PROPORTIONALITY AS THE NEW INNOCENCE

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INTRODUCTION

190 death row inmates have been exonerated since the Supreme Court ushered in the "modern era" of the American death penalty nearly fifty years ago in *Gregg v. Georgia*.[1] Those exonerations are of obvious and enormous significance to the individuals wrongly sentenced to death, but they also have cast a shadow on the death penalty as a whole, undermining its legitimacy in the eyes of many who had previously been death penalty advocates. But what of the defendants who are guilty of murder but nevertheless are clearly not "the worst of the worst," and, while rightly convicted, are wrongly sentenced to death, i.e., those whose capital sentences are disproportionate? Both with respect to granting relief to individual defendants and with respect to its potential for mobilizing broader opposition to the death penalty, innocence of the death penalty has played a very small role.

True, since *Gregg* the Supreme Court has developed a handful of categorical exemptions that are grounded in proportionality.[2] At least where crimes against individuals are involved, only homicide suffices to support a death sentence,[3] and one form of homicide—felony murder—is

1. *Innocence*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence (last visited July 10, 2023); *see* Gregg v. Georgia, 428 U.S. 153, 207 (1976).

2. *See* Kennedy v. Louisiana, 554 U.S. 407, 413 (2008); Tison v. Arizona, 481 U.S. 137, 154 (1987); Roper v. Simmons, 543 U.S. 551, 578 (2005); Atkins v. Virginia, 536 U.S. 304, 321 (2002).

3. *Kennedy*, 554 U.S. at 413.

sufficient only when the defendant's participation in the underlying felony is substantial and he was actually aware that the felony risked the death of a human being.[4] Moreover, neither juveniles[5] nor persons with intellectual disability may be executed.[6] However, for individuals outside those categorical exemptions, the Supreme Court has cared little about "innocence" of the death penalty.

The *Gregg* majority cited the bifurcated proceedings, the limited number of capital crimes, the requirement that at least one aggravating circumstance be present, and the consideration of mitigating circumstances as minimizing the risk of wholly arbitrary, capricious, or freakish sentences, but also noted "an important additional safeguard" against arbitrariness and caprice: the statutory scheme's provision for automatic view of each sentence of death to "determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases."[7] However, shortly thereafter, the Court held in *Pulley v. Harris* that proportionality review is not constitutionally required. Without a Supreme Court mandated constraint, most states proceeded to either gut the practice or eliminate it entirely.[8]

This Article makes the case for meaningful proportionality review. It will catalog and critique the various forms of proportionality review that have evolved in the state courts since *Pulley*. Most are virtually meaningless, but a few are good faith attempts to insure the absence of arbitrariness and caprice. It will consider some of the cases that have been found proportional under hollow systems and note the contrast in courts that have actually determined some sentences to be disproportionate. Finally, it will consider the role that proportionality review can (and should) play in rooting out unspoken racial bias.

I. A BRIEF HISTORY OF THE MODERN AMERICAN DEATH PENALTY

Until the middle of the twentieth century, the legality of the death penalty (as opposed to its utility or morality) went largely unchallenged. There were very few appeals in state courts, with most executions taking

4. *Tison*, 481 U.S. at 154.
5. *Roper*, 543 U.S. at 578.
6. *Atkins*, 536 U.S. at 321.
7. Gregg v. Georgia, 428 U.S. 153, 198 (1976).
8. Pulley v. Harris, 465 U.S. 37, 43–44 (1987).

place very soon after the death sentence was imposed and very rare review by the United States Supreme Court.[9] Indeed, the first death penalty case heard by the Supreme Court was *Wilkerson v. Utah*, [10] decided in 1878, and it did not tackle the legality of the death penalty, but only whether death by firing squad violated the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution—holding that it did not.[11]

In the early to mid-twentieth century, the Supreme Court began to show more interest in capital cases, especially Southern death sentences.[12] For example, in *Moore v. Dempsey*, the Court reviewed the death sentences imposed on five Black men in Arkansas, who had been convicted of murder following a race riot in which dozens of African Americans and a handful of whites died.[13] Nonetheless, eighty African Americans and no whites were criminally charged for their participation in the melee.[14] Twelve were sentenced to death by all-white juries following trials lasting forty-five minutes in a courtroom full of white spectators threatening a lynching.[15] The Supreme Court concluded that the defendants were denied due process and that the federal courts had the ability to order a new trial when the trial was a farce and the state courts had "failed to correct the wrong."[16]

During that period, the Supreme Court also overturned a number of capital convictions based on confessions elicited by police brutality.[17] Most of these cases involved Black defendants accused of the murder of a white victim and most arose in the South.[18] For example, in *Brown v. Mississippi,* the Court held that the defendant's confession should not have been admitted at his trial because it was literally beaten out of him with a bullwhip.[19] The local sheriff admitted as much: When asked if he

9. STEIKER & STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 26 (2016).

10. Wilkerson v. Utah, 99 U.S. 130, 134–35 (1878)

11. *Id.*

12. *See* STEIKER & STEIKER, *supra* note 9, at 34–35.

13. Moore v. Dempsey, 261 U.S. 86, 87 (1923).

14. STEIKER & STEIKER, *supra* note 9, at 35.

15. *Id.*

16. *Moore*, 261 U.S. at 91.

17. *See* Blackburn v. Alabama, 361 U.S. 199, 211 (1960); Spano v. New York, 360 U.S. 315, 32. (1959).

18. *See* Brown v. Mississippi, 297 U.S. 278, 281–83 (1936); Powell v. Alabama, 287 U.S. 45, 49. (1932).

19. *Brown*, 297 U.S. at 287.

had whipped the defendant he replied, "*not too much for a negro; not as much as I would have done if it were left to me.*"[20]

Other famous capital cases of the pre-World War II era also involved criminal procedure, as opposed to the legitimacy of the death penalty.[21] The famous "*Scottsboro Boys*" case provides the consummate example.[22] There, nine young Black defendants were accused of raping two white females on a train near rural Scottsboro, Alabama (*Powell v. Alabama*).[23] After narrowly escaping being lynched, the defendants were charged with the (then) capital offense of rape.[24] Because there was no clear right to appointed counsel for indigent defendants at the time, the local judge appointed the entire county bar to represent the defendants.[25] Proving the old adage that "everybody's job is nobody's job," no attorney did any work at all to investigate the alleged victim's allegations or prepare the case for trial and no one showed up to represent the defendants on the scheduled trial date.[26] Counsel, unfamiliar with the case and having no time to prepare was pressed into service and the trials proceeded immediately.[27] Despite quite flimsy evidence that the individuals charged were the perpetrators (or that the rapes had even occurred), the defendants were found guilty and sentenced to death based upon the testimony of the two unreliable "victims."[28] After the Alabama Supreme Court affirmed their convictions and death sentences, the Supreme Court agreed to hear the case and concluded the defendants were denied due process based on the lack of an "effective appointment of counsel."[29] The young men were eventually, after several more trials, appeals (including another trip to the United States Supreme Court),[30] and a commutation, all exonerated.[31] Despite the closer judicial scrutiny that occasional high profile death penalty cases received in the first half of the twentieth

20. *Id.* at 284 (emphasis added).
21. *See Powell*, 287 U.S. at 50.
22. *See id.*
23. *Id.* at 50–51.
24. Powell v. Alabama, 287 U.S. 45, 49–51 (1932).
25. *Id.* at 53.
26. *Id.* at 56–58.
27. *Id.* at 58.
28. *Id.* at 50.
29. *Id.* at 71.
30. Norris v. Alabama, 294 U.S. 587, 599 (1935).
31. Thomas A. Johnson, *Last of Scottsboro 9 Is Pardoned; He Draws a Lesson for Everybody*, N.Y. TIMES (Oct. 26, 1976), https://www.nytimes.com/1976/10/26/archives/last-of-scottsboro-9-is-pardoned-he-draws-a-lesson-for-everybody.html; *Eighty Years Later, Scottsboro Boys Pardoned*, INNOCENCE PROJECT (Nov. 21, 2013), https://innocenceproject.org/news/eighty-years-later-scottsboro-boys-pardoned/.

century, the constitutional legitimacy of the death penalty itself remained a given.

A. Furman v. Georgia

Direct legal challenges to the death penalty began in earnest in the early 1960's.[32] The formal triggering event was Justice Arthur Goldberg's dissent from the denial of certiorari in *Rudolph v. Alabama*.[33] Although not unprecedented, written comment about the Court's refusal to hear a case was rare at that time.[34] Rudolph, who had been sentenced to death in Alabama for rape, had asked the Court to hear his case.[35] When the Court declined to hear Rudolph' case, Goldberg, joined by two other members of the Court, raised several possible constitutional defects in the practice.[36] Goldberg's opinion challenged lawyers to develop and litigate legal challenges to the death penalty for crimes like rape that did not involve the loss of human life.[37]

The NAACP Legal Defense Fund ("LDF") heard and answered the call.[38] While LDF began by attacking the death penalty for rape and attempted rape—because that was where the racial effects were so profound and apparent—it soon expanded its efforts to all capital offenses and offenders.[39] In addition to gathering statistical support for an empirical challenge to racial discrimination in the death penalty for rape, LDF developed other constitutional challenges to various procedural aspects of how the death penalty was administered including: the exclusion of jurors with moral reservations about capital punishment; the combination of guilt-or-innocence and punishment determinations in a single (unitary) proceeding; and, the failure to provide capital juries with standards for making the life or death decision.[40]

In 1968, the Supreme Court decided in *Witherspoon v. Illinois* that the practice of "death qualifying" jurors (i.e., removing people from capital juries who had moral reservations or qualms about capital

32. STEIKER & STEIKER, *supra* note 9, at 8.
33. Rudolph v. Alabama, 375 U.S. 889, 889–91 (1963) (Goldberg, J., dissenting).
34. STEIKER & STEIKER, *supra* note 9, at 40–41.
35. *Id.* at 40.
36. *Rudolph*, 375 U.S. at 889–91 (Goldberg, J., dissenting).
37. *Id.*
38. STEIKER & STEIKER, *supra* note 9, at 41–42.
39. *Id.* at 44–45.
40. Carol S. Steiker, Furman v. Georgia*: Not an End, But a Beginning*, *in* DEATH PENALTY STORIES 95, 99 (John H. Blume & Jordan M. Steiker eds., 2009).

punishment) violated the Sixth Amendment right to jury trial.[41] In 1971, however, in two companion cases, *McGautha v. California* and *Crampton v. Ohio*, the Court rejected two of the remaining major legal arguments developed by LDF.[42] In *McGautha*, the Court held that the decision to impose death could be left to the "untrammeled discretion of the jury,"[43] and no standards were required for the exercise of that discretion. In *Crampton*, the Court rejected the argument that "the single verdict procedure unlawfully compels the defendant to become a witness against himself on the issue of guilty by the threat of sentencing him to death without having heard from him."[44]

B. Furman *and the "Backlash"*

While it appeared that executions would resume, just two months later the Court granted certiorari in *Furman v. Georgia* and several other related cases to tackle the larger issue: whether the death penalty violated the Eighth Amendment's ban on cruel and unusual punishment.[45] On, June 29, 1972, a bare five-four majority of the Supreme Court invalidated all then-existing death penalty statutes with the following words: "The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[46] The rub, however, was that all five of the justices in the majority wrote separately, and thus no clear consensus emerged as to *why* the death penalty—upheld against constitutional attack just a year earlier—was now unconstitutional.[47] A recurring theme in those opinions was the rarity with which the penalty was imposed and the absence of a "rational basis that could differentiate . . . the few who die from the many who go to prison."[48] The fear that racial discrimination played a significant role

41. Witherspoon v. Illinois, 391 U.S. 510, 522–23 (1968).

42. McGautha v. California, 402 U.S. 183, 207–08, 217 (1971). *McGautha* and *Crampton* were consolidated under 402 U.S. 183. *Id.* at 185.

43. *Id.* at 207.

44. *Id.* at 213.

45. STEIKER & STEIKER, *supra* note 9, at 48; Furman v. Georgia, 408 U.S. 238, 239 (1972).

46. *Furman*, 408 U.S. at 239–40.

47. *Id.* at 240; STEIKER & STEIKER, *supra* note 9, at 49.

48. *Furman*, 408 U.S. at 294 (Brennan, J., concurring). Justice Stewart echoed Justice Brennan's concerns: "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." *Id.* at 310 (Stewart, J., concurring). Justice Stewart went on to say:

in the death selection process was also of grave concern to several members of the Court.[49] Because all of the statutes before the Court had the same flaw—arbitrariness that flowed from jurors complete and unguided discretion—the Court found that all violated the Eighth Amendment.[50]

While many thought the American death penalty experiment had come to an end, others were not resigned to its demise.[51] Because only two of the five justices clearly stated that the death penalty was under all circumstances unconstitutional,[52] many states, especially the members of the old confederacy, rushed to try to craft a statute that might survive.[53] The difficulty, however, was that no one knew exactly what the new standard was or what a constitutionally adequate statute might look like. Was the main problem with the constitutionally deficient schemes arbitrary infrequency, virtually unlimited discretion, or invidious racial discrimination? Given the fractured set of opinions that produced the five-justice majority, there was no way to be certain what

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> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.

Id. at 309–10 (citations omitted). Justice White voiced similar objections, stating: "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and 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." *Id.* at 313 (White, J., concurring).

49. *See, e.g.*, *id.* at 242 (Douglas, J., concurring) (expressing Justice Douglas's view it was "incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices"). Justice Marshall agreed:

> It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination. Racial or other discriminations should not be surprising.

Id. at 364–65 (Marshall, J., concurring).

50. *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

51. Steiker, *supra* note 40, at 102–04.

52. *Id.* at 110.

53. *Id.* at 104; MARC J. TASSE & JOHN H. BLUME, INTELLECTUAL DISABILITY AND THE DEATH PENALTY: CURRENT ISSUES AND CONTROVERSIES 22 (2018).

kind of capital punishment regime might persuade one of the Justices in the *Furman* majority to shift his vote.

Given the uncertainty, states took different approaches. The post-*Furman* statutes fell into two quite different categories: mandatory death penalty statutes and guided discretion statutes,[54] both types of which were intended to reduce the role of jury discretion. The mandatory statutes were supposed to totally eliminate discretion, thereby curing both infrequency and discrimination.[55] The guided discretion statutes, on the other hand, attempted to reduce arbitrariness by creating new procedures: bifurcated trial separating the issues of guilt-or-innocence and punishment, statutory aggravating circumstances limiting eligibility for capital punishment, mitigating circumstances to individualize sentencing, and mandatory appellate review to determine if the death sentence was disproportionate to the offense.[56]

C. Gregg v. Georgia *and the Dawn of the "Modern Era" of Capital Punishment*

Several years after *Furman*, the Supreme Court of the United States agreed to review the new death penalty laws enacted by the states of Florida, Georgia, Louisiana, North Carolina, and Texas.[57] On July 2, 1976, the Court upheld the guided discretion statutes and concluded that the mandatory statutes violated the Eighth Amendment.[58] In *Gregg v. Georgia,* Justice Stewart wrote for the majority that "[d]espite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction."[59] Thus, the death penalty was not per se violative of the Eighth Amendment and the Georgia statute passed constitutional muster because "the discretion to be exercised is controlled by clear and

54. TASSE & BLUME, *supra* note 53, at 22.
55. *Id.*
56. *Id.*
57. *See generally* Gregg v. Georgia, 428 U.S. 153, 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).
58. The Court granted certiorari in five cases. *Gregg v. Georgia*, *Proffitt v. Florida*, and *Jurek v. Texas* involved guided discretion statutes of various types that were deemed constitutional. *Gregg*, 428 U.S. at 207; *Proffitt*, 428 U.S. at 259–60; *Jurek*, 428 U.S. at 276. *Woodson v. North Carolina* and *Roberts v. Louisiana* involved mandatory statutes that were invalidated. *Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 336.
59. *Gregg*, 428 U.S. at 179.

objective standards so as to produce non-discriminatory application."[60] The Court concluded:

> In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.[61]

The Court also emphasized the importance of appellate review, "an important additional safeguard against arbitrariness and caprice . . . ."[62] And, for purposes of this Article, the Court lauded the statutory requirement of comparative proportionality review stating that "to guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate."[63] This safeguard, in conjunction with the other procedure previously discussed, were held to satisfy *Furman*: "no longer should there be 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'"[64]

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60. *Id.* at 198 (quoting Coley v. State, 204 S.E.2d 612, 615 (Ga. 1974)).

61. *Id.* at 195. "In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant." *Id.* at 198.

62. *Id.* at 198.

63. Gregg v. Georgia, 428 U.S. 153, 153 (1976).

64. *Id.* (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)). In its decision upholding the Florida law, which was very similar to Georgia's except that it allowed the trial judge, and not the jury to impose the sentence following the sentencing hearing, the Court also noted the importance of appellate review by the Florida Supreme Court. Proffitt v. Florida, 428 U.S. 242, 258–59 (1976). It observed that the state court has "several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences," and this "in effect adopted the type of proportionality review mandated by the Georgia statute." *Id.* at 259. While the Texas law, which the Court also upheld, did not require proportionality review, the Court also noted the importance of "prompt judicial review of the jury's decision in a court with statewide jurisdiction." Jurek v. Texas, 428 U.S. 262, 276 (1976). Implicit in the language "statewide jurisdiction" is that the court would have a comparative frame of reference in that it sees all the cases where the death penalty is imposed.

The mandatory statutes, on the other hand, did not fare well. In *Woodson v. North Carolina*, the Court reasoned that such statutes were out of step with "contemporary" standards of decency because they eliminated the jury's essential role in maintaining a "link" between "community values" and the capital punishment system.[65] The Court asserted that the mandatory statutes only "papered over" the problem of unguided and unchecked discretion because juries would refuse to convict many defendants of murder if forced with such a draconian choice.[66] Due to the uniqueness of the death penalty, the Court held the Constitution required that the sentencer could not be precluded from considering the "character and record of the individual offender and the circumstances of the particular offense."[67]

II. THE FAILED ERA OF JUDICIAL REGULATION

The first few years after *Gregg* saw a Court highly engaged in managing—and in the view of some critics, micromanaging—state capital punishment systems. Relying on the Eighth Amendment principle that "death is different," the Court considered and found wanting state rules limiting the presentation or consideration of a capital defendant's mitigating evidence in *Lockett v. Ohio* and *Eddings v. Oklahoma*;[68] invalidated overly broad and vague statutory aggravating circumstances in *Godfrey v. Georgia*;[69] limited consideration of evidence in capital sentencing not disclosed to the defense in *Gardner v. Florida*;[70] and struck down other procedures the Court believed created a risk of arbitrary and capricious imposition of the death penalty.[71] Although

65. Woodson v. North Carolina, 428 U.S. 280, 295 (1976) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).

66. *Id.* at 302.

67. *Id.* at 304.

68. *See* Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (holding that the judge should not be precluded from considering, as a mitigating factor, anything about the defendant's character or record that he argues is a basis for a lesser sentence); Eddings v. Oklahoma 455 U.S. 104, 116–17 (1982) (holding that courts must consider relevant mitigating factors beyond age).

69. *See* Godfrey v. Georgia, 446 U.S. 420, 431–33 (1980) (holding that a state must define aggravating circumstances in a manner that is not so broad as to encompass every, or nearly every murder).

70. *See* Gardner v. Florida, 430 U.S. 349, 358 (1977) (holding that a defendant may not be sentenced to death on the basis of information he has no opportunity to meet or explain).

71. *See, e.g.*, Green v. Georgia, 442 U.S. 95, 97 (1979) (holding that state hearsay rules could not block the admissions of statements lessening a capital defendant's moral culpability).

litigation around the country was extensive, and challenged a number of issues,[72] both the size of state death rows and the number of executions steadily began to rise[73] in large part due to the increasingly laissez-faire approach to the regulation of state death penalty laws most starkly presented by the United States Supreme Court's rejection of the last of the LDF's systemic legal challenges to capital punishment, i.e., that the death penalty discriminates against African Americans.[74]

In the early 1980s, armed with a study of the Georgia death penalty system by a leading scholar in the field of statistics and the law that demonstrated that a defendant's chance of being sentenced to death in Georgia was 4.3 times higher in white victim than in Black victim cases, a result that could occur by chance less than one time in a hundred, and that Black defendants were 2.4 times more likely to be sentenced to death for killing someone white, than was a similarly situated white person, LDF attorneys challenged Warren McClesky's death sentence on Equal Protection Clause and Eighth Amendment grounds.[75] By a five-to-four vote, the Court determined that McClesky's statistical evidence did not make out a constitutional violation because it "only" demonstrated that discrimination operated in the system as a whole and not that the prosecutor or jury in his case acted with a specific discriminatory purpose, insisting that it would "decline to assume that what is unexplained is invidious."[76]

The deregulation of death, of which *McCleskey* is the most prominent substantive example, has also been accomplished procedurally by the Anti-Terrorism and Effective Death Penalty Act's limitation on review and the Supreme Court's enthusiastic embrace of those limits.[77] Two counter-trends, however, are worth mentioning as they are both relevant to the main thrust of this Article. First, for the last two decades, the Court did, on occasion, rigorously scrutinize the competency of counsel in

72. *See generally*, *Lockett*, 438 U.S. at 586; *Eddings* 455 U.S. at 104; *Godfrey*, 446 U.S. at 420.

73. Rick Halperin, *Execution Statistics Summary*, SMU (Aug. 3, 2023), https://s2.smu.edu/rhalperi/summary.html (showing execution numbers over the years).

74. Carol S. Steiker & Jordan M. Steiker, *The Rise, Fall, and Afterlife of the Death Penalty in the United States*, 3 ANN. REV. CRIMINOLOGY 299, 304–07 (2020).

75. McClesky v. Kemp, 481 U.S. 279, 287–89 (1980).

76. *Id.* at 313, 316–19. For an exploration of the social science data that "explains" how invidious discrimination is produced in capital cases, see Sheri Lynn Johnson, *Explaining the Invidious: How Race Influences Capital Punishment in America*, 107 CORNELL L. REV. 1513 (2022).

77. *See generally* Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 1739 (2022).

capital cases, especially in regard to the development and presentation of mitigating evidence.[78] In the majority of the cases it has reviewed on the issue, the Court concluded that capital defendants were deprived of their Sixth Amendment right to the effective assistance of counsel.[79] For example in *Porter v. McCollum*, the Court concluded that George Porter's trial counsel failed to adequately represent him because they failed to gather and present evidence during his capital sentencing hearing of his heroism during his military service in the Korean War, and the effects of the trauma he experienced during his service.[80] The Court has similarly found trial lawyers to perform incompetently for failing to discover and present evidence of sexual abuse, low intellectual functioning, and brain damage.[81]

The second doctrinal development, which was also a theme in *Furman* and *Gregg*, reaffirmed repeatedly over the last forty years is that capital punishment should be reserved for the most culpable offenders who commit the most heinous crimes. Justice Kennedy stated that "the death penalty is reserved for a narrow category of crimes and offenders"—for the "worst of the worst" and not for the "average" murderer.[82] The Court has made clear on a number of occasions that

78. *See* Williams v. Taylor, 529 U.S. 362, 415–16 (2000); Wiggins v. Smith, 539 U.S. 510, 523 (2003); Rompilla v. Beard, 545 U.S 374, 393 (2005); Porter v. McCollum, 558 U.S. 30, 44 (2009).

79. *See Williams*, 529 U.S. at 415–16 (holding that the defendant was deprived effective assistance of counsel because the attorney failed to introduce evidence that he was "*borderline mentally retarded*," that he did not advance beyond the sixth grade, and that prison guards stated that he was nonviolent and would thrive in a more structured environment); *Wiggins*, 539 U.S. at 523 (holding that the relevant inquiry into effective assistance of counsel is whether or not counsel's investigation leading him to not introduce evidence of mitigation was itself reasonable); *Rompilla*, 545 U.S. at 393 (holding that the likelihood of a different result if the evidence would have come in is sufficient to undermine confidence in the outcome that was reached at sentencing).

80. *Porter*, 558 U.S. at 44.

81. FAIR PUNISHMENT PROJECT, NEW REPORT: PRISONERS ON OHIO'S EXECUTION LIST DEFINED BY INTELLECTUAL IMPAIRMENT, MENTAL ILLNESS, TRAUMA, AND YOUNG AGE (Aug. 29, 2017), https://www.prisonpolicy.org/scans/fairpunishment/Prisoners_on_Ohio_Execution_List_Defined_by_Intellectual_Impairment_Mental%20Illness.pdf; Deborah W. Denno, *How Prosecutors and Defense Attorneys Differ in Their Use of Neuroscience Evidence*, 85 FORDHAM L. REV. 453 (2016).

82. Atkins v. Virginia, 536 U.S. 304, 319 (2002) ("[C]ulpability of the average murderer is insufficient to justify the most extreme sanction available to the State."). In *Furman*, Justice Brennan responded to the States' argument that death sentences were inflicted only in extreme cases, saying "[i]nformed selectivity, of course, is a value not to be denigrated." Furman v. Georgia, 408 U.S. 238, 293 (1972) (Brennan, J., concurring). However, the Justice found that the low levels of infliction of capital punishment made it "highly

capital punishment should be "reserved for those crimes that are 'so grievous an affront to humanity that the only adequate response may be the penalty of death.'"[83] The commitment to reserving capital punishment for the "worst of the worst" and conversely to preventing "average murderers" from being sentenced to death manifests itself most clearly in two discrete areas of the Court's capital punishment jurisprudence.

The Court has—at least in theory—confined the imposition of the death penalty to "a narrow category of the most serious crimes."[84] Thus, the death penalty may not be imposed (at least for now) for non-homicide offenses, e.g., armed robbery and rape.[85] The Court has also prohibited the imposition of the death penalty on those deemed less culpable than the worst offender, holding that its "narrowing jurisprudence . . . seeks to ensure that only the most deserving of execution are put to death."[86] In order to do so, the Court requires that "[i]n any capital case a defendant has wide latitude to raise as a mitigating factor 'any aspect of [his or her] character or record . . . as a basis for a sentence less than death"[87] Thus, in capital cases, a defendant may present virtually any kind of evidence he thinks will help persuade the jury to show mercy. Common types of mitigating evidence presented in capital cases include evidence of mental illness or impairment, low intellectual functioning, child abuse, intoxication, good behavior in prison, etc.[88] Second, the Court

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implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment." *Id.* at 293–94. In fact, he noted that if "Furman or his crime illustrates the 'extreme,' then nearly all murderers and their murders are also 'extreme.'" *Id.* at 294.

83. Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) (quoting Gregg v. Georgia, 428 U.S. 153, 184, 187 (1976)).

84. *Atkins*, 536 U.S. at 319.

85. *See Kennedy*, 554 U.S. at 437 (prohibiting the imposition of the death penalty for the rape of a child); Enmund v. Florida, 458 U.S. 782, 797 (1982) (prohibiting the imposition of the death penalty for felony murder where the defendant did not kill, attempt to kill, or intend to kill); Coker v. Georgia, 433 U.S. 584, 600 (1977) (prohibiting the imposition of the death penalty for the rape of an adult woman). Florida, however, recently passed a statute allowing the death penalty to be imposed upon individuals convicted of sexually assaulting children. The legislation is a bald, some would say brazen, attempt to force the Supreme Court to revisit its prior decisions. Douglas Soule & Eric Rogers, *DeSantis Signs Law Allowing Death Penalty for Child Rape, Defying US Supreme Court Ruling*, TALLAHASSEE DEMOCRAT (May 1, 2023), https://www.tallahassee.com/story/news/politics/2023/05/01/desantis-oks-death-penalty-for-child-rape-challenging-court-precedent/70169644007/.

86. *Atkins*, 536 U.S. at 319.

87. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

88. *See generally id.*; *Kennedy*, 554 U.S. at 437; *Enmund*, 458 U.S. at 797; *Coker*, 433 U.S. at 600.

has barred the imposition of the death penalty on certain individuals deemed categorically undeserving of the death penalty.[89] In *Enmund v. Florida* and *Tison v. Arizona*, for example, the Court held that persons guilty of murder as an accessory but who did not actually kill could only be sentenced to death if they were major participants in the criminal offense and showed deliberate indifference to human life.[90] Then, in *Atkins v. Virginia*, the Court created a categorical bar to execution for persons with intellectual disability (formerly classified as mental retardation), finding, "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."[91] Several years later, the Court similarly found that juvenile offenders "cannot with reliability be classified among the worst offenders" and barred the execution of offenders who committed a crime before turning eighteen in *Roper v. Simmons*.[92] The Court has also determined that individuals who have become insane while on death row, even if they were completely sane at the time they committed the capital offense, cannot be executed unless their sanity is restored.[93] Recently, the Court left open the door to extending this to persons who can no longer remember their offense due to dementia.[94]

A. Innocence

Many readers will be surprised to learn that the Supreme Court has never said that it is a constitutional violation to execute someone who is innocent. The Court first addressed the issue in the modern era in *Herrera v. Collins*, a case that originated in Texas.[95] After exhausting the normal course of appeals, Lionel Herrera's attorneys filed a second federal habeas petition maintaining that newly discovered evidence demonstrated that he was actually innocent of the crime (the murder of two police officers) that he was convicted and sentenced to death for

89. *See generally Enmund*, 458 U.S. at 797; Tison v. Arizona, 481 U.S. 137, 137 (1987); Atkins v. Virginia, 536 U.S. 304, 319 (2002); Roper v. Simmons, 543 U.S. 551, 551 (2005); Madison v. Alabama, 139 S. Ct. 718 (2019).

90. *Enmund*, 458 U.S. at 801; *Tison*, 481 U.S. at 158.

91. *Atkins*, 536 U.S. at 319.

92. *Roper*, 543 U.S. at 569.

93. *See Madison*, 139 S. Ct. at 735–38.

94. *Id.*

95. *See generally* Herrera v. Collins, 506 U.S. 390 (1993). In the interest of full disclosure, one of the authors of this article was a member of Herrera's legal defense team.

committing.[96] A federal district court judge granted a stay of execution and ordered an evidentiary hearing, which a panel of the Fifth Circuit vacated concluding that a "freestanding" claim of actual innocence, unaccompanied by a constitutional violation, was not cognizable in a federal habeas corpus proceeding.[97] The Supreme Court granted certiorari and affirmed.[98] The majority concluded that because Herrera had been found guilty in a state trial, which was a "decisive and portentous event," and because federal courts are not "forums in which to relitigate state trials," it could imagine "few rulings [that] would be more disruptive of our federal habeas system than to provide for federal habeas review of freestanding claims of actual innocence."[99] A capital defendant's primary remedy for situations where evidence of innocence emerges near a death row inmate's execution, the Court stated, was executive clemency which has long been the "fail safe" in the criminal justice system.[100] The Court did not totally slam the door on such claims; it assumed, for the sake of argument, that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," but it also stated that the "threshold showing" would "necessarily be extraordinarily high," and thus Herrera's evidence, developed ten years after his trial, fell, in the majority's view, "far short of that which would have to be made in order to trigger the sort of constitutional claims which we have assumed, arguendo, to exist."[101]

Since *Herrera*, the Court has only returned to the issue of the constitutionality of executing someone who is innocent one time, in the case of Troy Davis. Davis was a Georgia death row inmate who, like Lionel Herrera, had always maintained his innocence.[102] Davis, like

96. *Id.* at 393. The evidence consisted of affidavits that collectively attempted to establish that Lionel Herrera's brother, Raul, was the guilty party. *Id.* The affidavits from Raul's former attorney and cellmates contained admissions made by Raul, and an affidavit from Raul's son (and one of his friends) maintained that he was present at the time of the murders, that Lionel was not present, and that his father shot and killed the two law enforcement officers. *Id.* at 397.

97. *Ex parte* Herrera, 828 S.W.2d 8, 9 (Tex. Crim. App. 1992).

98. *Id.*

99. *Herrera*, 506 U.S. at 444.

100. *Id.* at 415.

101. *Id.* at 417–19. Lionel Herrera, a Vietnam veteran, was executed on May 12, 1993. His last words were "I am innocent, innocent, innocent. Something very wrong is happening here today." *Man in Case on Curbing New Evidence is Executed*, N.Y. TIMES (May 13, 1993), https://www.nytimes.com/1993/05/13/us/man-in-case-on-curbing-new-evidence-is-executed.html.

102. *See generally*, *In re* Davis, 557 U.S. 952 (2009).

Herrera, was also convicted of killing a police officer.[103] After exhausting the ordinary appeals, relying on a combination of old and newly discovered evidence, Davis filed a petition for writ of habeas corpus in the Supreme Court's original jurisdiction and, to the surprise of many, the Court transferred the case to the United States District Court for the Southern District of Georgia for an evidentiary hearing and for a determination of whether "evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[104] The district court ultimately concluded that Davis's proof was insufficient, the High Court did not intervene again, and Davis was executed on September 21, 2011.[105] Several things are notable about the Supreme Court's decision: first, it appears that the Court, at least implicitly, acknowledged that had Davis been able to satisfy the prescribed standard his execution would have been unconstitutional; second, the standard is effectively impossible to meet. Virtually no assertion of factual innocence rests exclusively on evidence that could not have been obtained at the time of trial. It is always (or 99.99% of the time), a combination of new and old evidence, and/or evidence that existed and could have been discovered but wasn't due to trial counsel's ineptitude, law enforcement's malfeasance, or some combination of the two. And, on top of that, the burden is using only new evidence to show that it "clearly establishes" the person's innocence.[106]

The Court has been slightly more kind to permitting claims of innocence to excuse various procedural failings, i.e., failure to raise constitutional claims in a timely or appropriate manner.[107] But, even in

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103. *Id.* at 952–53 (Stevens, J., Concurring).

104. *Id.* at 952.

105. *In re* Davis, 2010 U.S. Dist. Lexis 157445 (Aug. 12, 2010); Daniele Selby, *Nine Years After the Execution of Troy Davis, Innocent Black Men are Still Being Sentenced to Death*, INNOCENCE PROJECT (Sept. 21, 2020), https://innocenceproject.org/news/troy-davis-pervis-payne-race-death-penalty/.

106. *In re Davis*, 557 U.S. 952, 952 (2009).

107. *See generally* Schlup v. Delo, 513 U.S. 298, 301 (1995) (failure to raise claim in initial state habeas petition); House v. Bell, 547 U.S. 518, 522 (2006) (same); McQuiggin v. Perkins, 569 U.S. 383, 386 (2013) (excusing failure to file a federal habeas petition within the statutory limitations period). A possible counter-trend is *Jones v. Hendrix*, where the Court ruled that claims of actual innocence that were not raised in a previously filed federal habeas action pursuant to 18 U.S.C. § 2255 were barred as successive and could not be raised in a subsequent § 2255 action, even if intervening changes in the law after the initial petition was adjudicated established the innocence claim. 149 S. Ct. 1857 (2023). Justice Jackson authored a sharp dissent stating: "forever slamming the courtroom doors to a possibly innocent person who has never had a meaningful opportunity to get a new and retroactively applicable claim for release reviewed on the merits raises serious constitutional concerns." *Id.* at 1878 (Jackson, J., dissenting).

that context, the threshold showing required to establish "cause" for a procedural default is extraordinarily high, i.e., that in light of the new evidence "no reasonable juror would have found the defendant guilty" of the underlying offense.[108] A few lucky habeas petitioners make it through the "gateway" but most, even those with quite strong claims, fail to do so.[109] Finally, the Court has created a similar exception to procedurally barred claims in cases where a habeas petitioner can show that he (or she) is "innocent of the death penalty."[110] The showing required there is "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under [state] law," i.e., the habeas petitioner must show "there was no aggravating circumstance or that some other condition of eligibility [for the death penalty] had not been met."[111] As is true in the context of actual innocence, most assertions of innocence of the death penalty are unsuccessful.[112]

B. Proportionality

Despite the importance the *Gregg* opinion placed on Georgia's proportionality review, that emphasis was short lived. Eight years after *Gregg*, the Court granted certiorari in Robert Alton Harris's case to review a decision of the Ninth Circuit ordering the California Supreme Court to determine whether Harris's death sentence was proportionate to sentences imposed for similar crimes (which was not required by California's post-*Furman* death penalty statute).[113] While acknowledging some language in *Gregg* (and *Profitt*) "made much of the statutorily required comparative proportionality review," the Court pointed out that Texas's system, also upheld, did not provide for proportionality review.[114] Thus the Court determined that comparative proportionality review was not "indispensable," so long as the statute gave the sentencing authority "adequate information and guidance."[115] The majority admitted that without it, capital sentencing schemes "may occasionally produce aberrational outcomes," but nevertheless those "inconsistencies [were] a

108. *Schlup*, 513 U.S. at 329.
109. *See id.*
110. Sawyer v. Whitley, 505 U.S. 333, 338 (1992).
111. *Id.* at 344, 347.
112. *See* RANDY A. HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.5 (7th ed. 2023).
113. Pulley v. Harris, 465 U.S. 37, 44 (1987).
114. *Id.* at 45.
115. *Id.* at 45–47.

far cry from the major systemic defects identified in *Furman*."[116] Thus while comparative proportionality review was "an additional safeguard against arbitrarily imposed death sentences," it was not constitutionally required and the California system provided Harris with adequate "protection against the evil identified in *Furman*."[117] And, just like that, comparative proportionality review—at least as a constitutional matter—was dead. In the aftermath of *Pulley*, some states that had been doing proportionality review even though their statutes did not affirmatively require it, abandoned the practice, and some jurisdictions where the practice was demanded by legislative mandate began conducting the review in a more cursory manner, aware that there would be no Supreme Court oversight.[118] As we will show, in the years since *Pulley*, state court judicial findings that a death sentence imposed by a jury or judge was disproportionate are as rare as proverbial hen's teeth.[119]

C. Clemency

Finally, we need to briefly discuss clemency, since it might be assumed to play a role in assuring that the imposition of the death penalty is proportionate in individual cases. As the Court noted in *Herrera*, clemency has historically been considered to be the "fail safe" of our criminal justice system.[120] The clemency power does have deep roots as an integral part of the American capital punishment scheme, and, as recently as the 1960s, grants of executive clemency to death-sentenced inmates were common.[121] "For example, between 1923 and 1972, Texas executed 461 people, but in that same time period, Texas governors commuted 100 death sentences."[122] However, in the post-*Furman* era, Texas has executed 477 death-sentenced inmates and there have been only two clemency grants.[123] In some active death penalty states, e.g.,

116. *Id.* at 54.
117. *Id.* at 51, 54.
118. Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After* Pulley v. Harris, 70 U. COLO. L. REV. 813, 848–50 (1999).
119. *See infra* Sections III.B., C.
120. Herrera v. Collins, 506 U.S. 390, 415 (1993).
121. Michael Heise, *The Death of Death Row Clemency and the Evolving Politics of Unequal Grace*, 66 ALA. L. REV. 949, 951 (2015).
122. Cara Drinan, *Clemency in a Time of Crisis*, 28 GA. STATE U. L. REV. 1123, 1124 (2012).
123. *Id.*

South Carolina (forty-three modern era executions),[124] there have been no commutations.[125] As the New York Times noted in a 2014 article, "the concept of mercy went out of fashion" in the United States in the modern death penalty era, and "[t]he clemency system . . . is in a state of collapse."[126] Troy Davis's case, discussed above, is a good example. Despite lingering doubts about Davis's guilt, and support from Pope Benedict the XVI; former President Jimmy Carter; the former Chief Justice of the Georgia Supreme Court; and thousands of ordinary citizens from Georgia, other states, and around the world, the Georgia Board of Pardons denied clemency and allowed his execution to proceed.[127]

III. THE CONSEQUENCES OF *PULLEY V. HARRIS*

A. Comparative Proportionality Review in the States Prior to Pulley

As the *Pulley* opinion would later point out, although *Gregg v. Georgia* emphasized that comparative proportionality review provided an additional safeguard against the arbitrariness condemned in *Furman, Jurek v. Texas,* decided on the same days as *Gregg,* upheld a death penalty statutory scheme that did not contain any provision for proportionality review.[128] However, *Jurek* stressed that because a court with statewide jurisdiction handled all death penalty appeals, the Texas statute nonetheless assured "evenhanded, rational, and consistent imposition of death sentences under law,"[129] leading many states to infer that some sort or proportionality review was required.[130]

In the wake of *Gregg*, thirty-five of forty death penalty states had some form of mandatory proportionality review.[131] Most did so by statute, with twenty states closely tracking Georgia's requirement that the reviewing court determine "[w]hether the sentence of death is excessive

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124. *South Carolina Institutes Firing Squad Executions*, REUTERS (Mar. 18, 2022, 7:11 PM), https://www.reuters.com/legal/litigation/south-carolina-institutes-firing-squad-executions-2022-03-18/.

125. *Clemency Procedures by State*, DEATH PENALTY INFO. CTR. https://deathpenaltyinfo.org/facts-and-research/clemency/clemency-by-state (last visited Nov. 26, 2023).

126. Editorial, *Mercy in the Justice System*, N.Y. TIMES (Feb. 9, 2014), https://www.nytimes.com/2014/02/10/opinion/mercy-in-the-justice-system.html.

127. Drinan, *supra* note 122, at 1131.

128. Pulley v. Harris, 465 U.S. 37, 48 (1987); *see* Jurek v. Texas, 428 U.S. 262, 268 (1976).

129. *Jurek*, 428 U.S. at 276.

130. *Pulley*, 465 U.S. at 48–50.

131. *See* Gregg v. Georgia, 428 U.S. 153, 179 (1976).

or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant,"[132] and another eight employing different language with similar import.[133] The Indiana Supreme Court reviewed post-*Gregg* death sentences under the state constitutional provision that "[a]ll penalties shall be proportioned to the nature of the offense,"[134] and the Florida Supreme Court interpreted the Florida Constitution's express prohibition against "unusual punishments"[135] as requiring comparative proportionality review.[136] Two state courts—Arkansas and Arizona—judicially imposed a proportionality review requirement.[137] California imposed proportionality review by statute only when requested by the defendant.[138] Only the Colorado, Kansas, Oregon, Rhode Island, and Texas death penalty schemes never incorporated any form of proportionality review.[139]

The simple count of comparative-proportionality-review states prior to *Pulley* looks quite favorable, but examination of the application of that review in many jurisdictions paints a much less rosy picture. The statute upheld in *Gregg* provided no guidance on the question of how proportionality should be measured.[140] Should a case before the state court be compared only to other cases in which the death penalty had been *imposed*? As discussed below, for states that adopted this comparison pool, proportionality analysis almost universally ended with the determination that the death penalty had been imposed in at least one arguably similar case.[141] But other comparison pools were and are possible.[142] One possible slightly large pool—still easily accessible to a reviewing court—was the set of cases in which death had been sought,

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132. GA. CODE ANN. § 17-10-35 (1997); *see* White, *supra* note 118, at 842–43 (summarizing and citing state statutes prior to *Pulley* and stating that "Alabama, Idaho, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, Washington, and Wyoming" employed very similar language to Georgia).

133. *See* Appendix A (quoting language from Arkansas, Connecticut, Delaware, Massachusetts, Missouri, Montana, and Pennsylvania, and Utah).

134. IND. CONST. art. I, § 16.

135. FLA. CONST. art. I, § 17.

136. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

137. White, *supra* note 118, at 842 nn. 143, 167.

138. *Id.* at 842 nn. 144–65.

139. *See* Appendix A.

140. *See* Gregg v. Georgia, 428 U.S. 153, 165–68 (1976).

141. *See* Timothy V. Kaufman-Osborn, *Proportionality Review and the Death Penalty*, 79 WASH. L. REV. 775, 795–97 (2004).

142. *Id.* at 794.

and a majority of states, prior to *Pulley*, opted to assess proportionality against that pool.[143] A yet larger pool—and one most consistent with the *Furman* Court's concern with "struck by lightning" arbitrariness—would be the class of all death eligible cases;[144] Arizona, Florida, Louisiana, Missouri, Pennsylvania and Wyoming each purported to measure proportionality against this broadest comparison group.[145]

And there can be no doubt that the comparison pool matters. Alabama, Arkansas, Kentucky, Mississippi, Nebraska, Ohio, and South Carolina from the outset limited the comparison pool to other cases with death sentences.[146] Four of those states have *never* found a sentence to be disproportionate,[147] one has reversed only when disproportionality was coupled with concerns that prejudice had influenced the verdict,[148] and the other two found a total of four sentences disproportionate only in cases where the Supreme Court would later deem the defendant categorically ineligible for death.[149]

B. Comparative Proportionality Review After Pulley.

The immediate consequence of *Pulley* was the legitimation of California's system, which provided no mandatory proportionality review; given the size of the California death row, this consequence was itself important. But it was only the beginning. The aftermath of *Pulley*

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143. *Id.* at 795.

144. *Id.* at 797.

145. Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After* Gregg*: Only the Appearance of Justice*, 87 J. CRIM. L. & CRIMINOLOGY 130, 222–54 (1996).

146. *Id.*; *see* Appendix A.

147. *Id.*

148. Henry v. State, 647 S.W.2d 419, 488–89 (Ark. 1983); Sumlin v. State, 617 S.W.2d 372, 374 (Ark. 1981).

149. The Alabama Supreme Court has found only one sentence to be disproportionate using this methodology, and that was the case of a person who would now be found categorically ineligible for the death penalty due to intellectual disability. *Ex parte* Henderson, 616 So. 2d 348, 351 (Ala. 1992). The Mississippi Supreme Court found disproportionality three times, but two were in cases where the felony murder would now be insufficient to support a death sentence. *See* Bullock v. State, 525 So. 2d 764, 770 (Miss. 1987) (reducing a death sentence where the Mississippi supreme court had "not affirmed a single death penalty where the defendant's participation in the crime was as insubstantial as in Bullock's case"); Reddix v. State, 547 So. 2d 792, 794 (Miss. 1989) (finding the facts to be indistinguishable from the facts in *Bullock*, "except that Reddix [was], if anything, less culpable than was Bullock"). *Coleman v. State*, 378 So. 2d 640 (Miss. 1979), found that the death sentence imposed was disproportionate when compared to other cases in which the death sentence was imposed—but also involved a sixteen-year-old whose sentence would now be impermissible under *Roper v. Simmons*, 543 U.S. 551, 577–79 (2005).

made plain that predominance of proportionality review in the states was the product of it being a constitutional requirement as much as it was concern for arbitrariness, or innocence of the death penalty.[150] Today, only sixteen of the remaining death penalty states have *any* form of proportionality review.[151] True, half of the attrition suggested by those numbers is attributable to abolition of the death penalty.[152] But eight states repealed their proportionality review directly in response to *Pulley*[153] and Florida followed suit in 2020.[154] In addition, Nevada and Georgia made steps to sharply limit proportionality review. Prior to *Pulley*, Nevada's proportionality review required that it "compare all [similar] capital cases [in the state], as well as appealed murder cases in which the death penalty was sought but not imposed, and set aside those death sentences which appear comparatively disproportionate to the offense and the background and characteristics of the offender."[155] After *Pulley*, the Nevada legislature rewrote the statute to eliminate evaluation of proportionality,[156] and now the court limits review to excessiveness.[157] Likewise, Georgia prior to *Pulley* used a comparison pool of capital trials[158] but after *Pulley* confined its comparisons to cases in which death sentences had been imposed.[159]

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150. *See* White, *supra* note 118, at 817.

151. *See* Appendix A.

152. Nine states—Connecticut, Delaware, Illinois, Maryland, New Hampshire, New Jersey, New Mexico, New York and Washington—retained proportionality review until the abolition of their death penalty. See Appendix A for dates of abolition.

153. Seven states—Arizona, Arkansas, Florida, Idaho, Oklahoma, Pennsylvania, and Wyoming–that retain the death penalty abolished proportionality review in response to *Pulley*, as did two–Connecticut and Maryland—that since have abolished the death penalty. *See* White, *supra* note 118, at 848–49, 848 n. 186 (discussing the aftermath of *Pulley* and how the following states have abolished any form of proportionality review as a result: Arizona, Arkansas, Connecticut, Idaho, Maryland, Oklahoma, Pennsylvania, and Wyoming); Lawrence v. State, 308 So. 3d 544, 551 (Fla. 2020) (holding that there is no constitutional requirement to weigh proportionality in death sentences "in light of the Supreme Court's decision in *Pulley*"). *See also* Appendix A; *State and Federal Info: Connecticut*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/connecticut (last visited Nov. 26, 2023); *State and Federal Info: Maryland*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/maryland (last visited Nov. 26, 2023).

154. *See generally Lawrence*, 308 So. 3d at 551–52.

155. Harvey v. State, 682 P.2d 1384, 1385 (Nev. 1984).

156. NEV. REV. STAT. § 177.055(2)(e) (2023).

157. Dennis v. State, 13 P.3d 434, 440 (Nev. 2000).

158. *See generally* Moore v. State, 213 S.E.2d 829, 833 (Ga. 1975) (citing appendix with cases ending in life and death).

159. "Since *Pulley*, the Georgia Supreme Court has significantly narrowed the universe of cases from which it culls comparators. It now appears to be the court's practice never to

Given the varying ways in which states had enforced proportionality prior to *Pulley*, one might wonder whether those states that had never been invested in proportionality, never seriously undertaken it, were the ones to abandon it. But, no. Of the seven states that abolished proportionality review after *Pulley* and still have a death penalty, Arizona and Oklahoma each had previously found at least one sentence disproportionate,[160] Arkansas two,[161] Idaho three,[162] and Florida,[163] *many*. Moreover, Georgia, which moved to a death-sentences-only comparison pool after *Pulley*, had also found a number of sentences disproportionate when it used the broader pool.[164]

C. Executing Those Innocent of the Death Penalty.

The skeptical reader may by this point be asking: so, what difference does the abandonment of a searching comparative proportionality review make? Given that the Supreme Court has limited the imposition of the death penalty to murderers,[165] and only those murderers who both played a significant role in the crime and anticipated the risk that human life would be lost,[166] and also forbidden its imposition on juvenile offenders and intellectually disabled offenders,[167] what need is there for an individualized assessment of proportionality? At least two classes of cases argue that categorical exemptions are not enough to assure proportionality or, put differently, not enough to ensure that at least occasionally (albeit less often than before *Furman*), the imposition of the

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consider cases in which the jury sentenced the defendant to life imprisonment." Walker v. Georgia, 555 U.S. 979, 984 (2008) (Justice Stevens delivering a statement respecting the denial of the petition for a writ of certiorari).

160. *See* State v. Stevens, 764 P.2d 724, 728–29 (Ariz. 1988); Munn v. State, 658 P.2d 482, 487 (Okla. 1983).

161. *See* Sumlin v. State, 617 S.W.2d 372, 375 (Ark. 1981); Henry v. State, 647 S.W.2d 419, 425 (Ark. 1983).

162. State v. Pratt, 873 P.2d 800, 824 (Idaho 1993); State v. Scroggins, 716 P.2d 1152, 1159 (Idaho 1985); State v. Windsor, 716 P.2d 1182, 1195 (Idaho 1985).

163. *See, e.g.*, Amoros v. State, 531 So. 2d 1256, 1261 (Fla. 1988); Blair v. State, 406 So. 2d 1103, 1108–09 (Fla. 1981); Blakely v. State, 561 So. 2d 560, 561 (Fla. 1990); Caruthers v. State, 465 So. 2d 496, 499 (Fla. 1985); Chaky v. State, 651 So. 2d 1169, 1173 (Fla. 1995); Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993); Penn v. State, 574 So. 2d 1079, 1084 (Fla. 1991); Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989).

164. Hall v. State, 244 S.E.2d 833, 839 (Ga. 1978); Ward v. State, 236 S.E.2d 365, 368 (Ga. 1977).

165. Coker v. Georgia, 433 U.S. 584, 589 (1977); Enmund v. Florida, 458 U.S. 782, 797 (1982); Kennedy v. Louisiana, 554 U.S. 407, 438 (2008).

166. Tison v. Arizona, 481 U.S. 137, 158 (1987).

167. Roper v. Simmons, 543 U.S. 551, 578 (2005); *Atkins*, 536 U.S. at 321.

death penalty is not as arbitrary as being struck by lightning. Below we offer two examples of each, one from a jurisdiction that disavows proportionality review entirely, and one from a jurisdiction that claims to employ proportionality review but does so in an extremely perfunctory fashion.

1. Very Unaggravated Cases.

i. No Proportionality Review of the Offense.

Texas has no proportionality review,[168] and the fact that a single court reviews all death sentences[169] (which *Jurek* suggested would play a role in limiting arbitrariness in the imposition of the death penalty in Texas similar to the role proportionality review would play in the administration of Georgia's death penalty)[170] has had no discernible impact on removing those not "the worst of the worse" from death row.

Anthony Haynes's case provides one example. Haynes was nineteen years old and had recently flunked out of a federal program designed to recruit promising women and racial minorities for service as officers, thereby forfeiting a scholarship to college.[171] After returning to Houston, Haynes, who had no prior criminal record, committed several small robberies with friends and after one of them, riding around with those friends, for no particular reason shot off his gun, not aiming at anyone.[172] Houston police officer Kincaid (who was neither on duty nor in uniform) and his wife were passing Hayne's truck when something hit and cracked their windshield.[173] Kincaid, thinking that one of the occupants of Haynes's had thrown a rock at his car, turned his car around to investigate.[174] Haynes stopped his truck, the two men got out of their vehicles, and according to Kincaid's wife, Kincaid identified himself as a

168. Manvin S. Mayell, *Eighth Amendment — Proportionality Review of Death Sentences Not Required*, 75 J. CRIM. L. & CRIMINOLOGY 839, 843 (1984).

169. *Death Penalty in Texas*, TARLTON L. LIBR. (Sept. 6, 2022, 4:52 PM), https://tarlton.law.utexas.edu/texas-death-penalty (citing TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2023)).

170. Jurek v. Texas, 428 U.S. 262, 270 (1976).

171. *See* Application for Reprieve from Execution of Death Sentence and Commutation of Sentence to Imprisonment for Life for Anthony Haynes at 5–6, Haynes v. Thaler, 133 S. Ct. 639 (2012) (No. 12-6760), https://www.scribd.com/document/110031007/Clemency-Petition-for-Anthony-Haynes-to-Texas-Board-of-Pardons-and-Paroles.

172. *See id.* at 5–7.

173. *Id.* at 7.

174. *Id.*

police officer, and asked to see Haynes's driver's license.[175] As Kincaid reached toward his back pocket to get his ID, Haynes shot Kincaid, who died shortly thereafter.[176]

The only circumstance that made this capital murder was that Kincaid was acting in discharge of his duties as a law enforcement officer,[177] a circumstance arguably established by the testimony of the assistant police chief that department policy requires both on-duty and off-duty officers to take prompt and effective police action for any violation of the law committed in their presence, and when an officer takes such action, he is discharging his official duty.[178] At sentencing, the State presented evidence that Haynes had committed two (nonviolent) robberies the night of the murder, testimony from his co-defendant that Haynes had boasted that he felt no remorse, as well as trivial school misconduct and a voluntary mental health hospitalization as a juvenile.[179] Whether this was enough—for a nineteen-year-old—to warrant the death penalty was not considered by the Texas Court of Criminal Appeals, which has no statutory or constitutional vehicle that would support such an inquiry.

ii. Illusory Proportionality Review of the Offense.

Our interest in the topic of proportionality began with our joint work on the case of Richard Moore. Moore was convicted of murder and sentenced to death in Spartanburg County for the shooting death of James Mahoney, a clerk at Nikki's Speedy Mart ("Nikki's"), on September 16, 1999.[180] While the State's theory was that Moore's motive was robbery,[181] there was no dispute about any of the following facts: (1) when Moore entered the store Mahoney had three firearms within arm's reach and Moore had no gun; (2) both guns involved in the shooting were in Mahoney's possession when Moore arrived[182]; and (3) Mahoney was

175. *Id.* at 7; *see* Haynes v. Quarterman, 526 F.3d 189, 192 (5th Cir. 2008).

176. *See* Application for Reprieve, Haynes v. Thaler, 133 S. Ct. 639 (2012) (No. 12-6760), *supra* note 171, at 639.

177. *Id.* at 8 n.3.

178. Brief in Opposition to Petition for Certiorari at 5, Haynes v. Davis, 139 S. Ct. 917 (2019) (No. 18-6471), https://www.supremecourt.gov/DocketPDF/18/18-6471/76355/20181217092002938_Haynes%20BIO%20FINAL.pdf.

179. *Id.* at 5–8.

180. *See* State v. Moore, 593 S.E.2d 608, 609–10 (S.C. 2004).

181. Moore v. Stirling, 871 S.E.2d 423, 426 (S.C. 2022).

182. Petition for Writ of Certiorari at 4, 4 n.2, Moore v. Stirling, 141 S. Ct. 680 (2020) (No. 2020-5570), https://www.supremecourt.gov/DocketPDF/20/20-5570/151419/20200827103449298_Moore%20-%20Cert%20Petition.pdf.

killed after he pointed a gun at Moore, the two men got into a struggle, and Moore wrestled a gun away from Mahoney.[183] Moore took cash from behind the counter after the shooting, and although there was no direct evidence of Moore's intent when he entered the store, the jury could infer that intent from the fact that Moore had recently lost his job, had gone to a crack house earlier in the evening and returned there after the shooting.[184] At the sentencing phase of Moore's trial, the State focused on three categories of evidence it said warranted a death sentence: (1) the circumstances of the crime in which Moore killed Mahoney and shot at a bystander in the store, (2) the impact of the crime on Mahoney's family, and (3) Moore's character, which the State alleged was not deserving of mercy because of his prior criminal history, which included seven offenses, only one of which was violent, an aggravated assault.[185]

The South Carolina Supreme Court affirmed Moore's conviction and sentence on direct appeal, disposing of his proportionality challenge without even discussing the fact that Moore entered the store without a gun.[186] Its proportionality analysis was limited to a single sentence: "Further, the death penalty is not excessive or disproportionate to the penalty imposed in similar capital cases,"[187] followed by the cites for four capital cases with the armed robbery aggravating factor in which the defendant had been sentenced to death.[188]

In the quarter century that passed between Moore's direct appeal and the end of federal habeas proceedings, three of the four death sentences to which the court had compared Moore's case—*all* of which involved indisputably more aggravated homicides—were vacated and the defendants subsequently sentenced to life imprisonment.[189] The fourth death case to which the Court compared Moore's remained intact but was easily distinguishable: it involved a defendant convicted of two murders

183. *See id.* at 4–5.
184. *See id.* at 5; Moore, 871 S.E.2d at 426 n.1.
185. *See* Moore v. Stirling, 952 F.3d 174, 178 (4th Cir. 2020).
186. State v. Moore, 593 S.E.2d 608, 612 (S.C. 2004).
187. *Id.*
188. *Id.* at 612 (citing State v. Simpson, 479 S.E.2d 57 (S.C. 1996); State v. George, 476 S.E.2d 903 (S.C. 1996); State v. Sims, 405 S.E.2d 377 (S.C. 1991); State v. Patterson, 327 S.E.2d 650 (S.C. 1984)).
189. *See* State v. Moore, 593 S.E.2d at 612 (S.C. 2004); John H. Blume & Sheri Lynn Johnson, *Back to a Future: Reversing Keith Simpson's Death Sentence and Making Peace with the Victim's Family Through Post-Conviction Investigation*, 77 UMKC L. REV. 963, 963 (2009); John H. Blume & Lindsey S. Vann, *Forty Years of Death: The Past, Present, and Future of the Death Penalty in South Carolina*, 11 DUKE J. CONST. L. & PUB. POL'Y 183, 200 n.120, 227, 229 (2016).

in South Carolina, plus a murder and three attempted murders in California, all of which he had been convicted at the time of his South Carolina capital trial.[190] Moore therefore asked the Supreme Court to revisit its proportionality decision in his case and its method of assessing proportionality, pointing out that in the forty-five years since the South Carolina death penalty statute has been in place, the South Carolina Supreme Court had *never* found a death sentence to be disproportionate.[191] Thus, it might seem that proportionality review in South Carolina approximates the absence of proportionality review in Texas.

The state court agreed to hear argument in the case, suggesting that the court was interested in adding substance to its proportionality review.[192] Moore argued that his case was distinguishable as less aggravated than the cases cited by the court in his direct appeal, less aggravated than the cases of any of the forty-some men executed by South Carolina after *Furman*, and less aggravated than many of the cases in which sentences of life imprisonment had been imposed.[193] The majority responded to his arguments by "clarify[ing their prior precedent] . . . and hold[ing that the governing statute] does not limit the pool of comparison cases to only those in which the defendant actually received a sentence of death."[194] Nonetheless, the majority declared without any analysis that Moore's sentence was not disproportionate even when considered in light of those cases, relying on the fact that armed robbery does not require that the perpetrator carry a weapon or that he had the intent to use a weapon when he commenced the robbery.[195] But as dissenting Justice Hearn objected, "By improperly focusing on whether the crime committed by Moore meets the legal definition of armed robbery, the majority completely loses sight of the vast difference between a 'robbery gone bad' and a planned and premeditated murder."[196] After pointing to "numerous other state appellate courts [that] have found this distinction significant, if not dispositive in their comparative proportionality review," Justice Hearn observed that "[w]hile there are certainly differences between these

190. State v. Sims, 405 S.E.2d 377, 384 (S.C. 1991); *see* People v. Sims, 853 P.2d 992, 997 (Cal. 1993).
191. Moore v. Stirling, 871 S.E.2d 423, 433 (S.C. 2022).
192. *Id.*
193. *See id.* at 434–35.
194. *Id.* at 433.
195. *Id.* at 434.
196. *Id.* at 437–38 (Hearns, J., dissenting).

cases, all of them are more egregious than Moore's in one important respect: every perpetrator began the robbery or burglary armed at the inception—unlike Moore—yet *still* their death sentences were determined to be disproportionate."[197] He then concluded that "[w]hile tragic and heinous to the victim and his family, Moore's crime does not represent the 'worst of the worst' in terms of those murders reserved for the death penalty."[198]

2. Highly Mitigated Cases

i. No Proportionality Review

Just as some crimes, in Justice Hearns words, "[w]hile tragic and heinous to the victim and his family,"[199] are not the worst of the worst *murders,* some defendants, even when they have committed heinous crimes, have individual histories and attributes that compel the conclusion that they are not among the worst of the worst *offenders*. Ramiro Hernandez Llanas, executed by the state of Texas, which has no proportionality review, provides one example.[200] Although he bludgeoned his employer to death and raped his employer's wife[201]—crimes that most death penalty proponents would consider sufficiently terrible to deserve death—in any just world, the deprivation and terror he endured as a child should remove him from the ranks of the condemned.

The extraordinary poverty, constant exposure to neurotoxins, and violent abuse at the hands of his parents, summarized below, was never disputed by the state.[202] Born to a family of ten children in Nuevo Laredo, Mexico, at the age of two or three Ramiro and his family moved to—literally—a toxic waste dump.[203] Initially they had no shelter at all, but eventually they built a hut from cardboard, metal, and wood gathered

197. *Id.* at 438.
198. *Id.* at 438–39.
199. *Id.*
200. *See* Hernandez v. Thaler, No. SA-08-CA-805-XR, 2011 U.S. Dist. LEXIS 108823 (W.D. Tex. Sept. 23, 2011)*; Texas Executes Mexican Ramiro Hernandez-Llanas*, BBC NEWS (Apr. 10, 2014), https://www.bbc.com/news/world-us-canada-26964869.
201. *Hernandez*, 2011 U.S. Dist. LEXIS 108823, at *10.
202. Sheri Lynn Johnson, *A Legal Obituary for Ramiro*, 50 U. MICH. J.L. REFORM 291, 292–95 (2017).
203. *Id.* at 292.

from the dump.[204] The hut had a dirt floor, and rodents, but neither water nor electricity.[205] The family ate from the trash.[206]

From the time he was about four, Ramiro's parents forced him to work scavenging through at the dump.[207] The dump exposed Ramiro to toxic chemicals, which sometimes ignited.[208] Ramiro's family stored their drinking water in containers formerly used by gas stations, and as a young child, Ramiro would climb inside the containers in an attempt to clean them with trash, coming out coal black.[209] Both of Ramiro's parents severely physically abused Ramiro and his siblings throughout their childhood.[210] His father would beat them with belts, wires, hoses, wood stakes, and brooms.[211] His mother was at least as violent.[212] Because Ramiro understood the least, he was beaten the most.[213] Even school was not a sanctuary because in the third grade, Ramiro was kicked out because he could not learn.[214] Later, all valid scores on IQ tests placed Ramiro in the intellectually disabled range.[215]

Nonetheless, Ramiro was executed by the state of Texas, which has no mechanism for reviewing proportionality—and at that time, no clinically approved test for determining intellectual disability.[216]

ii. Illusory Proportionality Review

J.D. Gleaton, along with his half-brother Larry Gilbert, were convicted and sentenced to death in a joint trial for the murder of a storeowner killed during a botched armed robbery in South Carolina.[217] Gleaton entered the gas station and asked for some cigarettes; after the storeowner told him to buy them elsewhere, Gleaton brandished a knife and demanded money.[218] The victim grabbed for the knife.[219] A struggle

204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 293.
209. *Id.*
210. *Id.* at 294.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 303.
215. *Id.* at 301.
216. *See id.* at 298–306.
217. State v. Gilbert, 283 S.E.2d 179, 180 (1981).
218. Gilbert v. Moore, 134 F.3d 642, 649 (4th Cir. 1998).
219. *Id.*

ensured, and Gleaton stabbed the victim several times.[220] Gilbert, who was waiting outside in the car, saw the fight, ran into the store, and shot the victim.[221]

Gleaton, though his crime was much less aggravated than that of Hernandez Llanas, also endured an extremely harsh life. Complications at birth impaired J.D.'s cognitive abilities and his IQ was in the "borderline" range for intellectual disability.[222] He was raised by his grandparents, who were sharecroppers.[223] When he was six years old, J.D. was forced to work on the farm picking cotton where he was exposed to numerous pesticides.[224] He went only as far as the sixth grade, failed several grades, and never learned to read because the "boss man" threatened to evict the family from the land if J.D. went to school instead of working.[225]

J.D. later moved to Florida as a migrant farm worker and met his wife, with whom he had a daughter.[226] He had no problems with the law, was steadily employed, and was "by all accounts a devoted father and peaceful man."[227] When he became addicted to heroin, he checked himself into a rehabilitation hospital, overcame it, and he and his family moved back to South Carolina where he found a full-time job as a cook.[228] J.D.'s sobriety came to an end when his neck and both ankles were broken in an automobile accident.[229] To set his neck, the doctors installed a halo brace, which was held in place by four pins that were screwed into his skull.[230] Because of the pins, J.D. had to keep the brace on at all times for six months.[231] The brace was extraordinarily painful; even overdoses of the prescribed painkillers did nothing to diminish the excruciating agony.[232] In an effort at self-medication, J.D. resumed his use of heroin.[233] This led to the use of other drugs including amphetamines, marijuana,

220. *Id.*
221. *Id.*
222. John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit's "Double-Edged Sword": Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to Assistance of Counsel*, 58 MD. L. REV. 1480, 1491 (1999).
223. *Id.* at 1492.
224. *Id.* at 1492–93.
225. *Id.* at 1493.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*

and Valium. In the days preceding the offense, he was injecting speed every four to six hours and smoking one joint per hour.[234] He did not sleep and ate only cinnamon rolls and drank orange juice during that period.[235] A psychologist testified that due to his impaired cognitive abilities and drug addiction, his actions were impulsive, out of character for a man with no prior history of violence, and the actions of a person who was in a near psychotic state.[236]

The proportionality analysis following their death sentences was perfunctory: "Considering the record in this case and comparing it with *State v. Shaw and Roach* and *State v. Hyman* we find the death penalty is proportionate to a crime of this nature and to the crime and defendants in this case."[237] After exhausting the appeals process and being denied clemency, Gleaton and Gilbert were both executed.[238]

iii. The Specter of Race.

Richard Moore and Anthony Haynes are, and J.D. Gleaton was, Black; Ramiro Hernandez Llanas was Latino. Given the history of the death penalty in America, their races and the disproportionality of their death sentences likely are not a coincidence. The question after *Furman* was whether it was possible to rid the death penalty of racial bias. Would narrowing the class of death eligible offenses diminish or eliminate the gross racial disparities of the pre-Furman death penalty?

The looming shadow behind disproportionality is race, as the case that started our renewed interest in proportionality makes plain. Richard Moore is Black.[239] His victim was white.[240] As discussed above, regardless of the comparison pool, Moore's case was an outlier. Perhaps the explanation for the South Carolina Supreme Court's refusal to find the death penalty disproportionate in his case is indifference, or more benignly, reluctance to disturb what a jury determined. But neither of those explanations is helpful in answering why the prosecution *sought*

234. *Id.* at 1494.
235. *Id.*
236. *Id.* at 1494 n.112
237. State v. Gilbert, 283 S.E.2d 179, 182 (1981) (citing State v. Shaw, 255 S.E.2d 799 (1979); and then quoting State v. Hyman, 281 S.E.2d 209 (1981)).
238. Jesse J. Holland, *Half Brothers Executed in S.C./ Larry Gilbert and J.D. Gleaton Die on the Same Day After Spending 21 Years on Death Row*, GREENSBORO NEWS & REC. (Dec. 4, 1998), https://greensboro.com/half-brothers-executed-in-s-c-larry-gilbert-and-j-d-gleaton-die-on-the/article_c6f3ff3e-ae54-5026-b205-f3a9b3d3b69d.html.
239. *See* Moore v. Stirling, 871 S.E.2d 423, 443–44 (S.C. 2022).
240. *Id.* at 442.

death in Moore's and did not do so in more aggravated cases. The best—and worst—answer is race.[241]

McCleskey v. Kemp virtually foreclosed the use of general statistics about a state's discriminatory capital sentencing to establish constitutionally forbidden race discrimination in the imposition of the death penalty.[242] However, when an equal protection claim focuses on prosecutorial discretion exercised by a single decisionmaker, the claim is evaluated with "ordinary equal protection standards,"[243] and under these standards a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[244] "Circumstantial evidence of invidious intent may include proof of disproportionate impact," and as the Supreme Court has noted, in some cases proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."[245]

Solicitor Gossett's history of seeking death is such a case. Gossett was the Seventh Circuit Solicitor from 1985 to 2001.[246] Theodore Eisenberg, a law professor and statistician, examined the death-eligible homicides in the Seventh Circuit from 1985 to 1993.[247] During that time, Gossett sought the death penalty in forty-three percent of all death-eligible homicides.[248] However, of those cases, Gossett *never* sought the death penalty in a case with a Black victim.[249] Given the relative number of Black and white victim death-eligible homicides in the circuit during that

241. Justice Hearn recognized this answer in her dissent, describing Moore's death sentence as "a relic of a bygone era," noting that "[n]o African Americans served on the jury" that sentenced him to death, and stating that "it is disingenuous to discount the factor race plays" in the implementation of capital punishment in South Carolina. *See id.* at 442–43 (Hearn, J., dissenting).

242. McCleskey v. Kemp, 481 U.S. 279, 317–19 (1987).

243. United States v. Armstrong, 517 U.S. 456, 465 (1996) (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).

244. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); *see also* Washington v. Davis, 426 U.S. 229, 242 (1976) (stating that courts may infer discriminatory motivation from "the totality of the relevant facts").

245. Batson v. Kentucky, 476 U.S. 79, 93 (1986) (quoting *Davis*, 426 U.S. at 242).

246. Murray Glenn, *Gowdy Ousts Gossett*, GOUPSTATE (June 14, 2000, 12:01 AM), https://www.goupstate.com/story/news/2000/06/14/gowdy-ousts-gossett/29622350007/ [https://perma.cc/X5JR-9VG2].

247. Sheri Lynn Johnson, *Litigating for Racial Fairness After* McCleskey v. Kemp, 39 COLUM. HUM. RTS. L. REV. 178, 182 (2007); Petition for a Writ of Habeas Corpus at 38–39, Moore v. Stirling, 871 S.E.2d 423 (S.C. 2022) (No. 2020-001519).

248. *See* sources cited *supra* note 247.

249. *See* sources cited *supra* note 247.

period, Professor Eisenberg testified that the odds of this happening by chance were a mere six times in ten thousand.[250]

Solicitor Gossett's racially skewed vision of death-worthy victims persisted after the period of Professor Eisenberg's study. From 1993 until he lost the election for solicitor, there were thirty-five death-eligible homicides in Solicitor Gossett's jurisdiction, and sixty-one percent of those cases had a white victim.[251] Nonetheless, of the cases in which Gossett sought death, ninety percent had white victims.[252] Indeed, after 1993 (and therefore over his entire career, including when he decided to seek death against Richard Moore), Gossett sought the death penalty exactly once in a case involving a victim who was not white.[253]

Interestingly, even that single case does not weigh in favor of a finding of racial neutrality, or even the beginnings of reform. Rather, it provided further—this time explicit—evidence of racial motivation. Gossett did seek death in the case of Theodore Kelly, but the resulting death sentence was eventually vacated because it was racially discriminatory.[254]As state postconviction proceedings revealed through the testimony of an assistant solicitor, Gossett's office decided to seek death against Kelly specifically because they feared the Black community would react to apparent racial disparities in their decisions to seek death.[255]

Thus, Solicitor Gossett sought death against Kelly because his office did not want to face political consequences for previously refusing to seek the death penalty in Black victim cases. The assistant solicitor's testimony not only established that the office impermissibly considered race when it decided to seek or not seek death in any given case, but also demonstrated that Solicitor Gossett had no genuine interest in treating Black cases like white victim cases. Instead, because the facts of the Kelly

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250. *See* sources cited *supra* note 247.

251. Again, these numbers are drawn from an SCDC database provided to counsel for Moore in response to a FOIA request. *See* sources cited *supra* note 247.

252. *See* sources cited *supra* note 247.

253. *See* sources cited *supra* note 247.

254. Order Granting Relief, Kelly v. State, No. 99-CP-42-1174 (Ct. Common Pleas, Oct. 6, 2003).

255. The deputy solicitor testified:

> I told Holman [Solicitor Gossett] that I felt like the black community would be upset though if we did not seek the death penalty because there were two black victims in this case. . . . The only mention that was ever made of race was when I said that I felt like if we did not seek the death penalty, that the community, the black community, would be upset because we are seeking the death penalty in the (Andre) Rosemond case for the murder of two white people.

Id. at 38.

Black victim case so closely matched those of a white victim case, Gossett's office feared that the role of race in their death penalty cases would be obvious and it would suffer politically.

Kelly's case therefore makes plain that Gossett's interest was never in racial neutrality, but in flying under the radar. All well and good for Kelly, but of no avail to Moore. The problem is that after *McCleskey,* it is only when there is a smoking gun, a prosecutor who unwittingly admits to racial discrimination, that a remedy is available for racially tainted departures from the legitimate evaluation of death worthiness. Such admissions are rare; indeed, Kelly is the *only* case of which we are aware that a defendant claiming racial discrimination in the decision to seek or impose death has prevailed.[256] It's true that *McCleskey* could have provided a remedy for such departures by deeming statistical proof sufficient. But given *McCleskey*, the only realistic hope for cabining the influence of racial bias—whether conscious or subconscious, whether in the minds of prosecutors or jurors—is vigorous proportionality review.

IV. STATE ALTERNATIVES

Proportionality review does not need to be so limited. Several states rely or have relied on different ways of reviewing the proportionality of a death sentence that allow for more meaningful proportionality review of a case. This section will explore alternate mechanisms that states rely or have relied on in conducting proportionality review outside of considering the crime and the defendant in relation to other death-tried offenses. First, this section discusses several typologies of proportionality review. While not exhaustive of every typology of state proportionality review, below are several other mechanisms for proportionality review that have resulted in successful proportionality challenges to death sentences. Second, this section will discuss proportionality challenges that resulted in a sentence less than death.

256. Blume & Vann, *supra* note 189, at 224 n.247.

A. Typologies

1. Florida

Until recently, Florida provided a mechanism for proportionality review of death sentences.[257] The review mechanism followed in Florida allowed for better, more expansive proportionality review that did allow individuals with disproportionate sentences to actually obtain relief from their death sentences.[258] This included individuals who, despite committing rather aggravated offenses, had substantial mitigating circumstances present in their lives to warrant a sentence less than death.[259]

The Florida Supreme Court summarized this review mechanism most recently in *Yacob v. State*.[260] In explaining the mechanism, the court explained that proportionality review was "a unique and highly serious function of [the] Court" which existed to respond to the concerns about arbitrariness in the imposition of the death penalty set forth in *Furman v. Georgia*.[261] Under this mechanism, the Florida Supreme Court assessed whether a given case is one where "the most aggravating and least mitigating circumstances exist."[262] This required the court to engage in a qualitative review of the underlying basis and weight of all

257. In 2020, the Florida Supreme Court abandoned this jurisprudence, ruling that proportionality review violated the Conformity Clause of Article 1, Section 17 of the Florida Constitution. *See* Lawrence v. State, 308 So. 3d 544, 548 (Fla. 2020).

258. *See, e.g.*, Offord v. State, 959 So.2d 187, 191 (Fla. 2007).

259. *See, e.g.*, *id.* Offord was convicted of capital murder for bludgeoning his wife to death with a hammer, hitting her at least thirty times, most of which she was alive for. *Id.* at 188–89. Offord's mitigation included a history of profound mental illness, childhood sexual abuse, childhood physical abuse, substance abuse, and findings that Offord was both acting under the influence of extreme mental and emotional disturbance and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. *Id.* at 189–91. The Court found a single aggravating factor, "that the murder was especially heinous, atrocious or cruel." *Id.* at 191. In finding his death sentence disproportionate, the Court noted that the death penalty generally "is not indicated in a single-aggravator case where there is substantial mitigation," regardless of which aggravator underlies the original conviction. *Id.* at 191–92 (quoting Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999)).

260. Yacob v. State, 136 So. 3d 539, 547 (Fla. 2014). In *Yacob*, the Court considered the same challenge to proportionality review that was ultimately successfully used to end the doctrine in *Lawrence* six years later.

261. *Id.* at 546–47 (first quoting Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991); then discussing Furman v. Georgia, 408 U.S. 238, 253 (1972); and then discussing Gregg v. Georgia, 428 U.S. 153, 188 (1976)).

262. *Id.* at 549 (quoting Silvia v. State, 60 So. 3d 959, 973 (Fla. 2011)).

aggravating and mitigating circumstances in a given case as well as other relevant factors about the case.[263]

2. Missouri

Missouri still has a unique formulation of proportionality review that is distinct from most other states. Missouri's proportionality review statute requires the Missouri Supreme Court to consider whether the penalty "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant."[264] When selecting cases to compare the particular case to, the Court considers all factually similar cases where death was submitted to the jury, even if the ultimate sentence was life without the possibility of parole.[265]

3. Washington

Before Washington abandoned capital punishment in 2018, it provided for proportionality review of all capital sentences.[266] Under Washington's prior proportionality review, the Washington Supreme Court mandatorily reviewed each death sentence and made three specific determinations.[267] First, the Court determined whether there was sufficient evidence to justify an affirmative answer by the jury of the question: "[h]aving in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"[268] Next, the court determined whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, with similar cases meaning cases in which death was considered (regardless of the sentence imposed at trial) and for which there was a report filed with the Washington Supreme Court.[269] The court finally examined whether the sentence was a result of passion or prejudice and whether the defendant is intellectually disabled.[270]

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263. *Id.* at 550–51.
264. *E.g.*, State v. Driskill, 459 S.W.3d 412, 432 (Mo. 2015).
265. State v. Dorsey, 318 S.W.3d 648, 659 (Mo. 2010).
266. State v. Yates, 168 P.3d 359, 399 (Wash. 2007).
267. WASH. REV. CODE § 10.95.130 (2023); *Yates*, 168 P.3d at 399–400.
268. §§ 10.95.060(4), 10.95.130(1).
269. § 10.95.130(2).
270. §§ 10.95.130(3)–(4).

At a first glance, this mechanism sounds similar to many limited review mechanisms, as it assessed the propriety of a given death sentence against similar sentences in which death was sought, regardless of the sentence actually imposed at trial. However, the Washington Supreme Court provided for a more expansive version of this limited review in a unique way.[271] In order to ensure effective proportionality review, the Washington Supreme Court required a trial judge report to be filed in a central database for each aggravated first-degree murder case, regardless of whether the death penalty was sought in the case.[272] Statutorily, this report must respond to a standardized questionnaire and should contain substantial amounts of information about the defendant, the trial, the victim, the quality of the defense representation at trial, the chronology of the case, and other considerations about the capital trial proceeding including how impermissible factors such as race may have influenced the fairness of the proceeding.[273] This mechanism provides space for consideration of evidence about the various ways in which a case may be disproportionate by expanding the kinds of information before the court conducting the proportionality review.[274]

4. California

California's proportionality review is unique.[275] Most states that have or had some form of proportionality review made the review a mandatory statutory requirement to be undertaken by the highest court in the jurisdiction.[276] In California, proportionality review happens only at a

271. § 10.95.120.

272. *Id.*

273. WASH. REV. CODE § 10.95.120 (2023).

274. In practice, there have been no successful proportionality challenges under this system for several reasons including, but not limited to, inadequately completed questionnaires and ad-hoc judicial review at the time of a given proportionality review analysis. *See generally* Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness*, 79 WASH. L. REV. 775 (2004) (discussing, *inter alia*, the structure for and deficiencies in application of Washington's comparative proportionality review).

275. Notably, California did not always have proportionality review, including at the time of *Pulley v. Harris*, which considered a challenge to the California scheme's lack of a comparative proportionality review mechanism. 465 U.S. at 39–40. Intra-case proportionality review arose in California as part of the California Supreme Court's jurisprudence regarding the California Constitution's prohibition against cruel or unusual punishment. *See, e.g.*, People v. Kaurish, 802 P.2d 278, 316 (Cal. 1990) (citing People v. Dillon, 668 P.2d 697, 719–20 (Cal. 1983)).

276. *See, e.g.*, ALA. CODE § 13A-5-53(b)(3) (2022); GA. CODE ANN. § 17-10-35(c)(3) (2020); KY. REV. STAT. ANN. § 532.075(3) (2023); MISS. CODE ANN. § 99-19-105(3) (2016); MO. ANN.

particular defendant's request.[277] When a defendant requests a proportionality review, the California Supreme Court conducts an "intracase proportionality review," conducting an assessment "[t]o determine whether a sentence is cruel or unusual as applied to a particular defendant."[278] In doing so, the court considers several factors relevant to the case at hand, including "the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts."[279] The court must also consider the personal characteristics of the defendant, including "age, prior criminality, and mental capabilities."[280] The court must invalidate the sentence if it concludes that the penalty is "grossly disproportionate to the defendant's individual culpability" or that it "shocks the conscience and offends fundamental notions of human dignity."[281]

5. Ohio

In Ohio, proportionality review is automatic and requires different factual considerations than many other proportionality review mechanisms.[282] In reviewing a particular sentence, the court conducts an independent review of the record and other evidence to determine whether the evidence supports the jury's finding of an aggravating circumstance, whether the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt, and whether the imposition of a death sentence is proportionate to those affirmed in

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STAT. § 565.035.3(3) (2017); N.C.G.S. § 15A-2000(d)(2) (2020); OHIO REV. CODE ANN. § 292.05(A) (2021); S.C. CODE ANN. § 16-3-25(C) (2019); TENN. CODE ANN. § 39-13-206(c) (2020).

277. People v. Wallace, 189 P.3d 911, 958–59 (Cal. 2008). Illinois similarly has intra-case proportionality review, but the Supreme Court of Illinois considers conducting an excessiveness review of any death sentence imposed as a constitutional duty under the obligations imposed by the United States and Illinois Constitutions. People v. Bean, 560 N.E.2d 258, 289–290 (Ill. 1990).

278. *Id.* at 958. In its proportionality jurisprudence, the Court rejects explicitly intercase proportionality review, noting that it is not required under *Pulley* or required as a matter of equal protection. *See, e.g.*, People v. Bacigalupo, 820 P.3d 559, 586–87 (Cal. 1991), *vacated on other grounds*, 506 U.S. 802 (1992).

279. *Wallace*, 189 P.3d at 958.

280. *Id.*

281. *Id.* at 959.

282. *See* OHIO REV. CODE ANN. § 2929.05(A) (West 2023).

similar cases.[283] In doing this comparison, the court is limited to considering only cases where death was actually imposed.[284]

B. Successful Cases

Although proportionality review has been of very limited importance in the modern era of the death penalty, there have been several successful challenges that resulted from these alternate mechanisms for conducting proportionality review. These "success stories" are telling, as they establish not only that there are ways in which proportionality review can be meaningful but also guideposts for how courts might carefully consider the unique circumstances present in a death-eligible case to assess whether death is proportionate for the particular individual.

1. *State of Ohio v. Rayshawn Johnson*

Rayshawn Johnson's death sentence was found to be disproportionate and Mr. Johnson's case was remanded for resentencing by the Ohio Supreme Court in 2015.[285] Mr. Johnson was convicted of capital murder for the 1997 death of Shannon Marks.[286] Mr. Johnson broke into the Marks house to rob it.[287] Upon finding Shannon in the upstairs bathroom, he hit her on her upper back and the back of her head several times and proceeded to steal $50.[288] Shannon was found dead on the bathroom floor from brain injuries.[289] In independently reviewing Mr. Johnson's sentence, the Ohio Supreme Court affirmed the jury's finding of two aggravating factors: (1) aggravated murder during the course of an aggravated burglary and (2) aggravated murder during the course of an aggravated robbery.[290] However, the court then proceeded to thoroughly consider and weigh the mitigating evidence in Mr. Johnson's case,[291] highlighting several concerning mitigating features from Mr. Johnson's childhood, including:

283. *Id.*
284. State v. Spaulding, 89 N.E.3d 554, 588 (Ohio 2016).
285. State v. Johnson, 45 N.E.3d 208, 213 (Ohio 2015).
286. *Id.* at 212.
287. *Id.* at 213.
288. *Id.* at 214, 231.
289. *Id.* at 214.
290. *Id.* at 225–26.
291. *Id.* at 226–31.

- Johnson's familial history of drug and alcohol dependency, including fetal alcohol and drug exposure and the fact that Johnson was under the influence at the time of the offense;
- generational domestic violence and Johnson's upbringing without role models who taught him right from wrong;
- his mother's teen pregnancy, her attempted abandonment of him, and Johnson's exposure to his mother's sex work throughout his childhood;
- childhood drug exposure, including his mother putting Percocet, Percodan, or heroin in his baby bottle when he would cry and teaching him to both take and deal drugs;
- childhood poverty, including moving multiple times living in a shack with no water and electricity;
- familial mental illness, including his own depression, attention-deficit/hyperactivity disorder, and substance dependency diagnoses;
- Johnson's low IQ and attendant school and learning difficulties;
- evidence of Johnson's good prison behavior and acting as a positive influence on his son while incarcerated;
- Johnson's young age at the time of the crime (nineteen); and
- Johnson's remorse for the incident, including his confession and acceptance of responsibility for his actions.[292]

In weighing the evidence in mitigation, the court noted that "[a]ny one of the mitigating factors standing alone would not outweigh the aggravating circumstances in this case. But when viewed cumulatively, the mitigation evidence militates against imposing the death sentence."[293] Because the court could not conclude that "the aggravating circumstances that Johnson was found guilty of committing outweigh[ed] beyond a reasonable doubt the mitigating factors present in the case," it invalidated the imposed death sentence in his case.[294]

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292. *Id.* at 226–30.
293. *Id.* at 231.
294. *Id.*

2. *Terrance Tyrone Phillips v. State of Florida*

Terrance Tyrone Phillips's two death sentences were found to be disproportionate in 2016 by the Florida Supreme Court.[295] Mr. Phillips had been convicted of two counts of first-degree murder for the deaths of Mateo Hernandez-Perez and Reynaldo Antunes-Padilla.[296] Mr. Phillips shot and killed Mr. Hernandez-Perez and Mr. Antunes-Padilla after Mr. Phillips and several other individuals went to an apartment to attempt to rob the men.[297]

The Florida Supreme Court reviewed and assessed the aggravating and mitigating circumstances in Mr. Phillips' case and found his death sentence to be disproportionate.[298] Despite affirming the three aggravating circumstances found by the trial court,[299] the court carefully weighed the aggravation against the mitigation available in the case.[300] In discussing the mitigating circumstances in Mr. Phillips' case, the court considered several factors important in determining that the crime was not the worst of the worst, including Mr. Phillips' age of eighteen at the time of the offense; his significant intellectual deficits which include an IQ score of seventy-six and a history of receiving special services and educational therapy for learning disabilities and speech impediments during his childhood; his abusive childhood; and the vulnerability of Mr. Phillips at the time of his offense to the influence of peers due to the doubled impact of both his youth and his intellectual limitations.[301] In evaluating the weight of the mitigation and aggravation, the court noted that not only was Mr. Phillips's mitigation case substantial but the crime

295. Phillips v. State, 207 So. 3d 212, 215 (Fla. 2016).

296. *Id.* at 214.

297. *Id.* at 215–16.

298. *Id.* at 221–22.

299. The court recognized the three statutory aggravators and compared the case to another case that had been found to be disproportionate despite several aggravating factors. *Id.* at 222 (discussing Cooper v. State, 739 So. 2d 82 (Fla. 1999)). In Mr. Phillips's case, the trial court found three statutory aggravating factors: "(1) prior violent felony based on the contemporaneous murder of the other victim; (2) capital felony committed while defendant was on felony probation; and (3) capital felony committed during the commission of a robbery or burglary." *Id.* at 221.

300. *Id.* at 221–22.

301. *Id.* The court's opinion also discusses several other mitigating aspects of Mr. Phillips's life, including his grief over losing his father at a young age, his lack of parental supervision during his childhood, his generally good and helpful character traits, and his exposure to high levels of crime in his neighborhood. *Id.* at 217–18.

was even less aggravated than other cases where the court found a sentence disproportionate.[302]

3. *People of Illinois v. William P. Leger*

William P. Leger's death sentence was found to be excessive and was vacated to a life sentence by the Supreme Court of Illinois.[303] Mr. Leger was convicted of murdering his ex-wife and the attempted murder of his ex-wife's new husband and related offenses.[304] Mr. Leger broke into his ex-wife's new home and shot her several times while she was asleep, firing several shots at her new husband during the incident.[305]

The Supreme Court of Illinois reviewed Mr. Leger's death sentence, found it excessive, and vacated it to a life sentence.[306] In doing so, the Court carefully considered the facts of the offense, the substantial mitigating evidence that was presented at the sentencing phase of trial, and closely compared the case to several other cases with similar facts in either aggravation or mitigation where it had found death to be excessive.[307] The court highlighted several aspects of Mr. Leger's character and history it considered relevant in determining that death was an excessive sentence, including that substantially more evidence existed in mitigation than in the other cases where it had found capital sentences excessive.[308] First, the Court highlighted Mr. Leger's severe medical issues which included a prior mining accident that led to him nearly having both of his legs amputated, several surgeries on his back, and heavy prescription drug usage of medications that had the ability to affect someone's reasoning.[309] The Court also recognized as mitigating

302. *Id.* at 222. The court particularly discussed that Mr. Phillips's felony probation was for a drug offense in assessing the weight the aggravation should be given in its analysis. *Id.*

303. People v. Leger, 597 N.E.2d 586, 612 (Ill. 1992). At the time, Illinois had capital punishment. It has since abolished capital punishment. Illinois's proportionality scheme consisted of an intra-case proportionality assessment to determine whether the death sentence is excessive, focusing on "the particular defendant's extent of involvement in the offense, the nature of the offense, the character and background of the defendant, including any criminal record, and his potential for rehabilitation," although the court is empowered to consider other relevant factors, including other cases or an accomplice's participation. *See* People v. Bean, 560 N.E.2d 258, 289–90 (Ill. 1990).

304. *Leger*, 597 N.E.2d at 589–90.

305. *Id.*

306. *Id.* at 610–13.

307. *Id.*

308. *Id.* at 611–13.

309. *Id.* at 611–12.

that Mr. Leger had a good community reputation and work record, had served honorably in the Air Force, had expressed remorse, and suffered from longstanding alcohol dependency issues he had been seeking help for, which began when he was four years old.[310] Additionally, the Court recognized that Leger's criminal history was limited to a couple of incidents involving his ex-wife while they were married, there was no evidence of him being abusive or violent to others, and at the time of the murder in question he was dealing with the stress and disturbance of an impending divorce which appeared to trigger his behavior.[311] In evaluating the other cases where death had been reversed as excessive, the evidence in mitigation, and upholding the trial court's finding of statutory aggravating circumstances, the Court deemed that death was an excessive sentence and resentenced Mr. Leger to life without parole.[312]

V. REAL PROPORTIONALITY REVIEW: PROTECTING INNOCENCE OF THE DEATH PENALTY AND PREVENTING COVERT DISCRIMINATION.

As discussed above, the absence of any proportionality review threatens both the constitutional promise of assuring that death is reserved for the worst of the worst and the constitutional prohibition against racial discrimination. But, as the South Carolina examples make plain, a court can pretend to engage in proportionality review, but never strike down a single death sentence, and it can do so with only the most cursory analysis of even extremely unaggravated cases and cases with extraordinary mitigation.

What does meaningful proportionality review require? One way of answering this question is to look at the mechanisms of proportionality review in those states that successfully eliminate (at least some of) disproportionate death sentences. One characteristic stands out: expanding case comparisons beyond simply other cases in which death was imposed. Absent comparison to cases in which death was *not* imposed, it is impossible to know whether the sentence is out of the ordinary for that kind of crime (or kind of defendant). Put differently, one can hardly say whether a case is among "the worst of the worst" without looking at the cases that are not the worst of the worst; what the line is between blue and purple cannot be assessed by only looking at blues. Second, courts do better when they consider the evidence before them

310. *Id.* at 612.
311. *Id.*
312. *Id.* at 613.

rather than relying on any prior factfinder's assessment of the evidence. True, factfinders are better at credibility determinations, but mostly, proportionality does not depend on credibility but upon a comparison with other cases, and juries simply have no basis for comparison to other cases. And third, courts should have a predetermined analytic framework which they actually apply (which is not to say they cannot amend it), rather than ad-hoc comparisons; here, it is especially worth noting that one of the lessons of implicit bias research is that bias can be minimized by articulating criteria prior to the beginning of decision making.

More broadly, we think that any one methodology is likely to be inadequate. Cases can be disproportionate as to aggravation, or mitigation, or a hybrid of the two. Consequently, the disproportionality of a death sentence may be revealed in a comparison of cases with similar crimes, or with similar defendants to determine whether life sentences were often imposed in similar cases. But in the kind of cases where death is almost never sought, for example, so-called mercy killings or vehicular homicides, a better comparison group is death-eligible cases. Sometimes the best comparison is between all white defendant cases and all Black defendant cases. The best way therefore is not one way, but allowing counsel to proffer whatever evidence they have regarding proportionality. Too, for rarer kinds of cases (or rarer kinds of mitigation), or in states with a small set of death eligible cases, it may be necessary to look outside the state for appropriate comparators. That is not to say that a court must accept every form of proportionality argument that is proffered, but only that it should not mechanistically foreclose arguments that may in fact reveal disproportionality.

Finally, proportionality is not a single snapshot in time. We mean that in two ways. First, we think that if evidence (whether evidence of a defendant's mental illness or his torture as a child or his limited intellect, or whatever) not presented at trial later reveals that a sentence is disproportionate, there is no reason such disproportionality should not be remedied while it still can be. And second, we think it is important to remember that just as the Cruel and Unusual Punishment Clause embraces an evolving standard of decency, so should proportionality review. Perhaps in 1990 death sentences for nineteen-year-olds were not uncommon, but if in 2023 they are only meted out to Black young adults,[313] they are disproportional today.

313. *See generally* John H. Blume, et al., *Death by Numbers: Why Evolving Standards Compel Extending* Roper*'s Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98 TEX. L. REV. 921 (2020).

Appendix A. State Comparative Proportionality Mechanisms

The below chart only includes states that have had capital punishment at some point since Furman v. Georgia, 408 U.S. 238 (1972), was decided.

State	Capital Punishment Status May 2023	Did The State Ever Have Proportionality Review	Proportionality Mechanism	Comparator Pool	Did the State Ever Strike Down a Death Sentence as Disproportionate
Alabama	Yes	Yes. ALA. CODE § 13A-5-53(b)(3).	"In determining whether death was the proper sentence in the case the Alabama Court of Criminal Appeals . . . . Shall determine: whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." ALA. CODE § 13A-5-53(b)(3).	Cases where death has been imposed for similar facts. Beck v. State, 396 So.2d 645, 666 (Ala. 1980).	Yes. Ex parte Henderson, 616 So. 2d 348 (Ala. 1992).
Arizona	Yes	Yes, but no longer has proportionality review. State v. Salazar, 844 P.2d 566 (Ariz. 1992).	The court determines whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. State v. Richmond, 560 P.2d 41 (1976).	Cases where death was considered. State v. Ortiz, 639 P.2d 1020 (Ariz. 1981).	Yes, *See* State v. Fiero, 804 P.2d 72 (Ariz. 1990).
Arkansas	Yes	Yes, but no longer has proportionality review. Williams v. State, 902 S.W.2d 767 (Ark. 1995).	The Arkansas Supreme Court considers: 1) whether the sentence was the result of passion, prejudice, or any arbitrary factor; 2) whether the evidence supports the jury's finding of any statutory aggravating circumstances; 3) whether the evidence supports the jury's findings on the question of whether the mitigating circumstances outweigh aggravating ones;	Cases where death has been imposed and appealed. Sheridan v. State, 852 S.W.2d 772 (Ark. 1993).	Yes, *See* Henry v. State, 647 S.W.2d 419, 488-89 (Ark. 1983).

			and 4) whether the sentence is excessive. Henderson v. State, 844 S.W.2d 360 (Ark. 1993).		
California	Yes (governor imposed moratorium)	Yes (but not comparative). People v. Wallace, 189 P.3d 911, 958–59 (Cal. 2008).	While a comparative proportionality review is not automatic, "when a defendant requests intra-case proportionality review, . . . [the court] review[s] the particular facts of the case to determine whether the death sentence is so disproportionate to the defendant's personal culpability as to violate the California Constitution's prohibition against cruel or unusual punishment" People v. Wallace, 189 P.3d 911, 958-59 (Cal. 2008).	N/a. California does intra-case proportionality review, not comparative proportionality review.	No
Colorado	Abolished in 2020	No. People v. Davis, 794 P.2d 159, 173-74 (Colo. 1990).	N/a	N/a	N/a
Connecticut	Abolished in 2012	Yes, but no longer has proportionality review. *See* State v. Cobb, 743 A.2d 1, 23 n.13 (Conn. 1999).	The court determines whether "the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant." CONN. GEN. STAT. § 53a-46b(b)(3) (1994).	Cases where death was considered where capital penalty hearings occurred since 1973 where the underlying conduct was substantially similar to the conduct in the case being considered. State v. Webb, 680 A.2d 147, 210-16 (Conn. 1996).	No
Delaware	Abolished in 2016	Yes	The Delaware Supreme Court determines whether the sentence of death is disproportionate to the penalty recommended or imposed in similar cases. DEL. CODE ANN. tit. 11, § 4209(g)(2)(a) (1995).	Cases for first degree murder where death was considered at a capital penalty hearing where a life or death sentence has become final. Cooke v. State, 97 A.3d 513 (Del. 2014).	No

Florida	Yes	Yes, but no longer has proportionality review. Lawrence v. State, 308 So.3d 544 (Fla. 2020).	Florida Supreme Court assesses whether a given case is one where "the most aggravating and least mitigating circumstances exist." This requires the Court to engage in a qualitative review of the underlying basis and weight of all aggravating and mitigating circumstances in a given case as well as other relevant factors about the case. Yacob v. State, 136 So.3d 539 (Fla. 2014).	First degree murders. Rembert v. State, 445 So.2d 337, 340 (Fla. 1984).	Yes. *See* Phillips v. State, 207 So.3d 212 (Fla. 2016).
Georgia	Yes	Yes	The Supreme Court of Georgia shall determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." GA. CODE ANN. § 17–10–35(c)(3).	Appears to be cases where death was imposed with similar aggravating circumstances. *See* Gissendaner v. State, 532 S.E.2d 677, 691 (Ga. 2000).	Yes. *See* Hall v. State, 244 S.E.2d 833 (Ga. 1978).
Idaho	Yes	Yes, but no longer has proportionality review. *See* State v. Sivak, 901 P.2d 494, 500 (Id. 1995).	Prior to its amendment, I.C. § 19-2827(c)(3) required this Court to review whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."	Cases where death was considered. *See* State v. Wells, 864 P.2d 1123, 1125 (Id. 1993).	Yes. *See* State v. Windsor, 716 P.2d 1182 (Idaho 1985).
Illinois	Abolished in 2011	Yes (limited intra-case proportionality review). People v. Bean, 560 N.E.2d 258 (Ill. 1990).	"This court will examine the facts of that particular case and the evidence introduced at the trial and death penalty hearing, and, as a matter of reference, it may consider the sentence imposed on an accomplice or a codefendant in light of his involvement in the offense." People v. Bean, 560 N.E.2d 258, 289-90 (Ill. 1990).	That case and any co-defendant or accomplice cases. People v. Bean, 560 N.E.2d 258 (Ill. 1990).	Yes. *See* People v. Leger, 597 N.E.2d 586 (Ill. 1992).
Indiana	Yes	Yes (limited intra-case proportionality review under the	There is limited state constitutional proportionality protections as the Indiana Constitution provides that "[a]ll penalties shall be proportioned to the nature of	Cases where death was imposed. *See* Games v. State, 535 N.E.2d 530, 538 (Ind. 1989).	No

		Indiana Constitution and comparative proportionality review at the Court's discretion). *See* Baird v. State, 640 N.E.2d 1170 (Ind. 1990); Games v. State, 535 N.E.2d 530, 538 (Ind. 1989); Stevens v. State, 691 N.E.2d 412, 437-38 (Ind. 1997).	the offense." Ind. Const. Art. 1 § 16. The Indiana Supreme Court has interpreted this to mean that the section does not mandate comparative proportionality review, but instead requires a review based on the nature of the instant offense and offender. *See Baird v. State*, 640 N.E.2d 1170, 1183 (Ind. 1990). The Court has also, on occasion, reviewed a death sentence with regard for the imposition of other death cases in Indiana to ensure consistent application of the death penalty. *See* Games v. State, 535 N.E.2d 530, 538 (Ind. 1989); Stevens v. State, 691 N.E.2d 412, 437-38 (Ind. 1997).		
Kansas	Yes	No. State v. Gleason, 388 P.3d 101 (Kan. 2017).	N/a	N/a	N/a
Kentucky	Yes	Yes. KY. REV. STAT. ANN. § 532.075(3).	Whenever the death penalty is imposed for a capital offense . . . the sentence shall be reviewed on the record by the Supreme Court . . . With regard to the sentence, the court shall determine . . . Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. KY. REV. STAT. ANN. § 532.075(3).	Cases where death has been imposed since 1970. *See* Caudill v. Commonwealth, 120 S.W.3d 635, 679 (Ky. 2003).	No
Louisiana	Yes	Yes. La. Sup. Ct. R. 28, Rule 905.9.1, sec. 1(c).	"The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are	First degree murders from the same judicial district since 1976.	Yes. *See* State v. Sonnier, 380

			necessary to satisfy constitutional criteria for review." La. C. Cr. P. art. 905.9. By its rules, the court then must determine "whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." La. Sup. Ct. R. 28, Rule 905.9.1, sec. 1(c).	*See* State v. Welcome, 458 So. 2d 1235 (La. 1984).	So. 2d 1 (La. 1979).
Maryland	Abolished in 2013	Yes, but no longer has proportionality review. *See* Bruce v. State, 616 A.26 392, 411 n.4 (Md. 1992).	The Maryland Supreme Court determines whether the death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. 27 MD. CODE ANN. § 414(e)(4) (1991).	Cases where death was sought regardless of sentence. Tichnell v. State, 468 A.2d 1, 17 (Md. 1983).	No
Massachu-setts	Abolished in 1984	Yes but no longer have proportionality review. See Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (1984).	The statute required the supreme judicial court to determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in other similar cases of one or more jurisdictions legally authorized to impose said penalty of death, with the greater weight of such comparison to be given to similar Massachusetts cases in which the death penalty will have been imposed, with due consideration of both those cases in which a sentence of life imprisonment was imposed and those cases in which a sentence of death was imposed." MASS. GEN. LAWS ch. 279, § 71 (1982).	Unclear - the Court struck the statute down as unconstitutional before it was actually applied, although the statute seems to suggest cases where death was considered. See Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (1984).	No. The statute was never used and was then held unconstitution-al. See Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (1984).
Mississippi	Yes	Yes. MISS. CODE ANN. § 99-19-105(3).	"With regard to the sentence, the Mississippi Supreme court shall determine . . . whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" MISS. CODE ANN. § 99-19-105(3).	Cases the Mississippi Supreme Court has reviewed since 1976 where death was imposed.	Yes. *See* Bullock v. State, 525 So.2d 764 (Miss. 1987).

Missouri	Yes	Yes. MO. ANN. STAT. § 565.035.3.	Section 565.035.3 imposes an independent duty on the Missouri Supreme Court to undertake a proportionality review to determine: "Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant." MO. ANN. STAT. § 565.035.3. The court reviews "the whole record, independent of the findings and conclusions of the judge and jury." State v. Ramsey, 864 S.W.2d 320, 328 (Mo. 1993).	Factually similar cases where death was submitted to the jury. State v. Dorsey, 318 S.W.3d 648 (Mo. 2010).	Yes. *See* State v. Chaney, 967 S.W.2d 47 (Mo. 1998).
Montana	Yes	Yes. MONT. CODE ANN. § 46-18-310(1)(c).	The court determines whether the sentence of death is excessive of disproportionate to the penalty imposed in other cases in which a sentencing hearing was held pursuant to 46-18-301, whether the sentence imposed was death or a sentence other than death, considering both the crime and the defendant. MONT. CODE ANN. § 46-18-310(1)(c).	Cases where death was considered, a capital penalty hearing was held, and there is a record concerning the aggravation and mitigation presented. *See* MONT. CODE ANN. § 46-18-310(c), State v. Johnson, 969 P.2d 925, 936-37 (Mont. 1998).	Yes. *See* Kills on Top v. State, 928 P.2d 182 (Mont. 1996). Note: this is labeled by the Supreme Court of Montana as proportionality review but Mr. Kills on Top actually received relief pursuant to Tison v. Arizona, 481 U.S. 137 (1987).

Nebraska	Yes	Yes. Neb. Rev. Stat. §§ 29-2521.03, 29-2522(3); *see also* State v. Schroeder, 941 N.W.2d 445, 470 (Neb. 2020).	The court considers whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Neb. Rev. Stat. §§ 2902521.03, 29-2522(3).	Cases where death was imposed. *See* State v. Schroder, 941 N.W.2d 445, 470, 472-73 (Neb. 2020).	No
Nevada	Yes	Yes, but no longer has proportionality review. Dennis v. State, 13 P.3d 434, 440 (Nev. 2000).	The court compared all similar capital cases and appealed murder cases where death was sought but not imposed to determine if the case was disproportionate to the offense and the background and characteristics of the offender. *See* Nev. Rev. Stat. § 177.055(2)(d) (1977); Harvey v. State, 682 P.2d. 1384, 1385 (Nev. 1984).	Cases where death was imposed and cases where death was sought and appealed. Harvey v. State, 682 P.2d 1384, 1385 (Nev. 1984).	Yes. *See* Biondi v. State, 699 P.2d 1062, 1066 (1985).
New Hampshire	Abolished in 2019	Yes. N.H. Rev. Stat. Ann. § 630:5, XI(c).	The statute reads, "With regard to the sentence the supreme court shall determine: (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.H. Rev. Stat. Ann. § 630:5, XI(c).	Those cases in which the defendant committed the same kind of capital murder; a separate sentencing hearing occurred; the jury found predicate aggravating factors; and the penalty imposed was either death or life imprisonment without possibility of parole. *See* State v. Addison, 7 A.3d 1225, 1246-51 (N.H. 2010).	No
New Jersey	Abolished in 2007	Yes. N.J. STAT. ANN. § 2C:11-3(e) (2006). *See also* State v. Wakefield, 921 A.2d 954, 1019 (N.J. 2007).	"Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.J. STAT. ANN. § 2C:11-3(e) (2006).	Cases where death has been imposed. N.J. Stat. Ann. § 2C:11-3(e) (2006).	No

New Mexico	Abolished in 2009	Yes, but no longer has proportionality review. N.M. STAT. ANN. § 31-20A-4(C)(4) (1979). Repealed 2009 but still applied to anyone sentenced before repeal. *See* Fry v. Lopez, 447 P.3d 1086, 1098 (N.M. 2019).	The court considers whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.M. STAT. ANN. § 31-20A(-4(c)(4) (1979).	Cases where death was considered and the sentence of death or life imprisonment was affirmed on appeal, including cases involving the same aggravating circumstance and factually similar cases. *See* Fry v. Lopez, 447 P.3d 1086, 1103, 1107-09 (N. M. 2019).	Yes. *See* Fry v. Lopez, 447 P.3d 1086 (N.M. 2019).
New York	Abolished in 2004	Yes. N.Y. CRIM. PROC. LAW § 470.30 (3)(b).	The New York Court of Appeals considers "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. In conducting such review the court, upon request of the defendant, in addition to any other determination, shall review whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases by virtue of the race of the defendant or a victim of the crime for which the defendant was convicted." N.Y. CRIM. PROC. LAW § 470.30 (3)(b).	Unclear - there was never a full analysis by the highest court under this section.	No
North Carolina	Yes	Yes. N.C. GEN. STAT. § 15A-2000(d)(2).	The Supreme Court considers whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C. GEN. STAT. § 15A-2000(d)(2).	Cases where death was considered since 1977 and reviewed on direct appeal by the N.C. Supreme Court with factually similar circumstances. *See* State v. Syriani, 428 S.E.2d 118 (N.C. 1993), State v.	Yes. *See* State v. Watts, 584 S.E.2d 740, 750 (N.C. 2003).

				al-Bayyinah, 616 S.E.2d 500 (N.C. 2005).	
Ohio	Yes	Yes. OHIO REV. CODE ANN. § 2929.05(A).	The court conducts an independent review of the record and other evidence to determine whether the evidence supports the jury's finding of an aggravating circumstance, whether the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt, and whether the imposition of a death sentence is proportionate to those affirmed in similar cases. OHIO REV. CODE ANN. § 2929.05(A).	Cases where death has been imposed that have been considered already on appeal. State v. Steffen, 509 N.E.2d 383 (Ohio 1987).	Yes. *See* State v. Johnson, 45 N.E.3d 208 (Ohio 2015).
Oklahoma	Yes	Yes, but no longer has proportionality review. *See* Postelle v. State, 267 P.3d 114, 138-39 (Okla. Crim. App. 2011); Battenfield v. State, 816 P.2d 555, 563-64 (Okla. Crim. App. 1991).	The Court of Criminal Appeals determined whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. OKLA. STAT. ANN. tit. 21, § 701.13(C)(3) (1981).	Court considers factually similar cases imposed under the then current capital punishment scheme. *See* Jones v. State, 648 P.2d 1251, 1260 (Okla. Crim. App. 1982); Munn v. State, 658 P.2d 482, 487 (Okla. Crim. App. 1983).	Yes, Munn v. State, 658 P.2d 482, (Okla. Crim. App. 1983).
Oregon	Yes (governor imposed moratorium)	No	N/A	N/A	N/A
Pennsylv-ania	Yes (governor imposed moratorium)	Yes, but no longer has proportionality review. *See* Commonwealth v.	The Supreme Court determines whether a death sentence was excessive or disproportionate to the penalty imposed in similar cases considering both the circumstances of the crime and the character and	All cases of murder of the first degree convictions which were prosecuted or could have been prosecuted under the then governing death penalty statute.	No

		Knight, 156 A.3d 239, 249 (Pa. 2016).	record of the defendant. 42 PA. CONS. STAT. § 9711(h)(3)(iii) (1996).	Commonwealth v. Frey, 475 A.2d 700, 707 (Pa. 1984).	
Rhode Island	Abolished (was held unconstitutional in 1979 and no new statute was enacted)	No	N/A	N/A	N/A
South Carolina	Yes	Yes. S.C. CODE ANN. § 16-3-25(C).	The Statute requires the Supreme Court of South Carolina to determine whether "the sentence of death is 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).	Cases which could have been tried as a death case. Moore v. Stirling, 871 S.E.2d 423, 433-34 (S.C. 2022).	No
South Dakota	Yes	Yes. S.D. CODIFIED LAWS 23A-27A-12(3).	The Supreme Court of South Dakota shall determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." S.D. CODIFIED LAWS 23A–27A–12(3).	Cases where death was considered and a capital penalty hearing was held. State v. Robert, 820 N.W.2d 136, 145 (S.D. 2012).	No
Tennessee	Yes	Yes. TENN. CODE ANN. §39-13-206(c)(1)(D).	The Tennessee Supreme Court considers whether "[t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." TENN. CODE ANN. § 39-13-206(c)(1)(D).	Cases where death was considered and a capital penalty hearing was held and a jury made the sentencing determination. State v. Miller, 638 S.W.3d 136, 166 (Tenn. 2021).	Yes. *See* State v. Godsey, 60 S.W.3d 759, 793 (Tenn. 2001).
Texas	Yes	No. Pondexter v. State, 942 S.W.2d 557, 587-88 (Tex. Crim. App. 1996).	N/A	N/A	N/A

Utah	Yes	Yes. State v. Maestas, 299 P.3d 893 (Utah 2012).	The Utah Supreme Court considers "whether the death penalty was proportionate to [a] defendant's level of culpability" and "whether [a] defendant's sentence was in proportion to the general pattern of cases in our state." State v. Maestas, 299 P.3d 893, 987 (Utah 2012).	Cases where death was imposed. *See* State v. Holland, 777 P.2d 1019, 1025-26 (Utah 1989).	No
Virginia	Abolished in 2021	Yes. Repealed in 2021 when the death penalty was abolished in the state.	The Supreme Court determines whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. VA. CODE ANN. § 17.1-313(c)(2) (2020).	Cases where death was imposed after a finding of the same aggravating factors. *See* Lawlor v. Commonwealth, 738 S.E.2d 847, 895 (Va. 2013).	No
Washington	Abolished in 2018	Yes. Repealed effective Summer 2023.	The Washington Supreme Court considers whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. WASH. REV. CODE § 10.95.130(2)(b).	Cases where death was considered that are reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, and cases in which reports have been filed with the supreme court. WASH. REV. CODE 10.95.130(2)(b). *See also* State v. Yates, 168 P.3d 359 (Wash. 2007).	No
Wyoming	Yes	Yes, but no longer has proportionality review. *See* Harlow v. State, 70 P.3d 179, 204 (Wyo. 2003).	The Supreme Court considers whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. WYO. STAT. ANN. § 6-2-103(d)(iii) (1988).	Cases of other people convicted generally in the state and sentences imposed for conviction of the same crime in other jurisdictions. *See* Enberg v. State, 686 P.2d 541, 544 (Wyo. 1984).	No