cir. 2011) (“Appellate courts are not sentencing courts.”). And, 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.⁷ See Jones, 463 U.S. at 369 (“The State may punish a person convicted of a crime even if satisfied that he is unlikely to commit further crimes.”); Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937) (“[A state] may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes.”); State v. Fletcher, 322 S.C. 256, 260, 471 S.E.2d 702, 704 (Ct. App. 1996) (recognizing “punishment of the offender” is a proper motivation for a sentencing judge).

Critically, as demonstrated by the plea judge’s thorough explanation for his sentence, the plea judge carried out his difficult sentencing task by carefully evaluating *everything* presented to him, and the sentence he elected to impose after doing so fell within the appropriate sentencing limits for Appellant’s crime. Cf. State v. Harrison, 402 S.C. 288, 303, 741 S.E.2d 727, 735 (2013) (“The trial court’s statements at sentencing are the very embodiment of

⁷ Demonstrating the significant need for deterrence in DUI cases, Appellant candidly acknowledges on appeal his deadly offense was one that is “all too common.” (App. Br. p. 2). Likewise, at least one extensive DUI-focused study has recognized the potential value of imposing sentences on first-time DUI offenders that are sufficiently severe to discourage recidivism, which is a particularly rampant problem in the context of DUI offenses. See William J. Rauch et al., Risk of Alcohol-Impaired Driving Recidivism Among First Offenders and Multiple Offenders, 100 Am. J. Pub. Health 919, 921-922 (2010) (concluding from a study of more than *one-hundred million* driving records collected over a three-decade span of time “the rate of a subsequent [DUI] violation was increased 615% by the first violation,” indicating the study’s findings “call into question” the soundness of lenient sanctions being imposed upon first-time DUI offenders, explaining its findings “demonstrate the significance of any first arrest in terms of risk of recidivism,” and noting surveyed offenders overwhelmingly reported “they would have been less likely to recidivate if their sanctions for a first offense had been more severe”).

proportionality, and the court performed the analysis envisioned by the statute’s broad penalty provision and in sentencing [Harrison] based on the facts and circumstances of the case.”); Clark v. State, 259 S.C. 378, 382-383, 192 S.E.2d 209, 210-211 (1972) (“Appellant seeks to have his sentence set aside and be resentenced to a lesser term. His contentions in this respect require little comment. It has long been settled that this Court has no jurisdiction on appeal to correct an allegedly excessive sentence, which is within the limits prescribed by law for the discretion of the trial judge and which is not proved to be the result of partiality, prejudice, oppression or corrupt motive. We deem it unnecessary to cite or refer to the many authorities for this well settled proposition. The record here contains no suggestion, let alone evidence, of any partiality, prejudice, oppression or corrupt motive influencing or affecting the sentence.”). Beyond that, as reflected by the strikingly-similar sentence imposed in White for the exact same offense, the sentence imposed upon Appellant was *not* disproportionate—grossly or otherwise—to the seriousness of his highly-dangerous and reckless offense, which was one that resulted in irreparable harm in the form of the death of an innocent victim through extreme actions that were both totally unjustifiable and completely avoidable.⁸ See Brooks v. State, 325 S.C. 269, 272, 481 S.E.2d 712, 713 (1997) (“A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against a defendant.”); see also Missouri v. McNeely, 569 U.S. 141, 160 (2013) (explaining drunk driving is a problem that “continues to exact a terrible toll on our society”); Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 451 (1990) (“No one can seriously dispute the magnitude of the drunken driving problem or the

⁸ Notably, unless a sentence imposed is *grossly* disproportionate to the offense committed, it is unnecessary for purposes of a proportionality analysis to compare that sentence to the sentences imposed on other offenders convicted of similar crimes. Harrison, 402 S.C. at 299-300, 741 S.E.2d at 733; see also State v. Jones, 344 S.C. 48, 56, 543 S.E.2d 541, 545 (2001) (“The cruel and unusual punishment clause requires the duration of a sentence not be *grossly* out of proportion with the severity of the crime.” (emphasis added)).

States' interest in eradicating it."); South Dakota v. Neville, 459 U.S. 553, 558 (1983) ("The situation underlying this case—that of the drunk driver—occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented[.]"); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."). As a result, the fact Appellant may have personally wished the plea judge evaluated the pertinent sentencing factors differently and in a way that resulted in a sentence more to his liking does not in any way support a conclusion the plea judge abused his discretion or otherwise erred by imposing the sentence he imposed. See State v. Sanders, 251 S.C. 431, 444, 163 S.E.2d 220, 228 (1968) (instructing the "established rule" in South Carolina is an appellate court will not reverse a sentence for being "excessive" if it falls within the statutory sentencing limits and was not imposed as the result of partiality, prejudice, oppression, or corrupt motive); cf. People v. Cruz, 141 N.E.3d 1119, 1131 (Ill. App. Ct. 2019) ("[A]ll of the factors cited by [Cruz] on appeal were presented to the trial court and are presumed to have been considered appropriately. . . . [Cruz]'s argument is actually that the court did not weigh his potential for rehabilitation heavily enough. We decline to substitute our own judgment on the weight of such factors for that of the trial court. The trial court was not required to assign more weight to [Cruz]'s rehabilitative potential than to the seriousness of the offense, which is the most important sentencing factor." (citations omitted)); State v. Helms, 40 P.3d 626, 630 (Utah 2002) ("[T]he fact that Helms views his situation differently than did the trial court does not prove that the trial court neglected to consider the [sentencing] factors listed in [a specific Utah statutory provision].").

Accordingly, since Appellant's sentence fell within the appropriate statutory sentencing limits for his grievous offense and nothing suggested it was imposed based on partiality,

prejudice, oppression, corrupt motive, or any other improper considerations, the plea judge—just like the sentencing judge in White—did not abuse his broad discretion or commit any other error of law when imposing a legislatively-sanctioned sentence for felony DUI resulting in a death, and there is no proper basis upon which to disturb Appellant’s sentence on appeal. See State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) (“[T]he authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion.”); State v. Johnson, 159 S.C. 165, 170, 156 S.E. 353, 354 (1930) (“This Court has no jurisdiction on appeal to correct a sentence alleged to be excessive, when it is within the limits prescribed by law. The length of the prison sentence rests in the sound discretion of the trial Court unless partiality, prejudice, oppression, or corrupt motive is shown.”). Appellant’s conviction and sentence should be affirmed.

II.

To the extent Appellant appears to be asserting the manner in which he was sentenced violated his due process rights, that particular constitutional claim was not properly preserved for appellate review because it was neither raised to nor ruled upon by the plea judge. Furthermore, even if that constitutional claim could somehow appropriately be raised and considered for the first time on appeal, Appellant's due process rights were not violated by the manner in which he was sentenced because he was fully on notice of the applicable sentencing limits for his offense before he pled guilty and was sentenced to a term of imprisonment falling squarely within those limits.

For the first time on appeal, Appellant appears to be challenging his sentence on due process grounds. As support for that constitutional challenge, Appellant maintains South Carolina's sentencing laws allegedly do not provide adequate notice to defendants in regard to what sentencing factors will be considered and, based on that, seems to be suggesting his due process rights were violated by the manner in which he was sentenced. Importantly though, Appellant neither raised any due process arguments to the plea judge nor asserted he had not received adequate notice as to sentencing, and the plea judge obviously did not rule on those arguments since they were never raised. As a result, Appellant's new constitutional claim was not properly preserved for appellate review and, thus, cannot appropriately be considered or addressed for the first time on appeal. However, even if Appellant's due process challenge could somehow properly be entertained for the first time on appeal, Appellant had all the notice to which he was entitled based on the notice he received prior to sentencing regarding the applicable sentencing range for his offense. Therefore, Appellant's due process rights were not violated by the manner in which he was sentenced. Appellant's conviction and sentence should be affirmed.

A. Appellant's Failure to Properly Preserve Any Due Process Issues for Appellate Review

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004).

The key purpose of those requirements is “to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.” Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Through their enforcement and application, the trial court is guaranteed a chance “to rule properly after it considered all relevant facts, law, and arguments[,]” and the appellate court is provided with everything needed to properly review whatever ruling is made within the limits of the applicable standard of review. I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 488-489 (2007) (“If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call.”); Queen’s Grant, 368 S.C. at 373, 628 S.E.2d at 919 (“The rationale for the [error preservation] rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error.”).

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also Jean Hoefer Toal et al., Appellate Practice in South Carolina 185 (3rd ed. 2016) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). Thus, based on those requirements, an issue—including a constitutional one—cannot ordinarily be raised or considered on appeal unless it was first presented to and ruled upon by the trial judge. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”); State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974)

(“Only matter that has been ruled on below can be reviewed[.]”); In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) (“Constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appeal.”).

In the case at bar, Appellant—in addition to alleging the plea judge abused his discretion by sentencing him to a term of imprisonment falling squarely within the statutory limits for his crime—contends South Carolina’s sentencing laws categorically result in a denial of due process because the broad sentencing discretion afforded to sentencing judges in our state purportedly does not give adequate notice to a defendant as to what factors will be considered during the sentencing process. Beyond that, Appellant maintains principles of fundamental fairness demand “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.” Furthermore, Appellant goes on to chastise this Court for somehow “abdicat[ing] its duty” to ensure “fairness in the system” by “not requiring judges to put their sentencing reasoning on the record to facilitate meaningful appellate review” of sentences. Appellant then urges this Court to remand his case for resentencing while providing advisory guidance to the plea judge “as to what mitigating and aggravating factors the court should use to guide his discretion” when imposing a sentence.

Critically though, during the circuit court proceedings in Appellant’s case, defense counsel did not: (1) argue Appellant did not have constitutionally-sufficient notice as to what factors would be considered during sentencing; (2) allege the broad discretion afforded to sentencing judges in South Carolina was violative of due process in some manner; (3) contend the plea judge failed to identify—adequately or otherwise—the reasons upon which he based his sentencing decision in Appellant’s case; (4) ask the plea judge to provide a fuller explanation of

why he imposed the sentence he imposed; or (5) even mention due process *at all*. See Patterson, 324 S.C. at 19, 482 S.E.2d at 767 (instructing an appellant is limited on appeal solely to the grounds raised at trial). Thus, *none* of the arguments currently being raised on appeal in support of Appellant’s apparent due process challenge to his sentence were actually raised to or ruled upon by the plea judge.⁹ See In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) (“Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review.”); cf. State v. Baker, 390 S.C. 56, 65, 700 S.E.2d 440, 444 (Ct. App. 2010) (“Baker cannot now add a constitutional claim on appeal because he cannot raise one ground to the trial court and a different ground on appeal.”).

Accordingly, to the extent Appellant is attempting to challenge his sentence on constitutional grounds for the first time on appeal, that challenge must be rejected as it was simply not properly preserved for appellate review pursuant to our well-established issue preservation requirements. See State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court “cannot address unpreserved errors”); cf. State v. Charron, 351 S.C. 319, 328, 569 S.E.2d 388, 393 (Ct. App. 2002) (finding allegations of due process and equal protection violations were not preserved for appellate review when there was no indication those issues were raised to the trial judge). Appellant’s conviction and sentence should be affirmed.

B. Absence of Any Due Process Violations

Pursuant to the United States Constitution and the South Carolina Constitution, no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V;

⁹ Interestingly, the issue of due process was first referenced in the notice of appeal, which contained a statement indicating a due process argument “may” potentially be raised on appeal. (R. pp. 333-334).

U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Through the constitutional guarantee of due process, a criminal defendant is entitled to a criminal proceeding that is fundamentally fair, which—amongst other things—means one conducted only after reasonable notice has been provided. See California v. Trombetta, 467 U.S. 479, 485 (1984) (“Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness.”); Thompson v. State, 415 S.C. 560, 566, 785 S.E.2d 189, 192 (2016) (“Fundamentally, due process requires notice, a meaningful opportunity to be heard, and judicial review.”). However, in the context of criminal sentencing, the notice required by due process simply means notice of the applicable sentencing range for the charged offense, which is sufficient to alert the defendant of the bounds of the discretion afforded to the sentencing judge. See Beckles v. United States, ___ U.S. ___, 137 S. Ct. 886, 894 (2017) (“All of the notice required is provided by the applicable sentencing range, which establishes the permissible bounds of the court’s sentencing discretion.”). Significantly, if such notice is provided, a sentencing judge can exercise broad or even “unfettered” discretion in imposing a sentence falling within the established limits without violating a defendant’s due process rights. See id. (recognizing a system of “unfettered” sentencing discretion is not unconstitutional); United States v. Booker, 543 U.S. 220, 233 (2005) (“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”).

In Appellant’s case, the plea judge ensured Appellant was fully aware of the sentencing range for his offense before accepting Appellant’s guilty plea, and Appellant personally affirmed he understood he could be lawfully sentenced to a term of imprisonment of one to twenty-five years. Based on that, Appellant possessed all the notice to which he was entitled regarding sentencing, and he could validly and fairly be sentenced to a term of imprisonment falling within

the permissible sentencing limits of which he was fully aware. See Beckles, 137 S. Ct. at 894 (explaining notice of “the applicable sentencing range” provides a criminal defendant with constitutionally-sufficient notice as to sentencing). Therefore, the plea judge did not violate Appellant’s due process rights by imposing a statutorily-authorized sentence for Appellant’s crime even though the plea judge’s discretion over the matter was somewhat broad in scope. See id. at 893 (“[O]ur cases have never suggested that a defendant can successfully challenge as vague a sentencing statute conferring discretion to select an appropriate sentence from within a statutory range, even when that discretion is unfettered.”); Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) (recognizing it is not impermissible for sentencing judges to “exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute”).

In apparently arguing to the contrary, Appellant seems to suggest South Carolina’s system of affording broad sentencing discretion to circuit court judges is somehow unfair and unconstitutional based on the extent of the discretion it affords while pointing to the federal guideline-based system of sentencing as one that would be more to his liking. However, the adoption of sentencing guidelines by Congress for use in federal cases did *not* render the system of broad discretion that preceded it unconstitutional. See Beckles, 137 S. Ct. at 894 (2017) (“[T]he system of purely discretionary sentencing that predated the Guidelines was constitutionally permissible.”). Instead, as has historically been true in our country, South Carolina—along with other states—remains free as a matter of constitutional law to establish appropriate penalties or penalty ranges for state crimes and to define the limits of the discretion afforded to judges on matters of sentencing. See id. at 893 (recognizing the existence of a “long history of discretionary sentencing” in the United States); State v. Cantrell, 250 S.C. 376, 379,

158 S.E.2d 189, 191 (1967) (“*Historically* courts in this country have practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.” (emphasis added)). Therefore, since there is nothing unconstitutional about South Carolina’s system of affording broad discretion to sentencing judges, the fact Appellant may wish for South Carolina’s legislature to alter our sentencing laws to reign in that discretion or to impose some other new requirements on sentencing judges does not establish a basis to disturb his sentence on appeal no matter how much he personally disagrees with the decision reached by the plea judge in his case. See Collins v. Johnston, 237 U.S. 502, 510 (1915) (“To establish appropriate penalties for the commission of crime, and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within limits fixed by the lawmaking power, are functions peculiarly belonging to the several states[.]”); State v. Brannon, 341 S.C. 271, 278, 533 S.E.2d 345, 348 (Ct. App. 2000) (“Under most circumstances, the severity of a sentence prescribed for a particular offense remains a matter of legislative prerogative.”); cf. Harrison, 402 S.C. at 310, 741 S.E.2d at 739 (rejecting Harrison’s request for the appellate court to direct the legislature to adopt “a sentencing structure in uniformity and harmony with an undefined number of states” due to the fact such a request would run contrary to the broad authority of the legislature to determine “the types and limits of punishments for crimes”).

Ultimately, since the plea judge—who thoroughly explained the reasoning behind his decision—sentenced Appellant to a term of imprisonment falling squarely within the sentencing range our General Assembly deemed appropriate for Appellant’s crime only after first ensuring Appellant was fully aware of the applicable sentencing range, the plea judge did not deprive

Appellant of any notice or fairness to which he was entitled or otherwise violate Appellant's due process rights. See Beckles, 137 S. Ct. at 894 (recognizing notice of the applicable sentencing range is constitutionally sufficient). As a result, there are no proper grounds to disturb Appellant's sentence under the applicable standard of review. See State v. Beaty, 423 S.C. 26, 41, 813 S.E.2d 502, 510 (2018) (recognizing appellate courts in South Carolina are constitutionally limited to reviewing solely for errors of law in criminal cases); State v. Crosby, 160 S.C. 301, ___, 158 S.E. 685, 687 (1931) (explaining an appellate court "has no power to reduce the sentence or to reverse the judgment" based on a claim the trial judge should have imposed a lighter sentence because the term of the sentence imposed falls within the authority and discretion of the trial judge); see also Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (recognizing courts "do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly"). Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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Solicitor, Fifth Judicial Circuit

BY:



Mark R. Farthing
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ATTORNEYS FOR RESPONDENT

March 22, 2021

RECEIVED

Mar 22 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable George M. McFaddin, Jr., Circuit Court Judge
Appellate Case No. 2020-000631

THE STATE,

Respondent,

vs.

CHARLES DAVENPORT, JR.,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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Solicitor, Fifth Judicial Circuit

BY: 

Mark R. Farthing
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ATTORNEYS FOR RESPONDENT

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Appellate Case No. 2020-000631

The Honorable George McFaddin

The State of South Carolina.....Respondent,

v.

Charles Davenport.....Appellant.

FINAL REPLY BRIEF

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ARGUMENTS

I. The circuit court judge should not have sentenced C.J. Davenport to 25 years suspended on the service of 20 years given C.J.'s significant mitigation.

The State relies 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. Appellant agrees.

Appellant's claim is not that a 20 year sentence for felony DUI with death is "excessive as a matter of law." Rather Appellant argues that the circuit court judge

did not adequately consider the extensive mitigation that was offered on Appellant's behalf by family, friends, and his lawyers. As detailed in the initial brief, Appellant 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 really decent person who made a horrible and devastating mistake.

According to the State, a sentencing judge does not have to consider any particular factors. The State argues, “[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.” Respondent’s Brief, p. 15 (emphasis in original). First of all, Appellant never suggested that the circuit court should have discounted the very real and tragic loss associated with Newell’s death. That has never been Appellant’s position and the State’s imputing that view to Appellant is wrong and unfair. But also, the State’s view 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’s 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, Appellant 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.

II. The State's argument that Appellant's claim is procedurally barred.

Appellant concedes that this issue was not raised to the circuit court judge. This Court, however, possesses the inherent authority to do what is necessary to promote justice and fairness in the criminal justice system. *See State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012) (a court's power to hear and decide cases "carries with it the inherent power to control the order of its business"); *Hagy v. Pruitt*, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000) ("The legislature cannot restrict the judicial branch's exercise of its inherent authority... which includes the inherent authority to set aside a judgment on the ground of extrinsic fraud."); *Matter of Ferguson*, 304 S.C. 216, 403 S.E.2d 628 (1991) (recognizing inherent authority to suspend circuit judge indicted for serious crime despite constitutional article providing that legislature may remove judge by impeachment). Given the significance of this issue as argued in Appellant's brief, this Court should exercise its authority and provide guidance to the bench and bar about what factors circuit courts should be considering when imposing sentences despite the lack of a timely objection made the circuit court below.

CONCLUSION

Respectfully, this Court should remand this case for resentencing.

Respectfully submitted,

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March 22, 2021.



The South Carolina Court of Appeals

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Re: The State v. Charles Davenport
Appellate Case No. 2020-000631

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

A handwritten signature in blue ink, reading "V. Claire Allen".

CLERK

cc: Alan McCrory Wilson, Esquire
Byron E. Gipson, Esquire
The Honorable George M. McFaddin, Jr.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Charles Davenport, Appellant.

Appellate Case No. 2020-000631

Appeal From Richland County
George M. McFaddin, Jr., Circuit Court Judge

Unpublished Opinion No. 2023-UP-090
Submitted January 1, 2023 – Filed March 15, 2023

AFFIRMED

Elizabeth Anne Franklin-Best, of Elizabeth Franklin-Best, P.C., of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Attorney General Mark Reynolds Farthing, and Solicitor Byron E. Gipson, all of Columbia, for Respondent.

PER CURIAM: Charles Davenport, appeals his sentence of twenty-five years' imprisonment, suspended upon the service of twenty years' imprisonment, for felony driving under the influence (DUI) resulting in death. On appeal, he argues

(1) the trial court abused its discretion by rendering a sentence that was excessive in light of the significant mitigation evidence offered to justify a lesser sentence, and (2) South Carolina law does not give adequate notice to criminal defendants of the factors considered when imposing a sentence. We affirm pursuant to Rule 220(b), SCACR.

1. We hold the trial court did not abuse its discretion in sentencing Davenport because it imposed a sentence within the statutory range and Davenport failed to show the sentence resulted from "partiality, prejudice, oppression, or corrupt motive." *See Brooks v. State*, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997) ("A trial [court] is allowed broad discretion in sentencing within statutory limits."); *State v. Conally*, 227 S.C. 507, 510, 88 S.E.2d 591, 593 (1955) (holding an appellate court "has no jurisdiction to disturb, because of alleged excessiveness, a sentence which is within the limits prescribed by statute, unless: (a) the statute [is unconstitutional], or (b) the sentence is the result of partiality, prejudice, oppression, or corrupt motive"); S.C. Code Ann. § 56-5-2945(A)(2) (2018) (providing the trial court must sentence a person convicted of felony DUI resulting in death to not less than one year nor more than twenty-five years' imprisonment, as well as impose a fine of not less than \$10,100 nor more than \$25,100).

2. We hold Davenport's argument that South Carolina's sentencing structure resulted in a denial of due process is not preserved for appellate review because he did not raise it to the trial court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing that if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal); *id.* at 142, 587 S.E.2d at 694 ("[I]t must be clear that the argument has been presented [to the trial court] on that ground."); *State v. Langford*, 400 S.C. 421, 432, 735 S.E.2d 471, 477 (2012) ("Constitutional questions must be preserved like any other issue on appeal.").

AFFIRMED.¹

WILLIAMS, C.J., THOMAS, J., and LOCKEMY, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Charles Davenport, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-000631

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Rules of Appellate Procedure, C.J. Davenport requests this Court rehear this matter based upon the following:

1. The Court of Appeals erred in finding the trial court did not abuse its discretion in sentencing Davenport when it found the sentence was within the statutory range and Davenport failed to show the sentence resulted from “partiality, prejudice, oppression, or corrupt motive.” *See Brooks v. State*, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997).
2. The Court of Appeals erred in finding South Carolina’s sentencing structure argument could not be addressed by the Court because it was not objected to at the trial level.

Issues this Court Should Rehear:

- 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 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. 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. ROA 49. David and his sister prepared food for the homeless. ROA 53.

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

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://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 5/22/20); We Are Happiness.org at http://wearehappiness.org/?fbclid=IwAR1PZynEx3O8gh4Zzu0gLrilyQNj86qKW_jwrWv1_PbjwBHZPe_P7QLAhCU (last visited 7/22/20).

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.

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.

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.”

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 an 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.

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://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 a very wide discretionary range, and our appellate courts have very rarely reviewed those sentences. Indeed, since 2008, in South Carolina, criminal defendants may not 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 (21012) (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 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 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 (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).

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. 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, his Court should exercise its inherent authority and provide more oversight of criminal sentences. Respectfully, this Court should reconsider its opinion.

CONCLUSION

This Court should rehear this case.

Respectfully submitted,

/s/ Elizabeth Franklin-Best
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March 21, 2023.

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Mar 24 2023

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Appellate Case No. 2020-000631

The Honorable George McFaddin

The State of South Carolina.....Respondent,

v.

Charles Davenport.....Appellant.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this Petition for Rehearing on counsel of record, Mark Farthing, by sending via email on this date, March 21, 2023.

/s/ Elizabeth Franklin-Best

March 21, 2023

The South Carolina Court of Appeals

The State, Respondent,

v.

Charles Davenport, Appellant.

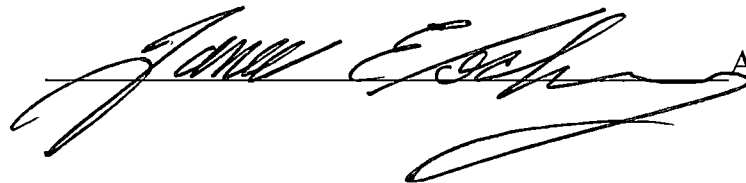
Appellate Case No. 2020-000631

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ C.J.


_____ J.


_____ A.J.

Columbia, South Carolina

cc:

Elizabeth Anne Franklin-Best, Esquire

Alan McCrory Wilson, Esquire

Mark Reynolds Farthing, Esquire

Byron E. Gipson, Esquire

The Honorable George M. McFaddin, Jr.

FILED
Apr 20 2023



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

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June 12, 2023

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Charles Davenport
Lower Court Case No. 2018GS4008199
Appellate Case No. 2020-000631

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,


CLERK

Enclosure

cc: Elizabeth Anne Franklin-Best, Esquire
Alan McCrory Wilson, Esquire
Mark Reynolds Farthing, Esquire
Byron E. Gipson, Esquire

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Sep 20 2023

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Appellate Case No. 2020-000631

The Honorable George McFaddin

The State of South Carolina.....Respondent,

v.

Charles Davenport.....Appellant.

MOTION TO RECALL THE REMITTITUR

Undersigned counsel respectfully asks this Court to recall the remitter in this case. Counsel’s petition for rehearing, which was filed on March 24, 2023 was denied on April 20, 2023. Counsel did not receive notice of the denial. The remittitur was issued on June 12, 2023. Again, counsel did not receive notice of the denial. Respectfully, Appellant’s case raises important issues regarding criminal sentencing in this State and counsel intended to file for certiorari in the South Carolina Supreme Court. Counsel became aware of this issue on September 18, 2023. This Court is empowered to withdraw the remittitur “through some mistake or inadvertence on the part of [the] court or its officer...” *State v. Keels*, 39 S.C. 553, 17 S.E. 802 (1863). Respectfully, counsel asks this Court to withdraw the remittitur and allow counsel to petition for certiorari in the South Carolina Supreme Court.

Counsel has conferred with Mark Farthing of the South Carolina Attorney General’s Office and he has no objection to this request.

Respectfully submitted,

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September 20, 2023