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Case for Comparative Proportionality Review

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COMMENT

The Case for Comparative Proportionality Review

The United States Constitution supports the rational, evenhanded, and consistent imposition of capital punishment by the states.¹ The Constitution, however, does not support capital sentencing statutes which permit judges and juries unfettered discretion to determine which defendants will receive the death penalty.² Any discretion must be exercised in accordance with readily identifiable and rationally reviewable objective criteria.³ As the Supreme Court has noted, arbitrary and capricious decisionmaking is unacceptable when applied to "a matter [as] grave as the determination of whether a human life should be taken or spared."⁴

Present state capital punishment statutes represent state legislatures' best attempts to promote rational, evenhanded, and consistent sentencing results.⁵ Nearly all these statutes provide for automatic appeal of death sentences. In addition to appellate review of the trial, most states also require comparative proportionality review in order to determine whether, considering both the crime and the defendant, the sentence is proportionate to that imposed in similar cases within the state.⁶

1 See *Gregg v. Georgia*, 428 U.S. 153, 168-87 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *Jurek v. Texas*, 428 U.S. 262, 268 (1976).

2 See *Furman v. Georgia*, 408 U.S. 238, 314 (1972) (Marshall, J., concurring).

3 *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).

4 *Zant v. Stephens*, 103 S. Ct. 2733, 2741 (1983) (quoting *Gregg*, 428 U.S. at 188-89) (opinion of Stewart, Powell, and Stevens, JJ.).

5 Presently, 38 states have some form of statutorily mandated capital punishment. Twelve others (Alaska, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, North Dakota, Oregon, Rhode Island, West Virginia, and Wisconsin) do not impose capital punishment under any circumstances.

6 Of the 38 states with capital punishment statutes, 30 require some form of comparative proportionality review before authorities carry out a death sentence. Twenty-seven states require comparative proportionality review by statute. See ALA. CODE § 13A-5-53 (1982); CONN. GEN. STAT. ANN. § 53a-46b(b) (West Supp. 1982); DEL. CODE ANN., tit. 11, § 4209(g)(2)(a) (1979); GA. CODE ANN. § 27-2537(c)(3) (1982); IDAHO CODE 19-2827(c) (1979); KY. REV. STAT. ANN. § 532.075(3)(c) (Baldwin Supp. 1982); LA. CODE CRIM. PRO. ANN., art. 905.9 (West Supp. 1982); MD. ANN. CODE art. 27, § 414(e)(4) (Supp. 1982); MISS. CODE ANN. § 99-19-105(3)(c) (Supp. 1982); MO. ANN. STAT. § 565.014.3(3) (Vernon 1979); MONT. REV. CODE ANN. § 46-18-310(3) (1981); NEB. REV. STAT. § 29-2521.03 (1979); NEV. REV. STAT. § 177.055(2)(d) (1981); N.H. REV. STAT. ANN. § 630.5 (VII)(c) (Supp. 1981); N.J. STAT. ANN. § 2C:11-3(e) (West 1982); N.M. STAT. ANN. § 31-20A-4C(4) (Supp. 1981); N.C. GEN. STAT. § 15A-2000(d)(2) (1978); OHIO REV. CODE ANN. § 2929.05(A) (Page 1982);

Although "proportionality" traditionally concerns whether a particular sentence is appropriate punishment for a particular crime,⁷ a comparative proportionality review presumes that the death sentence is not per se excessive or inappropriate punishment for the crime the defendant committed. The reviewing court instead focuses on whether the death penalty is nonetheless unacceptable in a particular case because other courts in the state have awarded lesser sentences to similarly situated defendants convicted of factually similar crimes.⁸ State appellate courts conduct this review to ensure that their death penalty statutes will serve the "goals of fairness to the accused and measured, consistent application."⁹

Although the Constitution mandates "meaningful appellate review" of death sentences,¹⁰ the Supreme Court recently ruled that it does not require comparative proportionality review as an element of state capital sentencing statutes.¹¹ The Court has stated, however, that comparative proportionality review provides "maximum rationality and consistency" in sentencing.¹² More than three-quarters of the states which allow capital punishment already require some form of comparative proportionality review.¹³ The legislatures and courts of these states have found that statewide comparative proportionality review achieves just results in capital sentencing with no undue burden on the reviewing body.¹⁴

This comment is directed toward the legislatures, judiciaries,

OKLA. STAT. ANN., tit. 21, § 701.12(C)(3) (West Supp. 1981); PA. STAT. ANN., tit. 42, § 9711(h)(3) (Purdon Supp. 1982); S.C. CODE ANN. § 16-3-25(C)(3) (Supp. 1982); S.D. CODIFIED LAWS ANN. § 23A-27A-12(3) (1979); TENN. CODE ANN. § 39-2-205(c) (1982); VA. CODE § 17-110, 1(C)(2) (Supp. 1982); WASH. REV. CODE ANN. § 10.95.130(2) (Supp. 1983); WYO. STAT. ANN. § 6-4-103(d) (1983). In three others (Arizona, Arkansas, and Florida), judicial decisions mandate comparative proportionality review. *See, e.g.*, *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976); *Collins v. State*, 261 Ark. 195, 221-22, 548 S.W.2d 106, 120-21 (1977); *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973).

7 The Supreme Court has occasionally struck down punishments as inherently disproportionate to the crime committed. *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty disproportionate punishment for rape).

8 Georgia's capital sentencing statute, for example, requires the reviewing court to determine whether a death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." GA. CODE ANN. § 27-2537(c)(3) (1982). The Supreme Court has termed this type of appellate review "proportionality review," *see, e.g.*, *Gregg*, 428 U.S. at 203; *Proffitt*, 428 U.S. at 259, or "comparative proportionality review," *see, e.g.*, *Pulley v. Harris*, 104 S. Ct. 871, 872 (1984).

9 *Eddings v. Oklahoma*, 435 U.S. 104, 111 (1982).

10 *Gregg*, 428 U.S. at 198; *see also Pulley*, 104 S. Ct. at 883 (Stevens, J., concurring).

11 *Pulley v. Harris*, 104 S. Ct. 871 (1984).

12 *Proffitt*, 428 U.S. at 258-59.

13 *See note 6 supra*.

14 *Pulley*, 104 S. Ct. at 890 (Brennen, J., dissenting).

and executives of the eight states which, while authorizing capital punishment, do not conduct statewide proportionality review of death sentences.¹⁵ Section I points to sound principles of public policy which counsel these states' legislatures to legislate statewide comparative proportionality review. Section II points to federal and state constitutional principles which have led other state judiciaries to adopt comparative proportionality review. Finally, section III encourages these states' governors, as a last resort, to conduct comparative proportionality reviews while exercising their clemency power.

I. Public Policy Support for Statewide Comparative Proportionality Review Legislation

The imposition of the death penalty is the most thorough and permanent manifestation of a state's power over an individual. Accordingly, state legislatures have tried to write capital punishment statutes which eliminate the potential for arbitrary and discriminatory sentencing so that death sentences will be imposed in an evenhanded and consistent manner. Despite their efforts, evidence shows that the death penalty is sometimes still arbitrarily and discriminatorily imposed.¹⁶ Statewide comparative proportionality review has eliminated at least a part of this inconsistency.¹⁷ As executions occur with greater frequency,¹⁸ the need to eliminate arbitrary and discriminatory sentencing results has become more critical. For those states with capital punishment statutes and no statewide comparative proportionality review, the need for legislation in this area is particularly acute.

A. *Discriminatory Results in Capital Sentencing*

A rapidly growing number of legal scholars have examined the

15 California, Colorado, Illinois, Indiana, New York, Texas, Utah, and Vermont do not conduct comparative proportionality review of death sentences. New York authorizes the death penalty only for murder by life-term inmates while Vermont authorizes the death penalty only for the first degree murder of correctional personnel. VT. STAT. ANN., tit. 13 § 2303(C) (Supp. 1982). In these two states, comparative proportionality review would serve a more limited purpose. Louisiana's capital punishment statute requires comparative proportionality review, LA. CODE CRIM. PRO. ANN. art. 905.9 (West Supp. 1982); however, the Louisiana Supreme Court restricts its comparisons to cases within the same geographic subdivision as the case under review. *See Williams v. Maggio*, 679 F.2d 381, 394-95 (5th Cir. 1982). This comment promotes statewide comparative proportionality review and therefore finds the Louisiana procedure inadequate.

16 *See* notes 19-28 *infra* and accompanying text.

17 *See* notes 34-35 *infra* and accompanying text.

18 *Pulley*, 104 S. Ct. at 887 (Brennan, J., dissenting).

extent to which current state capital punishment statutes promote discriminatory and arbitrary imposition of the death penalty. They have most commonly criticized the statutes for allowing racial factors to substantially affect whether or not the death penalty is imposed.¹⁹ The commentators have also identified prosecutorial discretion,²⁰ the defendant's gender and socioeconomic status,²¹ and the geographic location within the state where the defendant stands trial²² as factors which may promote inconsistent or discriminatory results in capital sentencing.

Although research revealing that racial discrimination pervades capital sentencing has not been completely and systematically marshalled,²³ critics have frequently stated that the criminal justice system has been and remains racially discriminatory.²⁴ For example, two commentators have concluded that the South Carolina capital sentencing statute discriminates against defendants whose victims are white.²⁵ Another commentator argues that the Florida death penalty statute results in discrimination based on both the victim's race and the defendant's race.²⁶ In perhaps the least damning of all studies on the subject, one commentator has provided a comprehensive reevaluation of data published nationwide regarding how race influenced executions from 1967 to 1978.²⁷ He concluded that only courts in southern states have generally imposed the death penalty for murder in a manner which discriminates against blacks.²⁸

19 See, e.g., Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980) (discrimination by defendant's race and victim's race); Foley & Powell, *The Discretion of Prosecutors, Judges, and Juries in Capital Cases*, 7 CRIM. JUST. J. 16 (Fall 1982) (discrimination by victim's race); Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 CRIM. L. & CRIMINOLOGY 379 (1982) (discrimination by victim's race); Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence With Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981); Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981) (discrimination by victim's race); Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 TEMP. L.Q. 261 (1976); Ziesel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981) (discrimination by defendant's race and victim's race); see also C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981).

20 See, e.g., C. BLACK, *supra* note 19, at 46-53.

21 See, e.g., Foley & Powell, *supra* note 19.

22 See, e.g., Bowers & Pierce, *supra* note 19.

23 Pulley, 104 S. Ct. at 887 (Brennan, J., dissenting).

24 See note 19 *supra*.

25 See Jacoby & Paternoster, *supra* note 19, at 384-87.

26 See Zeisel, *supra* note 19, at 456.

27 See Kleck, *supra* note 19.

28 *Id.*

Because of the danger that race and other constitutionally impermissible factors will promote comparative excesses in sentencing, all state capital sentencing statutes contain procedural safeguards intended to minimize the risk of arbitrary and capricious results.²⁹ How well these procedural safeguards function, however, may vary from case to case. A defendant can challenge the results either prior to sentencing or on appeal, but will often lack the time, money, and resources necessary to identify any discrimination.³⁰ The most timely and logical way to identify any sentencing disparities is for a court of statewide jurisdiction to compare sentences imposed for like crimes by different judges and juries within the state.

B. *The Value of Comparative Proportionality Review*

Comparative proportionality review, while not constitutionally mandated, is a valuable component of a capital sentencing procedure. The United States Supreme Court has stated that some meaningful appellate review of capital sentencing is necessary.³¹ The Court has further stated that comparative proportionality review provides the "function of death sentence review with a maximum of rationality and consistency."³² Proportionality review is also an effective means to keep state courts apprised of changing sentencing trends within the state. As the Supreme Court noted:

[P]roportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, these . . . procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.³³

Perhaps the best testament to the value of statewide comparative proportionality review is found by examining the results obtained in those states which already require such review. Thirty states presently require statewide comparative proportionality review before a death sentence can be carried out.³⁴ Appellate courts in

29 For example, all statutes limit capital punishment to a specifically defined subclass of homicide cases and identify aggravating and mitigating circumstances which the jury must consider. Moreover, capital sentencing statutes typically require bifurcated trials and appellate review of death sentences.

30 See generally C. BLACK, *supra* note 19, at 94-101.

31 *Gregg*, 428 U.S. at 198; see also *Pulley*, 104 S. Ct. at 883 (Stevens, J., concurring).

32 *Proffitt*, 428 U.S. at 258-59.

33 *Gregg*, 428 U.S. at 206.

34 See note 6 *supra*. Additionally, the National Center for State Courts is presently developing a model proportionality review procedure for the various states. The Center's major

these states have demonstrated that this procedure is capable of preventing excessive sentences in particular cases.³⁵ These states have thus recognized that comparative proportionality review eliminates some of the inconsistency that invariably plagues capital sentencing. Since the goal of any capital sentencing statute must be to impose sentences as evenhandedly as possible,³⁶ public policy dictates that each state's death penalty statute should provide statewide comparative proportionality review. This need for proportionality review will continue to become more acute if death rows continue to grow and executions increase throughout the states.

II. Judicial Adoption of Comparative Proportionality Review

The constitutions of the eight states which do not currently conduct statewide comparative proportionality review do not explicitly require such review. Arguably, however, the due process and equal protection clauses in their state constitutions imply that the state should make every possible effort to ensure the evenhanded imposition of the death penalty. While the Supreme Court has stated that the fourteenth amendment's equal protection and due process guarantees do not require statewide comparative proportionality review,³⁷ neither the federal nor state constitutions prohibit or restrict comparative proportionality review.

The Arizona, Arkansas, and Florida supreme courts require comparative proportionality review even though their state capital punishment statutes do not.³⁸ These courts have stated that such review is necessary to ensure evenhanded capital sentencing. The Arkansas Supreme Court noted as it reviewed a death sentence imposed on a convicted murderer:

objectives are to develop methods to select factually similar cases for comparative purposes and to assist state supreme courts which face important procedural questions arising in this context.

35 In the following cases, state appellate courts have found that the death penalty was excessive when compared to penalties imposed on similarly situated defendants within the state: *Henry v. State*, 278 Ark. 478, 488-489, 647 S.W.2d 419, 425 (1983); *Sumlin v. State*, 273 Ark. 185, 190, 617 S.W.2d 372, 375 (1981); *Blair v. State*, 406 So. 2d 1103, 1108-09 (Fla. 1981); *McCaskill v. State*, 344 So. 2d 783, 786-787 (Fla. 1977); *Provence v. State*, 337 So. 2d 1276, 1278-80 (Fla. 1976); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974), *aff'd sub nom.* *Gregg v. Georgia*, 428 U.S. 153 (1976); *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612 (1974); *Coleman v. State*, 378 So. 2d 640, 649-50 (Miss. 1979); *State v. McIlvoy*, 629 S.W.2d 333, 341-42 (Mo. 1982); *Munn v. State*, 658 P.2d 482, 487-88 (Okla. Crim. App. 1983).

36 See text accompanying notes 1-5 *supra*.

37 *Pulley v. Harris*, 104 S. Ct. 781 (1984).

38 See note 6 *supra*.

[T]here is no specific requirement that this court compare sentences in other cases; however, the scope of permissible review of the sentence on appeal would necessarily require that we consult prior cases as precedent for our determining whether there was error in the sentencing procedure . . . [or] whether any of the findings was the result of passion or prejudice or any other arbitrary factor. . . .³⁹

The judiciaries of the eight states which do not conduct comparative proportionality review should follow the example of the Arkansas Supreme Court and find that their capital sentencing statutes implicitly endorse such review.⁴⁰

Additionally, the wisdom of conducting comparative proportionality review, regardless of the fact that it is not constitutionally mandated, should prompt the remaining states to adopt such review. As Justice Frankfurter noted: “[C]ivil liberties draw at best only limited strength from legal guaranties. Preoccupation with the constitutionality, instead of with wisdom, of legislation or executive action is preoccupation with a false value.”⁴¹ Not only the Supreme Court, but the majority of the state legislatures have found “wisdom” in the use of comparative proportionality review of death sentences.⁴² In order to ensure evenhanded results in capital sentencing in the remaining states, state judiciaries should do likewise.

III. Proportionality Review and Clemency

For those states with capital punishment statutes and no statutorily or judicially mandated statewide comparative proportionality review, the clemency procedure provides the final opportunity to conduct such a review. Clemency, defined as an act of leniency or a

39 *Collins v. State*, 261 Ark. 195, 221-22, 548 S.W.2d 106, 120-21 (1977).

40 *See, e.g.*, COLO. REV. STAT. § 16-11-203(7) (Supp. 1983):

(a) Whenever a sentence of death is imposed upon a person pursuant to the provisions of this section, the Supreme Court shall review the propriety of that sentence, having regard to the nature of the offense, the character of the record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.

(b) A sentence of death shall not be imposed pursuant to this section if the Supreme Court determines that the sentence was imposed under the influence of passion or prejudice or any other arbitrary factor or that the evidence does not support the finding of statutory aggravating circumstances.

The scope of permissible review of the Colorado Supreme Court is clearly broad enough to allow for comparative proportionality review.

41 *Dennis v. United States*, 341 U.S. 494, 555 (1951) (Frankfurter, J., concurring).

42 *See* notes 6-14 *supra* and accompanying text.

disposition to be merciful,⁴³ provides a means to modify the decisions of juries and judiciaries which result in discriminatory sentencing. Clemency is more than the personal inclination of the executive to be lenient in a particular case.⁴⁴ As Justice Holmes stated:

[Clemency is] not a private act of grace from an individual happening to possess power. It is part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.⁴⁵

Although there is a growing trend toward decentralization of the clemency authority and greater delegation of this power to boards, governors continue to have the final word in the vast majority of states.⁴⁶ Despite Justice Holmes' statement, however, governors can exercise their clemency power in a wholly discretionary manner without following any stated standards.⁴⁷ Moreover, the governor's motives are not normally open to judicial review.⁴⁸ Indeed, their reasons for commuting death sentences to life sentences often indicate a discretionary character which would be constitutionally impermissible in a courtroom. These reasons include: the defendant's physical or mental health; the effect of intoxication, provocation or duress on the defendant's actions; the defendant's guilt relative to the co-defendant's; the defendant's degree of rehabilitation; the viciousness of the crime; and the degree of public outrage invoked by the crime.⁴⁹

A governor's personal opposition to capital punishment may also have a substantial effect on the commutation decision. Lee Cruce, the governor of Oklahoma from 1911 to 1915, commuted twenty-two death sentences to life imprisonment because he personally opposed the death penalty.⁵⁰ Former governors Edmund Brown of California and Endicott Peabody of Massachusetts likewise commuted substantial numbers of death sentences.⁵¹ Former governor of New York Alfred E. Smith commuted all death sentences which the

43 S. STAFFORD, *CLEMENCY: LEGAL AUTHORITY, PROCEDURE, AND STRUCTURE* xiii (1977).

44 *Id.* at xiv.

45 *Biddle v. Perovich*, 274 U.S. 480, 486 (1926).

46 S. STAFFORD, *supra* note 43, at 1-5.

47 C. BLACK, *supra* note 19, at 81.

48 *Eacret v. Holmes*, 215 Or. 121, 333 P.2d 741 (1950).

49 R. GOLDFARB & L. SINGER, *AFTER CONVICTION* 343 (1975).

50 *Id.* at 348.

51 *Id.*

court of appeals affirmed by a divided vote.⁵² Former governor of Pennsylvania Milton Shapp publicly announced that no prisoners would die while he was in office.⁵³ Although a state supreme court might disagree with a governor who uses the clemency power in this way,⁵⁴ the court could never prevent a governor from carrying out such a promise.

Governors can, through the use of their clemency power, thus compensate for gaps they perceive in the law. By conducting a state-wide comparative proportionality review, a governor could determine which defendants deserve more lenient treatment and also instill a more regularized approach in the clemency procedure itself. In a state where the judiciary does not conduct comparative proportionality review, the clemency procedure represents the final opportunity to ensure evenhanded imposition of the death penalty. Governors and boards already have staffs set up to review capital cases.⁵⁵ These staffs seem particularly well-suited to compare a particular defendant's sentence to that of similarly situated defendants throughout the state.

IV. Conclusion

Our society has determined through their state legislatures that the most loathsome of criminals deserve the death penalty. Capital punishment, however, must be imposed rationally and consistently, or not at all. The best way to determine whether a state has met this high standard is to examine statewide sentencing results before a state carries out a death sentence. Although not mandated by the Constitution, the majority of states and the Supreme Court have found statewide comparative proportionality review effective in en-

52 *Id.* at 346.

53 *Id.* at 348.

54 For example, the Oklahoma Supreme Court reacted to Governor Cruce's policy as follows:

No governor has the right to say, directly or substantially; . . . "I think capital punishment is wrong. I know what it is taught in the Bible, and is provided for in the laws of Oklahoma, but I occupy a higher plane than this . . . therefore, notwithstanding my official oath, I will place my judgment above the law, both human and divine, and will make my will supreme in the state, and will not permit capital punishment to be inflicted in Oklahoma, no matter what the law is, or how atrocious the offense committed may have been."

Id. (quoting *Henry v. State*, 10 Okla. Crim. 369, 389, 136 P. 982, 990 (1913)).

55 See generally S. STAFFORD, *supra* note 43. For a thorough discussion on methods used to complement comparative proportionality review, see generally Baldus, Pulaski, Woodworth & Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. (1980).

sure rational, evenhanded, and consistent sentencing results. Eight states, however, still do not conduct such a review at any stage of the sentencing process. The legislatures, judiciaries, and governors of these remaining states should recognize the wisdom of statewide comparative proportionality review and adopt it as an element of their capital sentencing procedure.

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