'NOTHING COMPARES 2 U:'[1] A RESPONSE TO BEYOND COMPARE: A CODEFENDANT'S PRISON SENTENCE AS A MITIGATING FACTOR IN DEATH PENALTY CASES

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We have been asked by the editors of the *Florida Law Review Forum* to write a response to Professor Jeff Kirchmeier's most recent article, *Beyond Compare: A Codefendant's Prison Sentence as a Mitigating Factor in Death Penalty Cases*.[2] In the piece, Professor Kirchmeier persuasively argues that two major strands of the United States Supreme Court's death penalty jurisprudence support—in fact mandate—that jurors in a capital case be allowed to consider a codefendant's sentence in determining whether to sentence a person to death or to life in prison.[3] The first line of Supreme Court authority invoked by Professor Kirchmeier is the Court's capital decisions setting forth the requirement that a death sentence be proportionate to the crime.[4] For example, the Court has said that a capital sentence is disproportionate for some categories of crimes (e.g., rape)[5] and offenders (e.g., juveniles).[6] The second category of capital case law Professor Kirchmeier uses to bolster his thesis is the Court's numerous decisions establishing a broad Eighth Amendment right of the capital defendant to present and have considered by the jury a broad range of mitigating evidence.[7] Looking at this corpus as a whole, Professor Kirchmeier asserts that "the Court should clarify that the Eighth and Fourteenth Amendments do require courts to permit juries to weigh evidence of a codefendant's prison sentence when a capital defendant submits such evidence as a mitigating factor."[8]

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1. PRINCE, *Nothing Compares 2 U, on* THE HITS/THE B-SIDES (Paisley Park Records & Warner Bros. Records 1993).

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2. Jeffrey Kirchmeier, *Beyond Compare: A Codefendant's Prison Sentence as a Mitigating Factor in Death Penalty Cases*, 71 FLA. L. REV. 1017 (2019).

3. *Id.* at 1068.

4. *Id.* at 1021.

5. *Id*. at 1025–27.

6. *See* Roper v. Simmons, 543 U.S. 551, 574–75 (2005) (abrogating Stanford v. Kentucky, 492 U.S. 361 (1989)).

7. Kirchmeier, *supra* note 2, at 1031–34. In a case arising out of South Carolina, where we primarily practice, the Court held that the right to present mitigating evidence included the ability to put before the sentencing jury any information that "might serve 'as a basis for a sentence less than death.'" Skipper v. South Carolina, 476 U.S. 1, 4–5 (1986).

8. Kirchmeier, *supra* note 2, at 1068.

We almost passed on the opportunity to write this response essay, not because we disagreed with anything in the original, but rather because we struggled with what we would say other than "what Kirchmeier said," and we did not believe that would be very interesting to write (or to read). But on further reflection, we realized we had one small "nit" to pick and wished to expand upon his argument and its potential application to a category of defendants that the Supreme Court has analogized to death-sentenced inmates: Juveniles. Specifically, juveniles sentenced to life imprisonment[9] and other draconian punishments.

First to our one quibble: we believe there is one more capital sentencing doctrine, not fully utilized by Professor Kirchmeier, that supports his main thesis. The Court's modern capital punishment jurisprudence has also focused on the need to eliminate arbitrariness in capital sentencing. First expressed in *Furman v. Georgia*,[10] the Court has held that discretion given to a capital sentencing body "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[11] Allowing the jury to consider the codefendant's relative culpability and sentence would further eliminate the concern with sentencing disparities first brought to light in *Furman* and restated throughout decades of subsequent Supreme Court decisions. As Professor Kirchmeier points out, there is no need for the jury to assign this evidence particular weight, nor is it a controlling factor in the sentencing phase; however, it would serve to decrease arbitrariness in the capital sentencing process.[12]

In the Court's analysis, proportionality and arbitrariness are closely linked—the principles are "interrelated" and the test of whether a punishment violates the constitution will be a "cumulative one."[13] It was on these bases that the Court in *Furman* determined carrying out the death sentences of the petitioners would constitute cruel and unusual punishment.[14] In so holding, several of the *Furman* concurrences expressed a deep concern with the sentencing patterns across the nation: Justice Stewart found that the death penalty was being "wantonly and . . . freakishly imposed" upon a "capriciously selected random handful" of

9. Graham v. Florida, 560 U.S. 48, 69, 74 (2010) (recognizing that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences" and imposing a categorical ban on such sentences for juveniles convicted of non-homicide offenses).

10. 408 U.S. 238 (1972).

11. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (interpreting the holding of *Furman*).

12. Kirchmeier, *supra* note 2, at 1064, 1066–67.

13. *Furman*, 408 U.S. at 282 (Brennan, J., concurring).

14. *Id.* at 239–40.

defendants,[15] while Justice Brennan felt that there was a "strong inference" that the state was "exercising arbitrary, 'unrestrained power'" and wrote that the state did not "respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others."[16] Justice White focused on the lack of justification for such a severe punishment for one person, when for another in "like circumstances life imprisonment or shorter prison terms are judged sufficient,"[17] concluding that "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[18]

Four years later in *Gregg v. Georgia*,[19] the Supreme Court approved the state's revised capital sentencing scheme that required the jury to find at least one statutory aggravator and mandated proportionality review by the state supreme court to determine whether the sentence was "arbitrary or disproportionate," concluding that these two principles "adequately protected against the wanton and freakish imposition" of death.[20] While states hurried to re-craft their capital sentencing statutes to comply with the Court's mandate that the death penalty cannot be imposed arbitrarily, the *Gregg* Court advised them that they should "ensure[] that the sentencing authority is given adequate information and guidance."[21]

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15. *Id*. at 309–10 (Stewart, J., concurring). Justice Stewart was deeply concerned that these discrepancies were based on race but did not feel that the evidence before the Court fully supported this conclusion. *Id*. at 310. Justice Douglas disagreed, noting in his concurrence that "there is evidence that the imposition of the death sentence . . . follow[s] discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups." *Id*. at 249–50 (Douglas, J., concurring).

16. *Id.* at 274–75, 275 n.18 (Brennan, J., concurring).

17. *Id.* at 311–12, 313 (White, J., concurring).

18. *Id.* at 313.

19. 428 U.S. 153 (1976).

20. Zant v. Stephens, 462 U.S. 862, 876 (1983); *Gregg*, 428 U.S. at 206–07.

21. *Gregg*, 428 U.S. at 195. In the companion cases to *Gregg*, the Court engaged in deeper review of state statutes to ensure the most severe punishment was not meted out in an arbitrary fashion. In *Roberts v. Louisiana*, the Supreme Court struck down the statute because of the risk of arbitrary and capricious death sentences arising from the lack of standards, safeguards, or review process. 428 U.S. 325, 334–35 (1976). In *Woodson v. North Carolina*, it held that a mandatory sentencing scheme "does not fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." 428 U.S. 280, 303 (1976). However, the Court upheld the statute in *Proffitt v. Florida* because the state assured the Court that the death penalty would not be imposed in an arbitrary or capricious manner due to the appellate review process, giving the court a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." 428 U.S. 242, 252–53 (1976) (quoting *Gregg*, 428 U.S. at 188). And in *Jurek v. Texas*, the Court upheld the statute because it enabled the jury to consider all mitigating factors, sufficiently avoiding the risk of arbitrary and freakish imposition of the death penalty. 428 U.S. 262, 276 (1976).

In *Godfrey v. Georgia*,[22] the Court struck down an aggravating circumstance that failed to narrow the class of persons eligible for the death penalty, concluding that it failed to create any "inherent restraint" on capital sentencing because a reasonable juror could find that nearly every killing could fit within the criteria.[23] Thus, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not."[24] Soon after, in *Zant v. Stephens*,[25] the Court further expressed concern with "vague" statutes that allowed "pattern[s] of arbitrary and capricious sentencing."[26] There, the Court upheld the statute in question because it mandated appellate review of each capital sentence "to avoid arbitrariness and to assure proportionality," and "assured that a death sentence will be set aside if the . . . penalty [is] arbitrary or capricious" or if it was "excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances."[27]

This initial stated desire to eliminate arbitrariness in the imposition of our nation's most severe punishment has not waned. Throughout the decades, the Court has held that capital sentencing procedures must constrain and guide the sentencer's discretion to ensure: "[T]hat the death penalty is not meted out arbitrarily and capriciously;"[28] that death penalty cases require "procedural protections . . . to ensure that the death penalty will be imposed in a consistent, rational manner;"[29] that states "must administer [the death] penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not;"[30] that "death penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion;"[31] and that "the imposition of capital punishment on the basis of 'caprice,' in 'an arbitrary and unpredictable fashion,' or through 'arbitrary' or 'freakish' means" is forbidden.[32]

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22. 446 U.S. 420 (1980).
23. *Id.* at 428–29.
24. *Id.* at 433.
25. 462 U.S. 862 (1983).
26. *Id.* at 876–77.
27. *Id*. at 890.
28. California v. Ramos, 463 U.S. 992, 999 (1983).
29. Barclay v. Florida, 463 U.S. 939, 960 (1983) (Stevens, J., concurring).
30. Spaziano v. Florida, 468 U.S. 447, 460 (1984).
31. California v. Brown, 479 U.S. 538, 541 (1987).
32. McKoy v. North Carolina, 494 U.S. 433, 454 (1990) (Kennedy, J., concurring); *see also* Mills v. Maryland, 486 U.S. 367, 374–75 (1988) (observing that a system requiring jurors to unanimously recognize the existence of identical mitigating factors in order to give those factors weight in sentencing would be "the height of arbitrariness"); Lowenfield v. Phelps, 484 U.S. 231,

However, in recent years, members of the Court have expressed concern that the "*Furman* promise"—to minimize the risk of arbitrary inflictions of capital sentences—has been impossible to obtain.[33] While the tension between individualized sentencing procedures and decreasing arbitrariness remains in our modern capital system, the introduction of co-defendant sentences as evidence would not further complicate the picture.[34] Indeed, as Professor Kirchmeier details in his article, it would serve to illuminate disparities that continue to persist in co-defendant sentencing. While it is true that arbitrariness is most often created by the inclusion of certain types of evidence, here, arbitrariness arises from excluding evidence of a co-defendant's sentence, as it creates an unacceptable risk that more (or equally) culpable co-defendants are sentenced to life while less (or equally) culpable co-defendants are

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244 (1988) ("To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'"); Booth v. Maryland, 482 U.S. 496, 502 (1987) ("It is well settled that a jury's discretion to impose the death sentence must be 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'"); Pulley v. Harris, 465 U.S. 37, 51 (1984) (upholding a sentencing scheme requiring a jury to find "at least one special circumstance" before imposing a death sentence); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (noting "a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual").

33. Callins v. Collins, 510 U.S. 1141, 1148–49 (1994) (Blackmun, J., dissenting)

> I have come to wonder whether there was truth in the majority's suggestion that discrimination and arbitrariness could not be purged from the administration of capital punishment without sacrificing the equally essential component of fairness—individualized sentencing. . . . Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer's discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense.

Id. at 1155; *see also* Glossip v. Gross, 135 S. Ct. 2726, 2760, 2762 (2015) (Breyer, J., dissenting).

> Despite the *Gregg* Court's hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i.e.*, without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands. . . . [W]hether one looks at research indicating that irrelevant or improper factors—such as race, gender, local geography, and resources—*do* significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors—such as 'egregiousness'—do *not* determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily.

Id. (citation omitted).

34. *See, e.g.*, Kirchmeier, *supra* note 2, at 1057.

sentenced to death and executed. Professor Kirchmeier has documented a number of such instances in his article.[35]

The Court has consistently and emphatically stated the need to ensure that a capital sentence is not arbitrarily handed down,[36] yet does not want to "second-guess" the jury's recommendation.[37] Providing information about the co-defendant's relative culpability and sentence to the jury or judge will allow the sentencing authority to properly reserve this extreme penalty to "the worst of the worst,"[38] and may further assure the reviewing courts that the proper outcome has been reached. While some on the Court have cautioned that the appellate process may not be enough to prevent the arbitrary imposition of a capital sentence,[39] allowing the jury to consider this evidence of co-defendant sentencing at the outset would further protect the constitutional rights of capital defendants.

The argument that the Court's desire to eliminate arbitrariness in capital sentencing should allow juries to consider co-defendant sentences applies with equal force to juveniles sentenced to life without parole—to whom the Court has applied similar constitutional protections[40]—or to juveniles facing a term of years effectively requiring death in prison.[41] In our work representing juveniles, we have seen the same kinds of extreme

35. *See, e.g.*, *id.* at 1019–20.

36. *See supra* text accompanying footnotes 15–34.

37. Harris v. Alabama, 513 U.S. 504, 525 (1995) (Stevens, J., dissenting) (disagreeing with the majority's decision not to impose a higher standard of proof for a judicial override of a jury's non-capital sentence).

38. Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting); *see also* Roper v. Simmons, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'").

39. Glossip v. Gross, 135 S. Ct. 2726, 2763 (2015) (Breyer, J., dissenting) ("Finally, since this Court held that comparative proportionality review is not constitutionally required, it seems unlikely that appeals can prevent the arbitrariness I have described.") (citations omitted).

40. Miller v. Alabama, 567 U.S. 460, 470 (2012) (prohibiting mandatory life without parole for juveniles convicted of homicide offenses); Graham v. Florida, 560 U.S. 48, 69, 74 (2010) (recognizing that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences" and imposing a categorical ban on such sentences for juveniles convicted of non-homicide offenses); *see also* Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016) (applying *Miller* retroactively).

41. The South Carolina Commission on Indigent Defense commissioned a life expectancy study for people incarcerated in the South Carolina Department of Corrections. This study was conducted by epidemiologist Dr. Vera Dolan. This study found that the remaining life expectancy of a child entering SCDC at age 16 is 39.2; at age 17 is 38.3; and at age 18 is 37.3. *See* Dolan Aff. Ex. 8 (on file with authors). Put another way, no child entering SCDC was expected to live past 56 years old, while in the unincarcerated population their peers were expected to live until their early 60s. *Id.* at Ex. 5–7. Therefore, a term of years sentence that would exceed 40 years for any child in South Carolina would be an effective death-in-prison sentence. The Dolan study also found that, based on observed deaths, the actual life span of children sentenced to life imprisonment in South Carolina was 31.8 years less than the life span of children in the unincarcerated population. *See id.* ¶ 17.

sentencing disparities between co-defendants, which result in punishments that "smack[] of little more than a lottery system."[42]

In a homicide case out of North Charleston, South Carolina, a fifteen-year-old child was sentenced by one judge to a fifty-year, day for day, de facto life sentence while his more culpable adult co-defendant received the mandatory minimum term of thirty years from another judge in a separate proceeding.[43] Our client, the fifteen-year-old Kenneth Lamont Robinson, Jr.,[44] was enjoying a Mother's Day potluck when there was a drive-by shooting that left his house riddled with bullets. In the ensuing chaos, he and another partygoer jumped into this adult co-defendant's car—a man Robinson knew, but was not friendly with.[45] As they drove around the neighborhood, the adult spotted a car that looked similar to the one driven by the men who just shot at Robinson's home.[46] But the adult was mistaken.[47] Robinson told him that he had the wrong car and tried to stop the adult as he began shooting.[48] Robinson's last words before the adult killed an innocent bystander that day were "don't shoot."[49] In what he described as a case of "mistaken identity," Robinson was charged with and convicted of murder under South Carolina's prosecution-friendly "hand-of-one, hand-of-all" theory of accomplice liability.[50] The two adult co-defendants entered into plea bargains with the prosecution and will be released at ages fifty and thirty-four, respectively.[51] But Robinson, the child who tried to prevent this crime from happening, will almost certainly die in prison.[52] After the two adults

42. Furman v. Georgia, 408 U.S. 238, 293 (1972) (Brennan, J., concurring).

43. *See* Brief for Appellant at 2, State v. Kenneth Lamont Robinson, Jr., No. 2018-001269 (S.C. Ct. App. June 30, 2020).

44. *See id.* at 3.

45. *Id.* at 3–4.

46. *Id.* at 4.

47. *Id.*

48. *Id.*

49. *Id.*

50. *See* State v. Harry, 803 S.E.2d 272, 276 (S.C. 2017) ("Under the hand of one is the hand of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.")

51. *See infra* note 41.

52. Both codefendants were adults. The shooter, Richard Simmons, Jr., pled to one count of murder and five counts of attempted murder. *Inmate Search Detail Report of Richard Dara Simmons, Jr.*, S.C. DEP'T OF CORRECTIONS, https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000378174 [https://perma.cc/4WPF-XCG2]. He received five thirty-year terms to be served concurrently and is scheduled to be released in 2045. *See id.* The passenger, Keon Anderson, pled to voluntary manslaughter and four counts of first-degree assault and battery. *Inmate Search Detail Report of Keon Marquell C. Anderson*, S.C. DEP'T OF CORRECTIONS, https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000378212 [https://perma.cc/PDG4-G7B2]. He received one fifteen-year term for the voluntary manslaughter

were sentenced, Robinson's appellate attorney filed a motion for a new sentencing hearing, claiming the co-defendants' disparate sentences were "newly discovered evidence."[53] The trial judge, however, held that co-defendant sentences were not "evidence" under the scope of the motion and refused to change the sentence on this basis.

While judges and juries may create initial discrepancies that produce the type of arbitrariness the Court has attempted to guard against, other actors in the system further reinforce (and sometimes exacerbate) these seemingly unjustifiable sentencing variations. For example, sixteen-year-old Joe Kelsey was sentenced to life imprisonment with the possibility of parole in 1994 for his role in the death of a young girl.[54] His older co-defendant—and the man who was actually responsible for her death[55]—was also sentenced to life with the possibility of parole. The third boy involved in the offense—and who was also arguably more culpable than Joe—cut a deal with the prosecution and received a ten-year sentence.[56] While disparities exist in the trio's original sentences, these inconsistencies have only been deepened by the actions of the South Carolina Department of Probation, Parole, and Pardon Services. Joe is now forty-three years old and has been incarcerated for twenty-five years, nearly two-thirds of his life; his debt has been paid, and both his age and length of incarceration suggest he would be a good candidate for

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charge and four ten-year terms to be served concurrently. *See id.* He is scheduled to be released in 2029. *See id.* Meanwhile, Robinson was convicted of only one count of murder and one count of assault and battery and received a fifty-year sentence and ten-year sentence to be served concurrently. *Inmate Search Detail Report of Kenneth Lamont Robinson, Jr.*, S.C. DEP'T OF CORRECTIONS, https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000376714 [https://perma.cc/ 5S48-Q3TM]. He is scheduled to be released in 2065 at age sixty-five. *See id.* His release is scheduled for nearly ten years past his life expectancy under the Dolan study (he was sentenced at age nineteen, making his expected age at death fifty-six years old). It is important to note that all three co-defendants had the same prosecutor, Culver Kidd; however, while the two adult co-defendants were both sentenced by Judge Roger Young, Robert was sentenced by Judge Kristi Lee Harrington. *See S.C. v. Richard Dara Simmons, Jr.*, CHARLESTONCNTY.ORG, https://jcmsweb.charlestoncounty.org/PublicIndex/PISearch.aspx [https://perma.cc/ BR5H-YAJC] (search Case No. 2015A1010202139); *S.C. v. Keon Marquell Cortez Anderson*, CHARLESTONCNTY.ORG, https://jcmsweb.charlestoncounty.org/ PublicIndex/PISearch.aspx [https://perma.cc/S9WE-MSFX] (search Case No. 2016A1021000 983); *S.C. v. Kenneth Lamont Robinson, Jr.*, CHARLESTONCNTY.ORG, https://jcmsweb.charlestoncounty.org/PublicIndex/PISearch.aspx [https://perma.cc/ 9NMR-MK9S] (search Case No. 2016A1010203761).

53. Brief for Appellant, *supra* note 43, at ii.

54. State v. Kelsey, 502 S.E.2d 63, 68 (S.C. 1998).

55. Payne v. State, 586 S.E.2d 857, 859 (S.C. 2003) (writing that the evidence "overwhelmingly prove[d] that Payne murdered [the victim]").

56. *S.C. v. Jamie Lynn Lee*, CHARLESTONCNTY.ORG, https://jcmsweb.charlestoncounty.org/PublicIndex/PISearch.aspx [https://perma.cc/N72X-TTDZ] (search Case No. 1995GS3500088).

release.[57] Despite this, as well as having an impeccable disciplinary record, earning an associate degree and bachelor's degree while incarcerated, receiving glowing recommendations from his supervisors, and having a release plan that included a robust support network, stable housing, and a job offer, the South Carolina Parole Board has denied Joe's application for parole three times based on the "nature and the seriousness of the offense"—something that Joe, of course, has no control over.[58] Meanwhile, Joe's older, more culpable co-defendant has been released by the Parole Board by unanimous vote.[59] The Parole Board insisted that the release of the older, clearly more culpable co-defendant was irrelevant to their decision to parole (or rather, not parole) Joe.[60] We posit that the Board's myopia only serves to further unconstitutional arbitrariness in juvenile-sentencing practices.

CONCLUSION

Certainly, to Robert and Joe, their arbitrary sentences and continued disparate treatment by decision makers must have felt as random as being "struck by lightning."[61] Such incongruities will only serve to further undermine waning public confidence in the criminal justice system. At the present moment, the criminal justice system needs all the public confidence it can muster. This is true not just in capital cases, or in cases where juveniles are sentenced to life without parole or other draconian punishments, but to put our cards completely on the table, in all criminal cases. Without Professor Kirchmeier's proposed prophylactic measures at the sentencing phase, combined with robust appellate and post-conviction review of the actions of juries, judges, and parole boards, the types of injustices documented in Professor Kirchmeier's article and in this response will continue to occur, serving no legitimate penological purpose and bringing the system into disrepute.

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57. *Inmate Search Detail Report of Joseph Glen Kelsey*, S.C. DEP'T OF CORRECTIONS, https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%20002 17218 [https://perma.cc/VNH6-GWBQ].

58. *See Hearing Outcome of Joseph Kelsey*, DEP'T OF PROB., PAROLE & PARDON SERVS. (Nov. 15, 2019), https://www.dppps.sc.gov/Parole-Pardon-Hearings/Offenders/JOSEPH-KELSEY [https://perma.cc/82VH-VPKX].

59. We are not suggesting that Joe's co-defendant should not have been released. We only argue that the fact that the South Carolina Parole Board saw fit to release this man should be a factor that the Board takes into consideration when ruling on Joe's fourth parole application next year, especially in light of his lesser culpability and more favorable parole package.

60. Audiotape: Geoffery Payne Parole Hearing (Mar. 20, 2019) (on file with authors).

61. Glossip v. Gross, 135 S. Ct. 2726, 2759 (2015) (Breyer, J., dissenting) (quoting Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring)).