RECEIVED

Sep 05 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION
CASE NO. _____

FREDDIE EUGENE OWENS
Petitioner,

v.

BRYAN STIRLING, DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, AND
THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,
Respondents.

PETITION FOR A WRIT OF HABEAS CORPUS AND STAY OF EXECUTION

INTRODUCTION

Freddie Eugene Owens (aka Khalil-Divine Black Sun-Allah), an indigent prisoner under sentence of death, hereby moves this Court to act pursuant to its original jurisdiction and set aside his sentence of death. Mr. Owens's execution is currently scheduled for September 20, 2024. This petition presents constitutional violations "which in the setting, constitute[] a denial of fundamental fairness shocking to the universal sense of justice." *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (quoting *State v. Miller*, 16 N.J. Super. 251, 84 A.2d 459 (1951)).

First, Mr. Owens's guilt-phase trial court included in the jury charge a mandatory presumption instructing the jury to infer malice from the commission of a felony, in violation of Mr. Owens's state and federal constitutional rights. This Court described a nearly identical instruction as "patent constitutional error." *Lowry v. State*, 376 S.C. 499, 506 657 S.E.2d 760,

764 (2008).

Second, under state and federal constitutional law, a death sentence is inherently disproportionate for a defendant who did not kill, intend to kill, or, while acting as a major participant in a felony, display reckless indifference to human life. *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676 (1987); *State v. Johnson*, 306 S.C. 119, 135, 410 S.E.2d 547, 557 (1991). Mr. Owens's death sentence does not satisfy that standard. Mr. Owens was convicted on an accomplice theory of felony murder, and the jury that sentenced him to death was not asked to determine who shot the victim or whether Mr. Owens had the level of culpability that the state and federal constitutions require.

Together, these two constitutional errors—the shifting of the burden of proof for the malice element of murder, and then the failure to find that Mr. Owens had the requisite level of intent for his death sentence to meet constitutional standards—constitutes "a denial of fundamental fairness shocking to the universal sense of justice." *Butler*, 302 S.C. at 468, 397 S.E.2d at 88.

Mr. Owens's death sentence should also be set aside because it fails the comparative proportionality review under the standard announced by this Court in *Moore v. Stirling*, 436 S.C. 207, 871 S.E.2d 423 (Apr. 6, 2022). *Moore* expanded the pool of cases for this Court's statutorily required comparative proportionality review to include cases that did not result in a death sentence. Within this petition, Mr. Owens will demonstrate that his death sentence is disproportionate using a statistical study that has analyzed thousands of death-eligible cases, and by identifying similar cases with more egregious facts in which the death sentence was not imposed. The disproportionate nature of Mr. Owens's death sentence presents yet another constitutional claim and "denial of

fundamental fairness shocking to the universal sense of justice," *Butler*, 302 S.C. at 468, 397 S.E.2d at 88, and this Court should therefore grant relief in its original jurisdiction.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Procedural history

In February 1999, Mr. Owens was convicted and sentenced to death for the 1997 armed robbery of a Speedway convenience store in Greenville that resulted in the death of Ms. Irene Graves, the cashier. The only aggravating circumstances found were that the crime had been committed during the commission of an armed robbery and an armed larceny. This Court twice reversed Mr. Owens's death sentences, *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001); *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004), before affirming his third death sentence, *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008).

Mr. Owens has exhausted all other post-conviction remedies. He filed an application for post-conviction relief, which was denied, and this Court denied review. Order, *Owens v. State*, Appellate Case No. 2013-001026 (S.C.). He sought and was denied relief in federal court pursuant to 28 U.S.C. § 2254. Order, *Owens v. Stirling*, No. 0:16-CV-02512-TLW, 2018 WL 2410641 (D.S.C. May 29, 2018). The United States Court of Appeals for the Fourth Circuit affirmed the denial, *Owens v. Stirling*, 967 F.3d 396 (4th Cir. 2020), and the United States Supreme Court denied Mr. Owens's request for a writ of certiorari, *Owens v. Stirling*, 141 S. Ct. 2513 (2021).

On August 23, 2024, this Court issued an execution notice directing the South Carolina Department of Corrections to schedule Mr. Owens's execution for September 20, 2024. Execution Notice, *State v. Owens*, No. 1999-011364 (Aug. 23, 2024). On August 30, 2024, Mr. Owens filed an Application for Post-Conviction Relief in the Court of Common Pleas and a motion for a stay of execution in this Court, which remains pending. Motion for Stay of

Execution, *State v. Owens*, No. 1999-011364 (Aug. 23, 2024).[1]

B. Relevant facts

Irene Graves was killed during an armed robbery shooting at a Speedway convenience store in Greenville, South Carolina, on November 1, 1997. Owens was charged with her murder, alongside three co-defendants: Steven Andra Golden, Nakeo Vance, and Luster[2] Young. Mr. Owens was nineteen years old at the time of the crime.

Video of the shooting shows two unidentifiable, masked assailants, both holding guns. *Owens*, 346 S.C. at 646, 552 S.E.2d at 750. No forensic evidence connected Mr. Owens to the crime scene, and he denied participating in the crimes. *Id.* at 646–47, 552 S.E.2d at 750. The closest the State came to direct evidence of Mr. Owens's guilt and role in the crime was testimony from Stephen Golden at Mr. Owens's 1999 trial. Golden's testimony was obtained in exchange for favorable treatment on the same death-eligible charge Mr. Owens faced. Golden admitted that he was one of the two unidentifiable masked gunmen in the video of the crime, but claimed it was Mr. Owens who shot Ms. Graves. *Owens*, 967 F.3d at 404. The state further relied on the testimony of another co-defendant, Nakeo Vance, a longtime friend of Golden's, 1999 ROA 1198, 1225, who also pled guilty in return for a favorable sentence, Exhibit A. The state also presented testimony of Mr. Owens's former girlfriend and an investigating officer. *Owens*, 346 S.C. at 646–47, 552 S.E.2d at 750. Jurors found Mr. Owens guilty of all charges.

[1] Mr. Owens's first Motion for Stay of Execution and Application for Post-Conviction Relief detail new evidence of the state's failure to disclose promises made to Mr. Owens's co-defendant in exchange for his testimony and the use of a stun belt visible to jurors at Mr. Owens's trial. The evidence and allegations presented in those pleadings would also satisfy this Court's standards for habeas relief within its original jurisdiction.

[2] Mr. Young is elsewhere referred to as "Lester."

The state proceeded with an accomplice liability theory of murder based on implied malice. As discussed in more detail below, jurors were instructed that Mr. Owens was guilty of murder if the evidence showed he was simply involved in the robbery, whether or not he was the shooter. *See* 1999 ROA (Vol. VII) at 2961–90; *id.* at 2979–80 ("If persons kill another in doing or attempting to doing an act amounting to a felony, the killing is murder and if a culpable homicide results from the pursuant common purpose or the conspiracy, all are alike criminally responsible."). The solicitor capitalized on this misstatement of law in his closing argument:

> [T]he main point to recognize at this time is that who was the shooter is not important. Because the state does not rest its case upon the fact that we can prove at this stage who was the shooter. . . . So if you find that both of these individuals are present and you find that Ms. Graves was killed by one of them, even though you don't find which one at this point because you don't need to then they are both guilty . . . .

1999 ROA at 2886–87. The solicitor then told jurors that they could convict Mr. Owens of murder based merely on his presence at the Speedway at the time of the shooting: "The *one issue* you are here to decide is *was Freddie Owens present* in the Speedway when Ms. Graves was killed[.]" *Id.* at 2890 (emphasis added); *id.* at 2894 ("[Golden] said that Mr. Owens pulled the trigger but that is[,] as I explained to you earlier, is [sic] not the issue at this point. The question is was [Owens] there."). The jury convicted Mr. Owens and sentenced him to death without being asked to determine who shot Ms. Graves. *See Owens*, 378 S.C. at 637–38, 664 S.E.2d at 80–81.

After the jury's verdict but before the penalty phase of the 1999 trial, authorities obtained a written confession from Mr. Owens to the murder of Christopher Lee, a cellmate at the Greenville County Detention Center. The document described that Mr. Lee had taunted Mr. Owens, claiming that Mr. Lee's cousin was on the jury and would sentence Mr. Owens to death. *Owens*, 346 S.C. at 653–57, 552 S.E.2d at 754–55. Another inmate, Fred Walker, Jr., was also charged with

Lee's murder. App. 1352–53.[3] These charges were later dismissed against both Mr. Owens and Mr. Walker. Exhibit B.

At Mr. Owens's 2006 re-sentencing trial, jurors were told that he was convicted of Ms. Graves's murder in 1999, *see* State Habeas App. ROA at 1081. Neither Vance nor Golden testified against Owens in 2006. This prevented the jurors from learning of the lenient sentences each had received in exchange for their testimony. Vance's testimony from 1999 was read into the record after he refused to testify. App. 1192. Recognizing that the 1999 jury had not found Mr. Owens to be the shooter, the 2006 re-sentencing judge included for the jury's consideration the mitigating circumstance that "[t]he defendant was an accomplice in the murder committed by another person and his participation was relatively minor." 2006 ROA at 1668. The jury was not asked to return written findings of mitigating circumstances, making it impossible to determine whether the jury found that Mr. Owens was a minor participant in the Speedway robbery.

REASONS RELIEF SHOULD BE GRANTED

The purpose of the Court's original jurisdiction is "to provide relief to those who have, for whatever reason, been utterly failed by our criminal justice system." *State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (S.C. 1991) (Toal, J., concurring). This Court has reserved this remedy for a prisoner who, like Mr. Owens, has exhausted all other avenues of direct and collateral review and faces execution. *See, e.g.*, *Tucker v. Catoe*, 346 S.C. 483, 522 S.E.2d 712 (2001) (per curiam); *Pennington v. State*, 312 S.C. 436, 439, 441 S.E.2d 315, 316 (1994); *Drayton v. Evatt*, 312 S.C. 4, 9 n.2, 430 S.E.2d 517, 520 n.2 (1993); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (Toal, J., concurring). In *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990), the Court

[3] "App." Citations refer to the Appendix submitted to this Court in connection with Mr. Owens's appeal from the denial of post-conviction relief.

explained that its original jurisdiction permits a prisoner to "take advantage of constitutional principles recognized after his trial, appeal, and exhaustion of state post-conviction relief proceedings." While "not every intervening decision, nor every constitutional error at trial will justify" relief, it is required "where there has been a 'violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice.'" *Id.* (quoting *State v. Miller*, 16 N.J. Super. 251, 84 A.2d 459 (1951)).

Moreover, when fundamental fairness and equity demand a remedy, this Court has set aside procedural obstacles that may have prevented earlier review and proceeded directly to the merits of claims. In *Butler*, this Court concluded that the petitioner had "delay[ed] in calling this grave constitutional error to [its] attention," but nevertheless granted relief because of the "unique and compelling circumstances" presented in that case. 302 S.C. at 468, 397 S.E.2d at 88. In *Tucker v. Catoe*, the Court granted relief on a petition asserting a statutory claim which had never previously been presented, and a constitutional claim which had been found procedurally defaulted on direct appeal and was later the subject of an unsuccessful claim of ineffective assistance of counsel. 346 S.C. 483, 552 S.E.2d 712 (2001).

I. Errors in Mr. Owens's capital trial and sentencing warrant this Court's exercise of the Writ.

Two errors at Mr. Owens's trial and resentencing warrant the extraordinary relief requested in this Petition: the burden shifting of the element of malice, and the failure to require a jury finding that Mr. Owens had the requisite level of culpability for his death sentence to satisfy constitutional standards. In *Tucker*, this Court was careful to "emphasize that it is the combination of factors, in the setting, which compel us to grant petitioner a writ of habeas corpus and to order a new sentencing proceeding." 346 S.C. at 495, 552 S.E.2d at 718. As in that case, the two errors described below—each egregious—reinforced each other to create, in combination, "a denial of

fundamental fairness shocking to the universal sense of justice." *Butler*, 302 S.C. at 468, 397 S.E.2d at 88.

A. The trial court relieved the State of the burden of proving the malice element of murder.

Mr. Owens's guilt-phase trial court charged his jury with mandatory presumption to infer malice from the commission of a felony, thereby shifting the burden of proof for the malice element of murder in violation of Mr. Owens's state and federal constitutional rights.

Both the United States and the South Carolina Constitutions "protect an accused against conviction unless the State supplies proof beyond a reasonable doubt of each element necessary to constitute the crime with which the accused is charged." *Lowry*, 376 S.C. at 505, 657 S.E.2d at 763 (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970)); *see also id.* at 505 n.2; 657 S.E.2d at 763 n.2. A jury instruction violates these principles "if it is reasonably likely that the jury understood the charge to create a mandatory presumption requiring it to infer an element of the offense if the State proved certain predicate facts, thereby relieving the State's burden of proof on an element of the offense." *Id.* at 505, 657 S.E.2d 763 (citing *Francis v. Franklin*, 471 U.S. 307, 313, 105 S. Ct. 1965, 1970 (1985)); *Sandstrom v. Montana*, 442 U.S. 510, 521, 99 S. Ct. 2450, 2458 (1979)).

In *Lowry*, this Court considered the precise issue of whether a felony-murder instruction unconstitutionally shifts the burden of proof for the malice element of a murder conviction. *Id.* at 501–02, 657 S.E.2d 461. In that case, the trial court initially instructed the jury that it could infer malice from the commission of a felony, but made clear that it was a permissive inference—"simply an evidentiary fact to be taken into consideration by you along with the other evidence in this case." *Id.* at 502, 657 S.E.2d at 762. After the jury started deliberating, the solicitor told the court he had not heard the court instruct on felony murder, and the court called the jurors back in

for a supplemental instruction. *Id.* This time, the court instructed:

> You will recall I went over and talked with you about accomplice liability, I meant to conclude that by telling you this in regard to what is called the felony murder doctrine. That is, if a person kills another in the doing or attempting to do an act which is considered a felony, the fact that this occurs while one is doing or attempting to commit a felony makes the killing murder. And, therefore, the killing by one of another in the commission or attempted commission of a felony makes that killing, by virtue of it occurring in that context, a murder.

Id. at 503, 657 S.E.2d 762 (alterations omitted).

This Court decided that the supplemental instruction "*unquestionably* shifted the burden of proof for the malice element of murder from the State to Petitioner." *Id.* at 506, 657 S.E.2d at 764 (emphasis added). Viewed in its entirety, "the supplemental jury charge contained no permissive language indicating that the jury may infer malice from Petitioner's participation in the armed robbery," and instead "simply provided that if the jury first determined that a killing occurred in the course of the armed robbery, it must find Petitioner guilty of murder." *Id.* This Court further held that the proper instruction on felony murder given in the court's initial jury charge did not rectify the "patent constitutional error." *Id.*

In Mr. Owens's case, the trial court gave the same unconstitutional instruction at issue in *Lowry*. Initially, when instructing on the felony-murder doctrine, the trial court presented a permissive inference:

> If one intentionally kills another during the commission of a felony an implication of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you along with other evidence in the case. And you may give it such weight as you, the jury, determine it should receive.

1999 ROA at 2976.[4] When later instructing on accomplice liability, however, the trial court used

[4] As described in Note 7, below, this permissive inference was also improper under this Court's recent caselaw. *See State v. Brown*, No. 2023-000166, 2024 WL 3435520, at *1 (S.C. July 17,

nearly identical language to the instruction deemed unconstitutional in *Lowry*:

> If persons kill another in doing or attempting to doing [sic] an act amounting to a felony, *the killing is murder* and if a culpable homicide results from the pursuant common purpose or the conspiracy, all are alike criminally responsible. This is commonly described as the hand of one is the hand of all.

1999 ROA at 2979–80 (emphasis added). As in *Lowry*, this follow-on instruction, "the killing is murder," created a mandatory presumption that unconstitutionally shifted the burden from the state on the element of malice. It was therefore "patent constitutional error," *Lowry*, 376 S.C. at 506, 657 S.E.2d at 764. The fact that the trial court also provided a permissive inference charge does not cure the problem: "In fact, these contradictory instructions likely only exacerbated the error by confusing the jury as to its fact-finding duties with respect to Petitioner's murder charge." *Id.* at 506–07, 657 S.E.2d at 764.[5]

The burden shifting on the malice element of the murder charge establishes not only a constitutional error at trial, but also a "denial of fundamental fairness shocking to the universal sense of justice." *Butler*, 302 S.C. 468, 397 S.E.2d at 88. While this Court has upheld convictions despite unconstitutional jury instructions on the malice element in cases where the record demonstrates "overwhelming evidence of malice," this is not such a case. *State v. Campbell*, 904

2024) (per curiam).

[5] Aside from the unconstitutional mandatory presumption for felony murder, the trial court's murder instructions were defective in two other ways. First, this Court recently held that it is improper to instruct a jury that malice can be inferred if one kills another during the commission of a felony. *See State v. Brown*, No. 2023-000166, 2024 WL 3435520, at *1 (S.C. July 17, 2024) (per curiam). In other words, even setting aside the mandatory presumption described above, the permissive inference instruction for felony murder was "an improper charge on the facts." *Id.*

Second, the trial court provided an instruction that the jury could infer malice from the use of a deadly weapon. 1999 ROA at 2976–77. In *State v. Burdette*, this Court held that "regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon." 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019).

S.E.2d 441, (S.C. July 17, 2024). In *Campbell*, the jury received an impermissible deadly weapon inferred malice instruction. *Id.* at 442. Because the defendant fired a "rifle fourteen times into an apartment where a party was going on," however, this Court held that there was overwhelming evidence of malice, and the malice instruction therefore did not contribute to the verdict. *Id.* In this case, by contrast, the jurors did not find that Mr. Owens pulled the trigger. None of the evidence presented by the state suggested a plan to kill or a history of killing during armed robberies. No forensic evidence tends to show that the shooting was the result of malice; the single gunshot wound to the victim indicates that the shooting could have occurred by accident or impulse.

In that way, Mr. Owens's case is akin to *Lowry*. As here, the State's primary direct evidence in *Lowry* consisted of testimony of two co-defendants, together with statements to the police in which the defendant gave certain information about the crime. *Lowry*, 376 S.C. at 509, 657 S.E.2d at 766. At Lowry's trial—like Mr. Owens's trial—the State produced statements of the defendant's friends, not involved in the crime, who testified that the defendant bragged about a murder. *Id.* This Court acknowledged that the co-defendants' testimony was "questionable at best," in part because they were receiving lighter sentences for their roles in the crime in exchange for their testimony. *Id.* at 509, 657 S.E.2d at 766. This Court likewise found that "[t]he probative value of Petitioner's friends' testimony with respect to malice is also minimal." *Id.* at 510, 657 S.E.2d at 766.

Reviewing all of the evidence presented against Mr. Owens, it is likely that his guilty murder verdict is attributable to the unconstitutional presumption of malice. The only evidence tending to show malice was the testimony of Mr. Owens's co-defendants, who received light sentences in exchange for their participation, and friends who were not involved in the crime—the same evidence that was insufficient under *Lowry* to overcome an unconstitutional mandatory

presumption. Moreover, the state took full advantage of the unconstitutional burden shifting. Never in the closing argument did the solicitor argue that the evidence proved malice beyond a reasonable doubt. Instead, the state emphasized that the jurors should convict Mr. Owens of murder based merely on his presence at the Speedway at the time of the shooting: "The one issue you are here to decide is was Freddie Owens present in the Speedway when Ms. Graves was killed." 1999 ROA at 2890. The State argued to the jury that "all you need to consider at this point is whether he was present," and that it had proven this one fact beyond a reasonable doubt. 1999 ROA at 2910. To execute someone for murder without having proven malice beyond a reasonable doubt is "shocking to the universal sense of justice." *Butler*, 302 S.C. 468, 397 S.E.2d at 88.

B. Owens's death penalty is inherently disproportionate because there has been no finding that he killed, intended to kill, or showed reckless disregard for human life.

1. In contravention of Mr. Owens's state and federal constitutional rights, no factfinder has determined that Mr. Owens killed, attempted to kill, intended to kill, or—acting as a major participant in the felony—showed reckless disregard for human life.

The Eighth Amendment forbids punishments "which by their excessive length or severity are greatly disproportioned to the offenses charged.'" *Weems v. United States*, 217 U.S. 349, 371, 30 S. Ct. 544, 551 (1910) (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting)). For a death sentence to comport with the proportionality requirements of the Constitution, it must be individualized, imposed only after "consideration of the character and record of the individual offender and the circumstances of the particular offense." *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 2991 (1976). Likewise, for a death sentence to be proportionate, it must serve what the Supreme Court has announced as the principal purposes of capital punishment: "retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S. Ct. 2909, 2930 (1976). Unless a defendant's death

sentence "measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *Enmund*, 458 U.S. at 798, 102 S. Ct. at 3377 (internal quotations omitted).

The United States Supreme Court has twice addressed and limited the use of the death penalty for a non-triggerman who is legally accountable for murder. In the first case, *Enmund,* the defendant was the getaway driver for a double homicide robbery. Although Enmund participated in planning the robbery that led to the victims' deaths, there was no proof he was present at the scene when they were killed or that he intended for them to be killed. *Id.* at 786, 798. Enmund was nevertheless convicted and sentenced to death on a vicarious liability theory of felony murder. The Supreme Court observed that "[p]utting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." *Id.* at 801. It held that the Eighth Amendment prohibits imposition of the death penalty on a defendant who "neither took life, attempted to take life, nor intended to take life." *Id.* at 787; *see also id.* at 801.

The Court revisited accomplice liability in death penalty cases in *Tison v. Arizona,* 481 U.S. 137, 107 S. Ct. 1676 (1987). In *Tison*, Ricky and Raymond Tison, along with other family members, helped their father and another inmate escape from the prison where their father was serving a sentence for murder. *Id.* at 139, 107 S. Ct. at 1678. When their getaway vehicle broke down, Raymond Tison flagged down a passing car containing a family of four, including two children. *Id.* at 140, 107 S. Ct. at 1679. The brothers helped abduct, detain, and rob the victims, and they watched their father and the other escapee murder the four family members with a shotgun. *Id.* at 140–41, 107 S. Ct. at 1679. Ricky and Raymond Tison were convicted of felony murder as accomplices and sentenced to death. *Id.* at 141–42, 107 S. Ct. at 1679–80. Seeking

postconviction relief, the brothers argued that their death sentences violated the culpability rule in *Enmund*. *Id.* at 143, 107 S. Ct. at 1680–81. The Supreme Court held that the Tison brothers' sentences would be proper only after a factual determination that: 1) they were major participants in the felony; and 2) they exhibited a reckless indifference to human life; it then remanded the case for that determination. *Id.* at 158, 107 S. Ct. at 1688.[6]

As discussed above, Mr. Owens's 1999 guilt-phase proceeding saw the state employ an accomplice liability theory of murder based on implied malice.[7] The judge instructed the jury that "if a culpable homicide results from the pursuant common purpose or the conspiracy, all are alike criminally responsible." 1999 ROA (Vol. VII) at 2979–80. The solicitor argued to the jury that the identity of the shooter "is not important" to the matter of Mr. Owens's guilt, and "all you need to consider at this point is whether he was present." 1999 ROA at 2886, 2910. The jury returned a general guilty verdict to the indictment of murder, but was not asked to determine who shot Ms. Graves, or to determine whether Mr. Owens killed, intended to kill, or displayed reckless indifference to human life.

At the 2006 resentencing, the judge recognized that the 1999 jury made no finding that Mr.

---

[6] On remand, Ricky and Raymond Tison were resentenced to life in prison. *See State v. Rodriguez*, 656 A.2d 262, 266 n. 11 (Del. Sup. Ct. 1993) (reporting the eventual ruling of the Arizona superior court).

[7] While South Carolina has never enacted a felony murder statute, at the time of Mr. Owens's trial, it applied the doctrine of felony murder through the concept of implied malice. *Gore v. Leeke*, 261 S.C. 308, 315–16, 199 S.E.2d 755, 757–58 (1973) ("The law itself implies the malice from proof of the felony. While a number of jurisdictions… have enacted felony-murder statutes, South Carolina has not done so, having instead consistently followed the common law rule."). *But see State v. Brown*, No. 2023-000166, 2024 WL 3435520 (S.C. July 17, 2024) ("We hold the trial court erred in giving the inferred malice instruction, for, in doing so, the trial court improperly elevated and commented to the jury upon a particular fact—the commission of a felony.").

Owens was the shooter, and therefore included for the jury's consideration the mitigating circumstance that "[t]he defendant was an accomplice in the murder committed by another person and his participation was relatively minor." 2006 ROA at 1668. The jury was not, however, instructed that it could not recommend a sentence of death if it found that Mr. Owens was not the shooter and his participation was relatively minor. Nor was the jury asked to return written findings of mitigating circumstances, making it impossible to determine whether the jury found that Mr. Owens was a minor participant in the Speedway robbery. In short, the verdicts in Mr. Owens's trials leave open the possibility that he was a minor participant in the crime, or that he did not display reckless disregard for human life. His death sentence and impending execution are therefore unconstitutional under *Enmund* and *Tison.*

2. Under this Court's precedents and his right to Due Process, Mr. Owens has the right to have a jury find the factors required by *Enmund* and *Tison*.

Mr. Owens has a due process right to a jury finding of whether his culpability rises to the level required by the Eighth Amendment for a death sentence. The Supreme Court left to the states the decision of how to narrow their death penalty schemes to ensure that a defendant without the requisite level of culpability under *Enmund* and *Tison* does not receive the death penalty. *See Cabana v. Bullock*, 474 U.S. 376, 386–87, 106 S. Ct. 689, 697 (1986) (holding that the *Enmund* rule need not be enforced by the jury and does not impose any particular procedure upon the States). This Court announced South Carolina's procedure for enforcing the *Enmund* rule in *State v. Peterson*: "During the penalty phase of death penalty cases which involve conspiracy liability, the trial judge should charge that the death penalty cannot be imposed on an individual who aids and abets in a crime in the course of which a murder is committed by others, but who did not himself kill, attempt to kill, or intend that a killing take place or that lethal force be used." 287 S.C. at 248, 335 S.E.2d at 802. Even after the Supreme Court's *Bullock* decision, this Court has repeated

that "such a charge should be given in a case that involves conspiracy liability." *State v. Johnson*, 306 S.C. 119, 135, 410 S.E.2d 547, 557 (1991).

Mr. Owens's trials took place after these rules of decision, and Mr. Owens therefore had a due process right to the protections afforded by the procedures outlined by this Court. *See* S.C. Const. art. I, § 3 (stating no "person [shall] be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws"); *see also S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 392, 699 S.E.2d 146, 153 (2010) (observing an interest protected by due process arises when there is a legitimate claim of entitlement that is created and defined by independent sources). The lack of a jury finding that Mr. Owens killed, intended to kill, or that he was a major participant in a felony and acted with reckless indifference to human life, therefore creates a constitutional violation "which in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Butler*, 302 S.C. at 468.

The Eighth Amendment specifically prohibits the use of the death penalty in a disproportionate and arbitrary manner. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976). The disproportionate and arbitrary use of the death penalty against those convicted under a theory of accomplice liability for felony murder is reflected in its infrequency. Executions are rare for people who are convicted under a theory of accomplice liability for felony murder. Exhibit C at 15. "We are not aware of a single execution in the modern history of the state (since the creation of the current death penalty regime in 1977) in which a person who did not kill or intend to kill was executed." Exhibit C at 1. Were his execution allowed to proceed, Freddie Owens would be the first.

C. These errors, taken together, constitute a denial of fundamental fairness shocking to the universal sense of justice.

This Court has emphasized that errors alleged in a writ of habeas corpus are not to be taken in isolation but considered in "combination . . . in the setting." *Tucker*, 346 S.C. at 495, 552 S.E.2d at 718. Here, the two errors described reinforced each other, and were made even more shocking by other issues with Mr. Owens's trial.

The errors detailed above are more shocking in light of the evidence that has recently come to light regarding the State's secret side arrangements with at least one of Mr. Owens's co-defendants. Lacking forensic evidence, the State's case relied almost entirely on witness testimony. *See Owens*, 346 S.C. at 647, 552 S.E.2d 750. As detailed in the Motion to Stay Execution filed on August 30, Steven Golden, Owens's co-defendant and the State's principal witness, acknowledged in an affidavit signed August 22, 2024—the day before Owens's execution notice issued—that the solicitor's office made him a secret deal in exchange for his testimony against Owens. Motion for Stay of Execution, *State v. Owens*, No. 1999-011364 (Aug. 23, 2024). The solicitor's office not only failed to disclose the deal, but also instructed Golden to give false testimony about the promises he received from the State, in violation of Owens's due process rights. That Golden was the only eyewitness, and provided the state's only direct evidence of malice, heightens the fundamental unfairness arising from the burden shifting instruction.

The "denial of fundamental fairness" is especially egregious in Mr. Owens's case because his death eligibility is predicated entirely upon the killing taking place during a robbery, which provided the factual basis for both of the aggravating circumstances found by his jury. *Owens*, 378 S.C. at 638, 664 S.E.2d 81. Thus, the improper mandatory presumption served not only to elevate the crime to murder, but to capital murder. In short, due to the constellation of errors at the trial and sentencing level, the jury convicted Mr. Owens of murder without finding malice, his

erroneous murder conviction was automatically death-eligible, and no factfinder decided whether Mr. Owens had the requisite level of culpability to satisfy *Enmund* and *Tison*. Given these "utter failures," his conviction and sentence should not stand, and his execution must not proceed.

II. Mr. Owens's death sentence is excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

A. Mr. Owens has a right to have this Court conduct comparative proportionality review under the standard announced in *Moore v. Stirling*.

In *Moore*, this Court unanimously held that this Court's statutorily required proportionality review of death sentences could not be limited "to only those [cases] in which the death penalty was actually imposed," but could include "cases where a defendant's conduct was eligible for a capital sentence, but the State elected to seek only a life or lesser sentence, as well as cases where a jury considered but ultimately declined to impose a death sentence." 436 S.C. at 226, 871 S.E.2d at 433. The Court noted that examples of comparison cases resulting in a life sentence could encompass:

> (1) bench trials resulting in life sentences;
> (2) guilty pleas resulting in a life sentence not pursuant to a plea bargain on charge or sentence;
> (3) cases in which the judge sentences to life over the jury's death verdict;
> (4) jury trials in which a life sentence was imposed and not appealed; and
> (5) jury trials in which a life sentence was imposed and later appealed on trial error.

Id. at 226 n.3, 871 S.E.2d at 433 n.3 (citing Cynthia M. Bruce, *Proportionality Review: Still Inadequate, But Still Necessary*, 14 Cap. Def. J. 265, 266 (2002)).

The Court noted that the proportionality review in Mr. Moore's case at the time of his direct appeal considered "similar *capital* cases" only. *Id.* at 215, 871 S.E.2d at 427 (emphasis added). The Court then considered an expanded pool of comparison cases identified by Mr. Moore that would have been available at the time of his comparative proportionality review in 2004. *Id.* at 227, 871 S.E.2d at 434. After detailed consideration of these cases, a divided Court found that Mr.

Moore's death sentence was not excessive or disproportionate to the penalty imposed in similar cases. *Id.* at 227, 871 S.E.2d at 434.

This Court resolved *Moore* in its original jurisdiction, holding that he—like Mr. Owens, a death-sentenced prisoner who had exhausted all other avenues for relief—had presented a cognizable claim:

> Having been statutorily directed to undertake comparative proportionality review for all persons receiving a capital sentence, we hold an allegation concerning the failure to adequately provide this mandated review for an individual defendant to prevent the wrongful deprivation of life implicates that defendant's right to due process and, therefore, presents a constitutional issue. *See* S.C. Const. art. I, § 3 (stating no "person [shall] be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws"); *see also S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 392, 699 S.E.2d 146, 153 (2010) (observing an interest protected by due process arises when there is a legitimate claim of entitlement that is created and defined by independent sources and not just by a "unilateral expectation" (citation omitted)). . . . As a result, we hold Moore's petition alleging an inadequate comparative proportionality review of his sentence presents a cognizable constitutional claim in the context of this state habeas proceeding. *See, e.g., Butler*, 302 S.C. at 468, 397 S.E.2d at 88 (setting forth the habeas framework, the first requirement of which is a constitutional claim).

Moore, 436 S.C. at 223, 871 S.E.2d at 432.

This Court next provided an opportunity to Mr. Moore to supplement the record, and then considered "those cases that would have been available at the time of Moore's direct appeal and comparative proportionality review . . . ." *Id.* at 227, 871 S.E.2d at 434. To execute Mr. Owens without considering the same spectrum of cases would constitute a "violation, which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Butler*, 302 S.C. at 468, 397 S.E.2d at 88 (quoting *Miller*, 16 N.J. Super. 251, 84 A.2d 459).

B. In other similar cases which should be compared to Mr. Owens's case in a proper proportionality review, defendants were not sentenced to death.

When the pool of comparison cases considered is expanded as described in *Moore*, 436 S.C. at 226, 871 S.E.2d at 433, to include defendants who received sentences less than death, it

becomes clear that Mr. Owens's death sentence is "excessive or disproportionate to the penalty imposed in similar cases . . . ." S.C. Code Ann. § 16-3-25.

1. Expert analysis of similar South Carolina cases

Dr. Frank Baumgartner, Richard J. Richardson Distinguished Professor in Political Science at the University of North Carolina at Chapel Hill, and Dr. Kaneesha Johnson, a post-doctoral researcher at the University of North Carolina at Chapel Hill in the department of Political Science, performed an analysis and reported findings considering the following aspects of Mr. Owens's case: race; his age of nineteen years at the time of the crime;[8] the single aggravating circumstance of robbery; and that he was a co-defendant in the crime and but was not found by the jury to be the triggerman. *See* Frank R. Baumgartner & Kaneesha R. Johnson, *Race, Youth, and the Death Sentence of Freddie Owens*, at 1 (Sept. 4, 2024) (attached as Exhibit C). They concluded that "the vast majority" of similarly situated cases led to punishments less than death.[9] *Id.* at 16.

Considering cases involving co-defendants with a homicide-robbery circumstance, Dr. Baumgartner and Dr. Johnson found that during the entire period of relevance to their analysis,[10]

---

[8] Their findings regarding the factors of age and race will be discussed *infra*.

[9] They explained that:

> our statistical analysis is based on comparisons of the crimes for which Mr. Owens was indicted and convicted. It does not include analysis of behavior for which Mr. Owens was never convicted, such as the 1999 homicide of Christopher Lee. If Mr. Lee is considered a second homicide victim attributed to Mr. Owens, statistical analysis shows that the death sentence rate for two-victim homicides is 3.54, meaning that more than 96% of two-victim homicides do not result in death sentences.

Exhibit C at 2 n.1.

[10] Based on this Court's limitation to reviewing cases that would have been available at the time of the proportionality review, *see Moore*, 436 S.C. at 227, 871 S.E.2d at 434, the relevant time period included cases from before July 14, 2008, *see State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008). Exhibit C at 1–2.

99.55 percent of such offenders did not receive the death penalty. *See id.* at 16. They found a similar result for cases involving the single aggravator of robbery or larceny, whether or not there was a co-defendant—98.96 percent of those defendants avoided a death sentence. *Id.* at 17.

Their analysis further showed that crimes with this aggravator are very common, but very rarely lead to the penalty of death. *Id.* at 11. That assessment encompassed both death-noticed cases and death sentences. For example, in cases with multiple defendants and an armed robbery charge, 1.70 percent of that group received death notices, and 0.44 percent received a death sentence. *Id.* at 14. "Death sentences in this group represent only 26.08 percent of the death noticed cases." *Id.* For those with circumstances similar to Mr. Owens—robbery-homicides with a co-defendant—a death sentence "was imposed in less than one-half of one-percent of the cases." *Id.*

Based on the data available to them, Dr. Baumgartner and Dr. Johnson could not find a single instance in South Carolina's modern era of capital punishment in which a person was executed absent a jury finding that they had killed or intended to kill. *See id.* at 16. This comparison is significant because neither jury was asked to determine whether Mr. Owens was the shooter. *See supra*. The substance and parameters of the jurors' specific findings cannot be disregarded in the scope of this Court's review. *Cf. Moore*, 436 U.S. at 229, 871 S.E.2d at 435 ("This Court's scope of review does not allow it to disregard the factual findings in the case and pronounce an alternative sentence in these circumstances.").

2. Analysis of specific comparison cases

In its 2008 finding that Mr. Owens's death sentence "was neither excessive nor disproportionate," this Court cited two cases in which the defendants were made eligible for a death sentence based on the aggravating circumstance of armed robbery, the crimes took place at convenience stores, and the defendants were sentenced to death. *Owens*, 378 S.C. at 641, 664

S.E.2d at 82 (citing *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1996) (Mr. Humphries shot a convenience store operator in the commission of attempted armed robbery); *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996) (murder of convenience store operator in the commission of armed robbery)). *Cf. Moore*, 436 S.C. at 225, 871 S.E.2d at 433 ("Looking at the aggravating circumstances present in other cases is an obvious point for comparison when analyzing whether a defendant's capital sentence is the result of a jury's arbitrariness or is disproportionate to the sentences of other offenders."). Despite these superficial similarities, however, neither *Simpson* nor *Humphries* supports a conclusion that Mr. Owens's sentence is proportionate.

In the first place, a proportionality review should juxtapose Mr. Owens's death sentence to the sentence ultimately received by the comparator case. As to Simpson, this Court overturned his armed robbery conviction after he was sentenced to death and found he was entitled to a new trial based on a finding that the Solicitor unconstitutionally withheld exculpatory, material evidence.[11] *See Simpson v. Moore*, 367 S.C. 587, 600, 627 S.E.2d 701, 708 (2006) ("the State's failure to tell the defense that a bag of money was found behind the counter prejudiced Simpson's case in the penalty phase."). On remand, Simpson was sentenced to life; he is eligible for parole in 2026.[12] *see also* John H. Blume & Sheri Lynn Johnson, *Back to a Future: Reversing Keith Simpson's*

[11] As this Court found in *Copeland*:

> It is axiomatic, of course, that a death sentence infected by prejudicial trial error is a nullity which must be categorically rejected from any comparative review of properly imposed death sentences. Thus our prior decisions vacating and remanding death sentences for retrial must be disregarded in the course of proportionality review.

State v. Copeland, 278 S.C. 572, 593, 300 S.E.2d 63, 75 (1982).

[12] South Carolina Department of Corrections Incarcerated Inmate Search, Inmate Search Detail Report, https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000316634 (last viewed Sept. 3, 2024).

Death Sentence and Making Peace with the Victim's Family through Post-conviction Investigation, 77 U.M.K.C. L. Rev. 963, 985, 987 (2009). By the Court's holding in *Moore*—finding that the Court is not required to restrict its review to only cases in which a sentence of death is imposed—Mr. Owens's sentence could and should now be compared to the non-capital sentence Mr. Simpson received on remand.

Moreover, the circumstances of Mr. Simpson's crime are more aggravated than the circumstances in Mr. Owens's case. Mr. Simpson fatally shot the convenience store's owner, who was working the register. *Simpson,* 367 S.C. at 593–94, 627 S.E.2d at 704–05. The owner was shot three times. Blume & Johnson, 77 U.M.K.C. L. Rev. at 965. Mr. Simpson also pointed and attempted to fire his gun at the forehead of a nine-year-old child. *Simpson*, 367 S.C. at 594, 627 S.E.2d at 705. Mr. Simpson's accomplice then shot the child's father in the parking lot, seriously injuring him, *see* Blume & Johnson, 77 U.M.K.C. L. Rev. at 965; as Mr. Simpson and his accomplice fled, they pointed and fired their guns at others in the area, *Simpson,* 367 S.C. at 594, 627 S.E.2d at 705. As this Court concluded in *Simpson*, "[a]lthough there is no doubt that some particulars of the crime are in dispute, there can be no doubt about Simpson's malicious conduct which amounted to gunning down a wounded crime victim and attempting to execute the witnesses." *Id.* at 598 n.1, 627 S.E.2d at 707 n.1.

The circumstances in *Humphries* also differ greatly from those in the present case. In the first instance, there was no question that Mr. Humphries was the shooter. *Humphries,* 325 S.C. at 30, 479 S.E.2d at 53. Proportionality "requires a nexus between the punishment imposed and the defendant's blameworthiness." *Enmund*, 458 U.S. at 825 (O'Connor, J., dissenting). As discussed previously, the Court established in *Enmund* and *Tison* that there are circumstances in which non-triggermen have a lower moral culpability than those who did not kill and are ineligible for the

death penalty. Because Mr. Humphries was a triggerman, while no jury determined that was Mr. Owens's role, *Humphries* is not an appropriate comparator case.

There is another comparator case quite similar to Mr. Owens in which the defendant received a much lighter sentence. Mr. Owens's co-defendant, Steven Golden, pled guilty to charges that included murder and armed robbery. Exhibit D. Mr. Golden—who had faced the death penalty until his plea—was sentenced to thirty years in prison. *Id*. At the same proceeding, Mr. Golden was sentenced to ten years in prison to run concurrently with his other sentences for assault and battery of a high and aggravated nature for breaking the nose of a jail guard several months earlier. *See* Exhibit E.

After Mr. Golden testified at Mr. Owens's 2003 resentencing, however, his convictions and 30-year sentence were vacated, and he was resentenced to lesser charges and 28 years in prison. Exhibit D. Mr. Golden should be eligible for parole this year, and his projected release date is 2026.[13] Mr. Golden's sentence contrasts starkly with Mr. Owens's death sentence, especially given the State's argument that they were equally responsible for Ms. Graves's murder. *See* 1999 ROA at 2886 ("[W]ho was the shooter is not important. . . . if you find that both of these individuals [were] present and you find that Ms. Graves was killed by one of them, even though you don't find which one at this point because you don't need to[,] then they are both guilty.").

Mr. Owens's death sentence is also disproportionate in comparison to the many similar but more aggravated armed robbery cases in which the defendant received a sentence less than death. A list of these cases is attached as Exhibit F. These cases should be included in any expanded pool of comparison cases considered by the Court. *See Moore*, 436 S.C. at 225–27, 871 S.E. 2d at 432–

[13] South Carolina Department of Corrections Incarcerated Inmate Search, Inmate Search Detail Report, available at https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000257183 (last viewed Sept. 3, 2024).

33. The following list presents examples of cases in which defendants received sentences of less than death for conduct similar to or more egregious than that attributed to Mr. Owens:

- Eric Gill shot and killed restaurant owner Bert Long during a 1977 robbery of Bert's Grill restaurant. Gill also shot and wounded the cook Isabelle Milles, who escaped into the bathroom. Gill pursued Mills into the bathroom and fired again, but Mills survived. Gill also shot another employee, Kathie Faile, in the back and the shoulder. Faile struggled to a phone and was calling for help when Gill yanked the phone from her hand and fled.
- James Anthony Butler entered a Santee motel in October 1980 and asked for a room. He began filling out the paperwork, then walked outside, returned with a gun, and demanded money. Thakor Patel, the motel owner, gave him about $200. Butler then told Mr. Patel and his wife—who was eight months pregnant—to lie on the floor. Butler shot Mr. Patel three times, then shot Mrs. Patel. Mrs. Patel survived but her husband did not. A jury found Butler guilty of murdering Mr. Patel, of committing an assault and battery upon Mrs. Patel with intent to kill her, and of unlawfully carrying a pistol.
- Stanley Eugene Woods shot and killed a 71-year-old man during a 1981 armed robbery of a gas station. The following month, Woods stole cash from a store, kidnapped the 16-year-old girl working as the store's clerk, and raped her in the back seat of a car.
- Jessie Lee Pringle robbed a convenience store in Sumter in 1991. After taking money from the cash register, he dragged Angela Taylor, the store clerk, into a wooded area behind the store. He raped her and then smashed her skull with a cinderblock, killing her.
- Felix Cheeseboro robbed a barbershop, then ordered the three men present to kneel with the hands behind their heads. Cheeseboro committed execution-style murders of two—a 75-year-old barber and his 70-year-old customer. He also attempted to execute a third man,

an employee of the barbershop, shooting him in the back of the neck. The third man survived; he was found "lying in a pool of blood" with one of the victims on top of him. It is impossible to review the facts of these cases, each of which ended in a sentence less than death, and conclude that Mr. Owens's sentence of death is proportionate to his moral culpability.

3. Mr. Owens was nineteen years old and suffered from organic brain damage at the time of the murder, characteristics that render his death sentence disproportionate.

This Court's statutory mandate is to determine whether death sentences are "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime *and the defendant*." S.C. Code Ann. § 16-3-25(C)(3) (emphasis added). This Court's 2008 proportionality review of Mr. Owens's death sentence made no attempt to consider Mr. Owens's youth, traumatic background, compromised mental health, and other mitigating circumstances. *See Owens*, 378 S.C. at 641, 664 S.E.2d at 82. These factors further demonstrate that the death penalty is excessive and disproportionate in Mr. Owens's case.

Mr. Owens was only nineteen years old when Ms. Graves was killed. Sentencing a person so young to death is extremely rare. South Carolina imposed ten new death sentences in the three-year period between the Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), and this Court's 2008 proportionality review of Mr. Owens's death sentence. Exhibit C at 9. None was imposed on a person twenty-one or younger at the time of the crime. *Id.* at 9. No offender as young as Mr. Owens was executed between 1997 and 2008. *Id.* at 1. As of 2008, Owens would have been only the second person ever executed in South Carolina for a crime committed at the age of 19. *Id.* at 9. Between the resumption of capital punishment in 1977 and 2008, only two offenders younger than Mr. Owens have been executed.[14] *Id.*

[14] Since *Gregg*, death sentence verdicts in South Carolina against people aged eighteen to twenty-one years old at the time of their crimes have been imposed in a racially discriminatory manner.

In holding that the Eighth Amendment prohibits the execution of people younger than eighteen at the time of their crimes, the United States Supreme Court found that juveniles have a "lack of maturity and underdeveloped sense of responsibility," coupled with a vulnerab[ility] or susceptib[ility] to negative influences and outside pressures, including peer pressure," that "render suspect any conclusion that [they] fall[] among the worst offenders." *Roper*, 543 U.S. at 569–71. The Court has also recognized a comprehensive body of research on adolescent development, which establishes that maturity is defined by brain growth, and that the frontal lobe—which controls "executive functions" such as planning and impulse control—is among the last areas of the brain to mature. *Miller v. Alabama*, 567 U.S. 460, 472 (2012); *Graham v. Florida*, 560 U.S. 48, 68 (2010).[15] Any proportionality review must account for Mr. Owens's youth and resulting neurodevelopmental immaturity, particularly in light of the evidence of the extensive brain damage that impaired his functioning.[16] *See* S.C. Code Ann. § 16-3-25(C)(3).

Exhibit C at 7. Although the Black population in South Carolina has been between about 28 percent and 30 percent of the state's total population in the period between 1980 and 2010, 56 percent of the late adolescent class (age eighteen to twenty-one) youths sentenced to death before July 14, 2008, have been Black. Exhibit C at 9.

[15] In 2021, Dr. Scott J. Hunter, Director of Neuropsychology and head of the Pediatric Neuropsychology Service for the University of Chicago Medicine and Comer Children's Hospital, reviewed previous evaluations of Mr. Owens to consider the applicability of neurodevelopmental science to understanding Mr. Owens's neurodevelopmental status at the time of Ms. Graves's murder. As Dr. Hunter concluded, "at the time of his actions at age 19 . . . [Mr. Owens] was not functioning as an adult and was incapable of making adult level decisions or actions." Exhibit G at 2. At that time, "Mr. Owens was both still neurologically immature and as a result less capable of responsible actions when under challenge and threat, and more limited in being able to meet the demands of responsible action given his complex neurodevelopmental injuries." *Id.* at 2.

[16] In 2016, Dr. Ruben Gur, the director of Neuropsychology and the Brain Behavior Laboratory of the University of Pennsylvania, performed neuroimaging that diagnosed Mr. Owens with organic brain damage, identifying multiple frontal-lobe abnormalities indicative of diminished decision-making, emotional regulation, memory, and cognitive functioning. Exhibit H at 4–5. Dr. Gur described Mr. Owens's brain as "analogous to a car with weak brakes….The frontal lobe is unable to do its job and act as the brakes on the primitive emotional impulses," causing him to

These characteristics diminish Mr. Owens's moral culpability and establish that the death sentence is a disproportionate punishment in his case. *See, e.g.*, *Roper*, 543 U.S. at 571.

CONCLUSION

For the reasons discussed above, this Court should grant the writ of habeas corpus and vacate Mr. Owens's capital conviction and sentence, or, alternatively, remand to the circuit court for development and presentation of the facts herein, and resolution of any disputed facts, and for other appropriate relief. Mr. Owens believes oral argument would be beneficial, and he respectfully requests that the Court schedule the case for oral argument as appropriate.

Respectfully submitted on this, the 5th day of September, 2024,

Gerald W. King, Jr.
Chief, Capital Habeas Unit for the Fourth Circuit
Gerald_King@fd.org

s/ Gabrielle Amber Pittman
Gabrielle Amber Pittman (No. 71771)
Deputy Chief, Capital Habeas Unit for the Fourth Circuit
G_Amber_Pittman@fd.org

129 West Trade Street, Suite 300
Charlotte, NC 28202
(704) 688-6946

s/ Joshua Snow Kendrick
Joshua Snow Kendrick (No. 70453)
KENDRICK & LEONARD, P.C.
P.O. Box 6938
Greenville, SC 29606
Josh@KendrickLeonard.com

"misinterpret danger signals and when excited…will issue false alarms[.]" *Id.* at 5. Also in 2016, Dr. Stacy Wood, a neuropsychologist, conducted a test battery including tests that measured Mr. Owens's executive functioning in the *first percentile*, categorizing him as "severely impaired" in a way "consistent with temporal lobe injury." Ex. I at 15, 18–19.