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The Evolution of North Carolina's Comparative Proportionality Review in Capital Cases

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In *Furman v. Georgia*[1] the United States Supreme Court held that the eighth and fourteenth amendments to the United States Constitution prohibit state capital sentencing schemes that operate at the unfettered discretion of the sentencing authority.[2] Death may be imposed only after the sentencing authority has followed specific guidelines designed to ensure fair, nonarbitrary sentencing.[3] Sentencing bodies, however, must be allowed to exercise limited discretion to assure that the particular circumstances of the crime and the defendant in each case are considered before deciding on an appropriate sentence. Thus, the Court also has rejected mandatory capital sentencing as constitutionally impermissible.[4] Consistent with these dual goals of nondiscretionary and particularized sentencing, many states have enacted "guided discretion" capital sentencing statutes.[5] Typically, in a guided discretion scheme the jury must consider evidence of both aggravating[6] and mitigating[7] circumstances. Death may be im-

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1. 408 U.S. 238 (1972) (per curiam).

2. *Id.* at 239-40. *Furman* was a per curiam decision with nine separate opinions (five concurring, four dissenting). Justice Stewart argued that it was cruel and unusual punishment to impose the death penalty on a "selected random handful" of defendants at the discretion of the jury. *Id.* at 309-10 (Stewart, J., concurring).

3. *Id.* at 255-57. While the United States Supreme Court did not create guidelines for acceptable capital sentencing procedures in *Furman*, the Court has approved state capital sentencing schemes in several subsequent cases. *See, e.g.*, Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion); Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion). The Court also has invalidated some capital sentencing procedures. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325 (1976).

4. Woodson v. North Carolina, 428 U.S. 280 (1976).

At issue in *Woodson* was North Carolina's capital sentencing statute, Act of April 8, 1973, ch. 1201, §1, 1973 N.C. Sess. Laws 323 (formerly codified at N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975)), which called for the automatic imposition of the death penalty upon conviction of first degree murder. The Court held that the statute was unconstitutional on three grounds. First, the statute failed to take into consideration the "character and record of the individual offender and the circumstances of the particular offense." *Woodson*, 428 U.S. at 304. Second, the statute failed to reflect "contemporary standards respecting the imposition of the punishment of death." *Id.* at 301. Last, the Court noted that juries might be unwilling to convict defendants charged with first degree murder in light of the mandatory death sentence such a conviction imposed. *Id.* at 302-03.

5. "In response to [*Furman*], roughly two-thirds of the States promptly redrafted their capital sentencing statutes in an effort to limit jury discretion . . . ." Pulley v. Harris, 104 S. Ct. 871, 876 (1984). North Carolina's capital sentencing statute, N.C. GEN. STAT. § 15A-2000 (1983), is fairly typical. The statute provides for a bifurcated procedure in capital felony cases: the guilt and sentencing phases of the trial are conducted separately. *Id.* § 15A-2000(a). At the sentencing phase, evidence may be presented to the jury relating to aggravating and mitigating circumstances. *Id.* § 15A-2000(a)(3). The jury decides whether to impose death or life imprisonment by weighing the circumstances: if the aggravating circumstances are found to outweigh the mitigating circumstances, the defendant may be sentenced to death. *Id.* § 15A-2000(b)(1) to (3). The sentence recommendation must be unanimous; if the jury cannot agree on a sentence the trial judge must impose a sentence of life imprisonment. *Id.* § 15A-2000(b). A jury recommending death must return in writing the statutory aggravating circumstances found. *Id.* § 15A-2000(c)(1). For a discussion of the history and application of the North Carolina capital sentencing statute, see Comment, *Capital Punishment in North Carolina: The 1977 Death Penalty Statute and the North Carolina Supreme Court*, 59 N.C.L. REV. 911 (1981).

6. *See, e.g.*, N.C. GEN. STAT. § 15A-2000(e) (1983).

posed only upon a finding of one or more aggravating circumstances and only if such circumstances outweigh any mitigating circumstances found.[8]

As an added "safeguard against arbitrarily imposed death sentences,"[9] many states incorporate a proportionality review into their capital sentencing procedures.[10] There are two basic types of proportionality review.[11] Traditional proportionality review examines the "appropriateness of a sentence for a particular crime."[12] For example, a traditional proportionality review might examine whether the death penalty is too severe a punishment for kidnapping.[13]

The second type of proportionality review—the subject of this Note—is comparative proportionality review.[14] Comparative proportionality procedures require the reviewing court to compare the case under review to "similar" cases previously decided in the same jurisdiction. The court must decide "whether the [death] penalty is . . . unacceptable . . . because [such penalty is] disproportionate to the punishment imposed on others convicted of the same crime."[15] Unless the case is found to be sufficiently similar to other cases in which the death penalty has been imposed, the death penalty will be deemed disproportionate. Although comparative proportionality review is not constitutionally required,[16] the United States Supreme Court clearly approves of such review in capital sentencing procedures.[17]

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7. *See, e.g., id.* § 15A-2000(f).

8. *Id.* § 15A-2000(c).

9. Pulley v. Harris, 104 S. Ct. 871, 879 (1984).

10. Thirty-two states currently provide for proportionality review, either by statute or case law. *See* Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 793 n.61 (1983) (complete listing of proportionality statutes).

11. *See* Pulley v. Harris, 104 S. Ct. 871, 875-76 (1984).

12. *Id.* at 875.

13. The United States Supreme Court has invalidated statutes after applying traditional proportionality analysis in several cases. *See, e.g.*, Solem v. Helm, 463 U.S. 227 (1983) (life imprisonment without possibility of parole disproportionate punishment for issuing a $100 bad check); Enmund v. Florida, 458 U.S. 782 (1982) (death penalty disproportionate punishment for an accessory to robbery convicted of murder under the felony murder rule); Coker v. Georgia, 433 U.S. 584 (1977) (death penalty disproportionate punishment for the rape of an adult victim); *see also* D. PANNICK, JUDICIAL REVIEW OF THE DEATH PENALTY (1982) (discussing traditional proportionality principles).

14. This type of review has been described as "proportionality review," "comparative excessiveness," "comparative sentence review," and "comparative proportionality review." *See* Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentencing: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 663 n.1 (1983). Thirty-one states require comparative proportionality review. Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1189 n.382 (1984).

15. Pulley v. Harris, 104 S. Ct. 871, 876 (1984).

16. The issue in *Pulley* was "whether the Eighth Amendment . . . requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases." *Id.* The Court unequivocally rejected the concept of constitutionally mandated comparative proportionality review, holding that "there is . . . no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case." *Id.* at 879.

Justice Brennan, in dissent, argued that comparative proportionality review is constitutionally required. Brennan noted that while comparative proportionality review is no panacea to the problems inherent in any capital sentencing scheme, "such review often serves to identify the most extreme examples of disproportionality among similarly situated defendants . . . [and] to eliminate some of the irrationality that currently surrounds imposition of a death sentence." *Id.* at 890 (Brennan, J., dissenting).

17. *See e.g.*, Zant v. Stephens, 462 U.S. 862, 890 (1983) (the Court upheld a death sentence

Two determinations are central to the effective functioning of a comparative proportionality review scheme. First, the reviewing court must define the group or "pool" of cases that are to be used in making similarity comparisons.[18] Second, the court must decide how to determine similarity: the court must identify the factors that will be considered pertinent in comparing one case to another.[19] This Note will examine how North Carolina has dealt with these issues in the development and application of its comparative proportionality review procedure.

The current North Carolina capital sentencing statute was enacted in 1977.[20] Under the statute any case in which the jury imposes a sentence of death is automatically appealed to the North Carolina Supreme Court.[21] On appeal the court reviews assignments of error from both the guilt and sentencing phases of the trial.[22] If both phases are found to be error-free,[23] the court then undertakes three additional inquiries. First, the court examines whether the record supports the "jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death."[24] Second, the court must determine that the sentence was not imposed "under the influ-

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under Georgia's capital sentencing statute, stating that "[o]ur decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence . . . to avoid arbitrariness and to assure proportionality."); Gregg v. Georgia, 428 U.S. 153, 198 (1976) ("[a]s an important additional safeguard against arbitrariness and caprice . . . [the Georgia Supreme Court] is required by statute . . . [to determine] whether the sentence is disproportionate compared to those sentences imposed in similar cases.").

Several theories have been advanced for the necessity of comparative proportionality review. Such review "may be the best means of ensuring that a state's statutory capital sentencing scheme is functioning within . . . eighth amendment guidelines . . . [because it] measures the consistency with which sentencing authorities impose the death penalty—a crucial factor in discerning potentially cruel and unusual punishment." Special Project, *supra* note 14, at 1189. Comparative proportionality review is "the only review technique which tests capital sentences against accumulated evidence of contemporary mores, as required by *Woodson*." Goodpaster, *supra* note 10, at 814.

18. Possible pools include all the cases in which (1) the defendant was convicted of a capital crime, (2) the defendant was convicted of a capital crime or pleaded guilty to a capital crime as a part of a plea-bargaining arrangement, (3) the defendant was sentenced to death, (4) the defendant was sentenced to death and the sentence was affirmed on appeal, (5) the defendant was sentenced to death or life imprisonment and the sentence was affirmed on appeal.

19. The United States Supreme Court has held that to impose a death penalty the sentencing authority must consider the particular circumstances of the crime and of the defendant and that there must be a "principled way to distinguish [a] case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, 446 U.S. 420, 433 (1980). Beyond these guidelines it is not clear what factors a court may or should consider controlling in assessing similarity. In any fact situation there are many different possible comparison factors. For example, if an intoxicated 18 year-old defendant is convicted of the first degree murder of two store clerks during an armed robbery, the case could be compared on proportionality review to armed robbery cases, youthful offender cases, multiple murder cases, felony murder cases, diminished capacity cases, or some combination of these cases.

20. Act of May 19, 1977, ch. 406, 1977 N.C. Sess. Laws 407. North Carolina drew heavily on MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962) in creating the current statute. State v. Johnson, 298 N.C. 47, 60, 257 S.E.2d 597, 608 (1979).

21. N.C. GEN. STAT. § 15A-2000(d) (1983). The current statute allows imposition of the death penalty only upon a conviction of first degree murder. *Id.* § 14-17 (1981).

22. *Id.* § 15A-2000(d)(1) (1983).

23. State v. Jackson, 309 N.C. 26, 45, 305 S.E.2d 703, 717 (1983) (proportionality review is performed by the court only if both phases of the trial are error-free).

24. N.C. GEN. STAT. § 15A-2000(d)(2) (1983).

ence of passion, prejudice, or any other arbitrary factor."[25] Last, the court must conduct a comparative proportionality review. The court must overturn the death sentence and impose life imprisonment "upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[26]

North Carolina's comparative proportionality scheme is intended to serve "as a check against the capricious or random imposition of the death penalty"[27] and to assure that "individualized consideration [is] given to the defendant before the death sentence can be upheld."[28] In carrying out its proportionality review, the court must be "sensitive not only to the mandate of the Legislature, but also to the constitutional dimensions of [the] review."[29]

For purposes of assessing similarity, the court recognizes the "pool" of cases available for comparison purposes as

> *all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.[30]

This pool is further limited to only those cases that have been affirmed on appeal by the North Carolina Supreme Court.[31] The court also may "suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions" of the statute.[32]

In conducting the proportionality review, the court compares "the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant."[33] Significant factors in comparing cases are "the manner in which the crime was committed and defendant's character, back-

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25. *Id.*

26. *Id.*

27. State v. Jackson, 309 N.C. 26, 46, 305 S.E.2d 703, 717 (1983).

28. State v. McDougall, 308 N.C. 1, 36, 301 S.E.2d 308, 329, *cert. denied*, 104 S. Ct. 197 (1983).

29. State v. Rook, 304 N.C. 201, 236, 283 S.E.2d 732, 753 (1981) (citing Gregg v. Georgia, 428 U.S. 153, 204-06 (1976), and Profitt v. Florida, 428 U.S. 242, 258-59 (1976)), *cert. denied*, 455 U.S. 1038 (1982).

30. State v. Williams, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 104 S. Ct. 202 (1983).

31. State v. Jackson, 309 N.C. 26, 45, 305 S.E.2d 703, 717 (1983). As of January 30, 1985, the proportionality pool consisted of 88 cases. *See infra* Appendix. For a compilation of additional information on some of these cases, see Petersen, *Outline of Legal Principles Established by the North Carolina Supreme Court for Capital Cases Under G.S. § 15A-2000, 1977-1983*, in NORTH CAROLINA CAPITAL DEFENSE TRIAL MANUAL 39-46 (1983). The North Carolina Supreme Court has made clear that in conducting a comparative proportionality review, it will not "necessarily feel bound . . . to give a citation to every case in the pool of 'similar cases' used for comparison." State v. Williams, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 104 S. Ct. 202 (1983).

32. N.C. GEN. STAT. § 15A-2000(d)(2) (1983). The North Carolina Supreme Court never has invoked this language. Presumably, this language would enable the court to defer review of a death penalty case until such time as sufficiently similar cases become available for comparative review purposes.

33. State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984). Thus, the court need not compare the case under review with every case in the pool, but only with those deemed roughly similar.

ground, and physical and mental condition."[34] For purposes of proportionality review, if the trial court finds one or more mitigating circumstances[35] but does not specify exactly what those mitigating circumstances are, the reviewing court must assume that the jury found *all* the mitigating circumstances submitted for consideration in the sentencing phase.[36] Other than the general guidelines mentioned above, the North Carolina Supreme Court has not established a framework for consistently conducting a comparative proportionality review.[37]

Although the provisions for comparative proportionality review were enacted in 1977,[38] the North Carolina Supreme Court did not have occasion to apply the scheme until 1979. In *State v. Barfield*[39] the court applied the proportionality review for the first time. The court concluded that the death penalty was not excessive or disproportionate considering "the manner in which death was inflicted and the way in which [the] defendant conducted herself after she administered the poison to [the victim.]"[40] Clearly the court did not conduct a true *comparative* proportionality review in *Barfield*. Instead of comparing *Barfield* to similar cases in the proportionality pool, the court merely applied the traditional proportionality test—general appropriateness of the punishment for the crime at issue[41]—and decided that the death penalty was not excessive or inappropriate in Barfield's case. In a line of cases following *Barfield* the court continued this conclusory review, simply stating that the death penalty was not disproportionate without citing or analyzing specific similar or dissimilar cases.[42]

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34. *Id.*

35. *See* N.C. GEN. STAT. § 15A-2000(f) (1983).

36. State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984).

37. Highly structured quantitative schemes for assessing similarities between cases have been suggested by some commentators. *See, e.g.*, Baldus, Pulaski & Woodworth, *supra* note 14 (advocating statistical analysis of similarity variables using a computer-based data management system); Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979) (analyzing appellate review of death penalty cases in Georgia, Florida, and Texas). The North Carolina Supreme Court rejects such quantitative factor analyses on several grounds. First, the court has noted that the factors used for comparative proportionality review "are not readily subject to complete enumeration and definition." State v. Williams, 308 N.C. 47, 80, 301 S.E.2d 335, 355, *cert. denied*, 104 S. Ct. 202 (1983). "[The relevant] factors will be as numerous and as varied as the cases coming before us on appeal." *Id.* Second, the use of quantitative analysis in comparing cases would tend to "become the last word on the subject of proportionality rather than serving as the initial point of inquiry." *Id.* at 80-81, 301 S.E.2d at 356. Third, the courts might tend to base their decisions on the scientific analyses rather than the "experienced judgments of [their] own members." *Id.* at 81, 301 S.E.2d at 356. Last, the court believes that sole reliance on scientific analysis would deny the defendant "the constitutional right to 'individualized consideration.'" *Id.* Consistent with this goal of individualized consideration, the court has held that "although the cases in the pool offer guidance in determining whether a sentence of death in a particular case is excessive or disproportionate, ultimately each case must rest on its own unique facts." State v. Vereen, 312 N.C. 499, 519, 324 S.E.2d 250, 263 (1985).

38. *See supra* note 20.

39. 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980). In *Barfield* defendant was convicted of poisoning the victim to death for pecuniary gain. The evidence indicated that defendant previously had poisoned four others, also for pecuniary gain. *Id.* at 310-16, 259 S.E.2d at 518-22.

40. *Id.* at 355, 259 S.E.2d at 544.

41. *See supra* notes 12-13 and accompanying text.

42. *See, e.g.*, State v. Brown, 306 N.C. 151, 186, 293 S.E.2d 569, 591 ("[T]he record before us reveals two of the most blood-thirsty and brutal crimes which have ever been reviewed by this Court . . . . The bloody facts disclosed by the record before us leave this Court no choice but to conclude

In *State v. Hutchins*[43] the North Carolina Supreme Court for the first time identified cases used for comparison purposes in conducting its proportionality review.

> The present case does not present the situation in which a victim was brutally murdered in such a way that the episode could be characterized as being a torture slaying. *Compare State v. Martin*, [citation omitted]; *State v. McDowell*, [citation omitted]. . . . However, the record clearly establishes a course of conduct on the part of defendant which amounts to a wanton disregard for the value of human life and for the enforcement of the law by duly appointed authorities. These factors lead us to conclude that the sentence of death is not disproportionate or excessive.[44]

It is not clear from this language what factors in the cited cases the court deemed sufficiently similar to support imposition of the death penalty against Hutchins.[45]

In *State v. Pinch*[46] the court again identified cases used for comparison in conducting its proportionality review. The court cited six previous cases in which the death penalty had been affirmed, but did not discuss any particular

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that the sentence of death imposed is not disproportionate or excessive."), *cert. denied*, 459 U.S. 1080 (1982); State v. Smith, 305 N.C. 691, 711, 292 S.E.2d 264, 276 (no cases cited) ("The sentence of death for the intentional, deliberate and senseless murder of [the victim] was not excessive or disproportionate."), *cert. denied*, 459 U.S. 1056 (1982); State v. Taylor, 304 N.C. 249, 292, 283 S.E.2d 761, 787 (1981) ("[Because] the murder of [the victim] was, simply put, a cold-blooded killing of an innocent woman on her way to work, we see no reason to reverse the judgment of the jury. The sentence of death is not excessive or disproportionate."), *cert. denied*, 463 U.S. 1213 (1983); State v. Rook, 304 N.C. 201, 236, 283 S.E.2d 732, 753 (1981) ("Defendant's sadistic and bloodthirsty crimes committed against this victim compel the conclusion that the sentence of death is not disproportionate or excessive."), *cert. denied*, 455 U.S. 1038 (1982); State v. Martin, 303 N.C. 246, 256, 278 S.E.2d 214, 220-21 ("The brutal manner in which death was inflicted, which followed defendant's declaration approximately six months previously that he was going to kill [the victim], leads us to conclude that the sentence of death is not excessive or disproportionate."), *cert. denied*, 454 U.S. 933 (1981); State v. McDowell, 301 N.C. 279, 294, 271 S.E.2d 286, 296 (1980) ("Considering the brutal manner in which . . . [the victims were murdered] and considering defendant's prior history of violent criminal behavior, we conclude that the sentence of death is not excessive."), *cert. denied*, 450 U.S. 1025 (1981). The North Carolina Supreme Court's perfunctory review of death penalty cases during this period led one commentator to note that the court "appears to be engaging in cursory or rubber stamp review." Comment, *Evolving Standards of Decency: The Constitutionality of North Carolina's Capital Punishment Statute*, 16 WAKE FOREST L. REV. 737, 759 (1980).

43. 303 N.C. 321, 279 S.E.2d 788 (1981). Hutchins was convicted of the first degree murder of two police officers who responded to a call from Hutchins' daughter. The daughter claimed that Hutchins was drunk, had beaten her, and had threatened other family members. Hutchins shot the officers as they were getting out of their police car in the Hutchins' driveway. *Id.* at 327, 279 S.E.2d at 793.

44. *Id.* at 357, 279 S.E.2d at 810. The two cases used for comparison by the court were State v. Martin, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933 (1981) and State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025 (1981).

45. The court might have intended to imply that the stated "wanton disregard for the value of human life" was a similar factor in the cited cases. It also is interesting to note that the court specified the disregard of law enforcement as a ground for upholding the death penalty. *Hutchins*, 303 N.C. at 357, 279 S.E.2d at 810. *See infra* note 111.

46. 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056 (1982). In *Pinch* defendant was convicted of two counts of first degree murder. Defendant had expressed a dislike for and intention to kill the victims. He borrowed a shotgun, went to a club and shot both victims in the chest at close range. The second victim pleaded for his life before being shot. One victim was killed instantly; the other victim lay moaning on the ground until defendant shot him again. *Id.* at 4-6, 292 S.E.2d at 210-11.

factors that made these six cases similar to *Pinch*.[47] In affirming the death penalty, the court concluded that "[a]ll things considered, we cannot say, *as a matter of law*, that this defendant is somehow less deserving of capital punishment than the other occupants of death row."[48] Two justices noted that the majority had failed to identify the relevant pool of cases for purposes of proportionality review.[49] Justice Exum, in dissent, urged as a comparison pool all cases tried under the 1977 death penalty statute in which the defendant had received the death penalty or life imprisonment.[50]

In *State v. Williams*[51] the court adopted Justice Exum's proposed proportionality pool.[52] In conducting the proportionality review the *Williams* court cited no cases, but simply stated that they had made "a comparison of this case to the cases in the pool of 'similar cases.' "[53] The court concluded that the murder was "so brutal and so utterly senseless as to lead us to conclude that the sentence of death imposed in this case is not disproportionate."[54]

For the first time in *State v. McDougall*,[55] a companion case to *Williams*, the court identified specific variables in the cases chosen for comparison upon which its decision to uphold the death penalty was based. In *McDougall* defendant was convicted of stabbing his victim to death while he was under the influence of cocaine.[56] The jury found as mitigating circumstances defendant's impaired capacity[57] and his mental or emotional disturbance at the time of the murder.[58] On review, the court noted that "[w]hile these findings are often per-

47. *Id.* at 35-36, 292 S.E.2d at 228. The six cases were State v. Rook, 304 N.C. 301, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982); State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), *cert. denied*, 463 U.S. 1213 (1983); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Martin, 303 N.C. 246, 278 S.E.2d 214 (1981); State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025 (1981); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980).

48. *Pinch*, 306 N.C. at 35, 292 S.E.2d at 228. The court also noted that the death penalty "do[es] not seem excessive or disproportionate considering the premeditated and callous manner in which the defendant calmly shot and killed two people in cold blood, suddenly and without any provocation by them, for reasons exhibiting a wanton disregard for human life." *Id.* at 37, 292 S.E.2d at 229. Thus, it appears the court upheld the death penalty in *Pinch* not as a result of comparison with similar cases, but simply on the facts of the case itself.

49. *Id.* at 62, 292 S.E.2d at 229-30 (Carlton, J., concurring); *id.* at 59, 292 S.E.2d at 242-43 (Exum, J., dissenting).

50. *Id.* at 60-61, 292 S.E.2d at 243 (Exum, J., dissenting).

51. 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 104 S. Ct. 202 (1983). In *Williams* defendant was convicted of sexually assaulting and beating to death a 100-year-old woman. *Id.* at 51-55, 301 S.E.2d at 339-41.

52. *Id.* at 79, 301 S.E.2d at 355; *see supra* note 30 and accompanying text.

53. *Williams*, 308 N.C. at 82, 301 S.E.2d at 357.

54. *Id.* The court continued this perfunctory review, citing affirmed death penalty cases without discussion, in a case following *Williams*. *See* State v. Craig, 308 N.C. 446, 464, 302 S.E.2d 740, 750-51 (no cases cited) ("We . . . have compared this case with all similar cases . . . [and] [w]e believe that the imposition of the death penalty . . . is not disproportionate."), *cert. denied*, 104 S. Ct. 263 (1983).

55. 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 104 S. Ct. 197 (1983). In *McDougall* defendant was convicted of stabbing the victim to death after he had tricked the victim and her roommate into letting him into their home by pretending that he needed to use the phone to get medical assistance for his wife. *Id.* at 5-7, 301 S.E.2d at 311-13.

56. *Id.* at 7, 301 S.E.2d at 313.

57. *Id.* at 16, 301 S.E.2d at 318.

58. *Id.*

suasive on the jury in recommending life imprisonment, they are not conclusive."[59] The court noted cases in which juries had sentenced the defendant to death when the defendant had exhibited impaired capacity and emotional disturbance; the court noted similar cases in which the defendant was sentenced to life imprisonment.[60] The court distinguished *McDougall* from the life imprisonment cases on the ground that the defendant in *McDougall* might have voluntarily injected the cocaine that resulted in impaired capacity and emotional disturbance.[61] The court reasoned that the jury thus could have given the mitigating circumstances less weight than in the life imprisonment cases.[62] Based on this conclusion, the court found *McDougall* to be sufficiently dissimilar from the life imprisonment cases and affirmed the death penalty.[63]

The court employed a more stringent analysis in conducting its comparative proportionality review in several cases decided in 1984. In *State v. Lawson*[64] defendant was interrupted by the victim homeowner while burglarizing a house. Defendant shot and killed the homeowner and also shot the homeowner's father to eliminate witnesses to the burglary.[65] In conducting the proportionality review the court considered a number of factors. The *Lawson* jury found two aggravating circumstances: murder for the purpose of avoiding a lawful arrest[66] and murder committed as a part of a course of conduct of violence against other persons.[67] The court noted that the latter circumstance had been found by the jury in seven of the fourteen cases in which the death penalty had been affirmed.[68] The court also compared mitigating circumstances, noting that in *Williams* as well as in *Lawson* the jury found as mitigating the defendant's lack of prior convictions.[69] The court continued the proportionality review by comparing *Lawson* to cases in which a similar type of crime had been committed. The court identified another case in which the victim surprised the defendant who was in the act of burglarizing the victim's home[70] and cited similar robbery-murder cases.[71] Defendant's character, background, and physical and mental condition also were cited as grounds for similarity comparisons.[72] After noting

59. *Id.* at 36, 301 S.E.2d at 329.

60. *Id.* at 36 nn.9-10, 301 S.E.2d at 329 nn.9-10.

61. *Id.* at 37, 301 S.E.2d at 329.

62. *Id.*

63. *Id.* In another 1983 case, State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983), the court upheld the death penalty for a defendant convicted of murdering a witness during an armed robbery. The court compared the case to State v. Williams, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056 (1982), a robbery-murder case in which the death penalty was affirmed, and held the death penalty not disproportionate. Central to the *Oliver* court's decision was the fact that the murder was motivated chiefly by the desire to eliminate witnesses to the armed robbery. *Oliver*, 309 N.C. at 375, 307 S.E.2d at 335.

64. 310 N.C. 632, 314 S.E.2d 493 (1984).

65. *Id.* at 634-35, 314 S.E.2d at 495-96.

66. *Id.* at 637, 314 S.E.2d at 497.

67. *Id.* at 637-38, 314 S.E.2d at 497.

68. *Id.* at 648-49, 314 S.E.2d at 503-04.

69. *Id.* at 649, 314 S.E.2d at 504; *Williams*, 308 N.C. at 57, 301 S.E.2d at 342.

70. *Lawson*, 310 N.C. at 649, 314 S.E.2d at 504. The cited case was *Williams*.

71. *Lawson*, 310 N.C. at 649-51, 314 S.E.2d at 504-05.

72. *Id.* at 650-51, 314 S.E.2d at 504-05.

the similarities and dissimilarities of the relevant cases, the court concluded that the death penalty should be upheld because cases in which life imprisonment had been imposed were "for the most part distinguishable on the basis of the absence of an aggravating factor present in this case or the presence of mitigating factors absent in this case."[73]

In the next death penalty case affirmed by the court, *State v. Maynard*,[74] the court returned to the pre-*Lawson* practice of dispensing with the proportionality review; the court made a conclusory determination that the death penalty was not disproportionate and supported this conclusion with case citations[75] but without discussion or analysis. Central to the court's decision to uphold the death penalty in *Maynard*, another witness elimination case, were "compelling policies which encourage witnesses to testify in criminal trials without fear."[76] Although the court then cited without discussion two cases in support of its similarity comparisons,[77] it seems clear that the *Maynard* proportionality review focused on a single facet of the crime—witness elimination—as a basis of comparison. The court did not analyze any other aggravating or mitigating circumstances or characteristics of the crime or defendant. The decision to affirm the death penalty, based primarily on a single feature of the crime, is uncomfortably similar to the mandatory death penalty sentencing schemes outlawed in *Woodson v. North Carolina*.[78]

The North Carolina Supreme Court conducted a somewhat more detailed proportionality review in two recent cases. Defendant in *State v. Boyd*[79] stabbed his ex-lover to death in the presence of her mother and child. The court compared *Boyd* to another murder case involving a domestic relationship in which the death penalty had been upheld.[80] The court observed that in both cases the murder was preceded by threats against the victim and that the victim was not murdered "in a quick and efficient manner."[81] The court also noted that in both cases the victim was murdered in the presence of her child and that both defend-

73. *Id.* at 651, 314 S.E.2d at 505.

74. 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 105 S. Ct. 363 (1984). In *Maynard* defendant beat, stabbed, and shot the victim and then threw the victim into a river, to keep the victim from testifying against defendant. *Id.* at 5-7, 316 S.E.2d at 200-01.

75. *Id.* at 36, 316 S.E.2d at 216.

76. *Id.*

77. *Id.* The court cited State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980), and State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983), noting that in both those cases the motivation for the murders was to "avoid detection or arrest." *Maynard*, 311 N.C. at 36 n.3, 316 S.E.2d at 216 n.3.

78. 428 U.S. 280 (1976); *see supra* note 4 and accompanying text.

79. 311 N.C. 408, 319 S.E.2d 189 (1984), *cert. denied*, 105 S. Ct. 2052 (1985).

80. *Id.* at 435, 319 S.E.2d at 207. The court compared *Boyd* to State v. Martin, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933 (1981), in which defendant shot his estranged wife to death in front of their young child.

81. *Boyd*, 311 N.C. at 435, 319 S.E.2d at 207. The suffering experienced by the victim before death is often noted as a consideration in the review of death penalty cases. *See, e.g.*, *Boyd*, 311 N.C. 408, 319 S.E.2d 189; State v. Smith, 305 N.C. 691, 292 S.E.2d 264, *cert. denied*, 459 U.S. 1056 (1982); State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982); State v. Martin, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933 (1981); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980).

ants "presented evidence of social and emotional problems."[82] The court reviewed the estranged lover and estranged spouse murder cases in which the defendant had received life imprisonment and found them to be dissimilar.[83]

In another case involving a domestic relationship, *State v. Noland*,[84] the court focused on previous murder cases involving domestic relationships[85] as well as previous cases that involved "death or serious injury to one or more people other than the murder victim."[86] Because *Noland* was similar to these previous cases the court affirmed the death penalty. A dissent[87] examined the case with an emphasis on completely different factors. The dissent compared the case with other mental disturbance cases, noting that the death penalty generally had not been imposed when mental and emotional disturbance was found to be a mitigating circumstance[88] and that the death penalty previously had been upheld in domestic murder cases only when the murder was particularly brutal and the victim had been made to suffer needlessly.[89] Thus, the supreme court's review of *Noland* illustrates that a case logically can be compared with previous cases using completely different variables[90] and that the choice of different comparison variables may lead to an entirely different result.

In *State v. Huffstetler*,[91] decided only one month after *Noland*, the court inexplicably returned to cursory review.[92] In *Huffstetler* the court cited no cases in support of its decision to uphold the death penalty, but simply stated that

> the record before us reveals a senseless, unprovoked, exceptionally brutal, prolonged and murderous assault by an adult male upon a sixty-five year old female . . . . Having compared the defendant and the crime in this case to others in the pool of similar cases, we conclude that the sentence of death . . . is not disproportionate.[93]

A strong dissent criticized the majority's failure to identify the cases on which the proportionality review was based and alluded to possible constitutional problems raised by such a perfunctory review.[94]

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82. *Boyd*, 311 N.C. at 435, 319 S.E.2d at 207.

83. *Id.* at 436, 319 S.E.2d at 207.

84. 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 105 S. Ct. 1232 (1985). In *Noland* defendant's estranged wife moved to another state. Defendant threatened to kill his wife's family unless she returned to North Carolina. When his wife refused to return, defendant carried out his threat, killing her father and sister and severely injuring her mother. *Id.* at 4-6, 320 S.E.2d at 645-46.

85. *Id.* at 24-25, 320 S.E.2d at 656. The court cited *Boyd* and *Martin* as comparable domestic relations murder cases. *Id.* The court also noted that in all three cases the defendant previously had threatened the murder victims. *Id.*

86. *Noland*, 312 N.C. at 25, 320 S.E.2d at 656.

87. *Id.* at 25, 320 S.E.2d at 657 (Exum, J., dissenting).

88. *Id.* at 33, 320 S.E.2d at 661 (Exum, J., dissenting).

89. *Id.* (Exum, J., dissenting).

90. *See supra* note 19.

91. 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 105 S. Ct. 1877 (1985). In *Huffstetler* defendant brutally beat his mother-in-law to death with a cast iron skillet. *Id.* at 95-98, 322 S.E.2d at 113-15. *See* Note, State v. Huffstetler: *Denying Mitigating Instructions in Capital Cases on Grounds of Relevancy*, 63 N.C.L. REV. 1122 (1985).

92. *See supra* note 42 and accompanying text.

93. *Huffstetler*, 312 N.C. at 118, 322 S.E.2d at 126.

94. *Id.* at 123, 322 S.E.2d at 129 (Exum, J., dissenting). The dissent argued that:

Since 1977, the North Carolina Supreme Court has vacated the death penalty in four cases based on a finding of disproportionality. In *State v. Jackson*[95] defendant feigned car trouble and persuaded a passerby to give him a ride to a local service station. The victim later was found in his car, robbed and murdered.[96] In holding the death sentence disproportionate, the court noted that in *Jackson*, unlike the other robbery-murder cases in which the death penalty was imposed, there was no evidence as to the exact circumstances of the victim's death and thus no reason to conclude that the murder had been "especially heinous."[97] The court concluded that this murder did not "rise to the level of those murders in which we have approved the death sentence upon proportionality review."[98]

The court again vacated the death penalty in *State v. Bondurant*.[99] Pivotal in its decision that the case was not similar to other death penalty cases were findings that defendant did not "coldly calculate" the commission of the crime, that it was not a "torturous" murder, and that the murder did not occur while defendant was perpetrating another felony.[100] The court also noted that in this case defendant was highly intoxicated, that there apparently was no motive in the shooting, that defendant and victim were friends, that defendant helped rush the victim to the hospital immediately after the shooting, and that defendant was

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> The majority seems to treat the [proportionality] issue as being one exclusively within this Court's unbridled discretion.
>
> I think the question of proportionality . . . is more serious than this. It is not a question for the unbridled discretion of this Court. We do not sit as a super jury on this issue. Whether a death sentence in any case is disproportionate is a question of law.

Id. In another recent case, State v. Vereen, 312 N.C. 499, 324 S.E.2d 250 (1985), the court affirmed the death penalty after citing previous cases in which the death penalty was affirmed, without a discussion of relevant factors or relevant life imprisonment cases used in its comparison. In *Vereen* defendant strangled, stabbed, and sexually assaulted his 72 year-old victim and sexually assaulted and stabbed the victim's mentally retarded daughter. *Id.* at 502-04, 324 S.E.2d at 253-54. The court concluded that "[c]onsidering both the crime and the defendant, the circumstances of this case fall well within the class of first-degree murders in which we have previously upheld the penalty of death." *Id.* at 518, 324 S.E.2d at 262.

95. 309 N.C. 26, 305 S.E.2d 703 (1983).

96. *Id.* at 30, 305 S.E.2d at 708.

97. *Id.* at 46, 305 S.E.2d at 717. Whether the crime is considered "heinous" has been significant in several cases in which the death penalty was imposed. *See, e.g.*, State v. Boyd, 311 N.C. 408, 319 S.E.2d 189 (1984); State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983); State v. Craig, 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 104 S. Ct. 263 (1983); State v. Williams, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 104 S. Ct. 202 (1983); State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 104 S. Ct. 197 (1983); State v. Brown, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080 (1982); State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056 (1982); State v. Smith, 305 N.C. 691, 292 S.E.2d 264, *cert. denied*, 459 U.S. 1056 (1982); State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982); State v. Martin, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933 (1981); State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025 (1981); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980).

98. *Jackson*, 309 N.C. at 46, 305 S.E.2d at 717.

99. 309 N.C. 674, 309 S.E.2d 170 (1983). In *Bondurant* defendant and several acquaintances had been drinking and driving. The victim, in the back seat of the car, expressed a desire to go home. Defendant, in the front seat, turned and pointed a gun at the victim's face. Although the other passengers in the car pleaded with defendant to put down the gun, defendant told the victim, "You don't believe I'll shoot you, do you?" and fatally shot him. *Id.* at 677, 309 S.E.2d at 173.

100. *Id.* at 693, 309 S.E.2d at 182.

helpful to law enforcement officials.[101] The court noted that "[i]n no other capital case among those in our proportionality pool did the defendant express concern for the victim's life or remorse for his action by attempting to secure immediate medical attention for the deceased." The court stressed, however, that the expression of remorse was not controlling for purposes of the proportionality review.[102] The court also noted that the totality of circumstances must be considered on proportionality review and that the "presence or absence of a particular factor will not necessarily be controlling."[103]

In *State v. Hill*[104] defendant was convicted of shooting a police officer to death in the course of an eighty second encounter in which defendant ran from the policeman, the policeman tackled defendant, and defendant got control of the officer's gun and shot him.[105] The court found only two previous cases in which the victim was a police officer and compared *Hill* to these. On roughly similar facts one defendant had received the death penalty and the other had received only life imprisonment.[106] Because of this irreconcilable disparity in sentencing, the court did not find these cases helpful in assessing proportionality and thus proceeded to compare *Hill* to the "*entire* pool of cases in which the death penalty had been affirmed."[107] Based on this comparison and on the circumstances surrounding the murder, the court vacated the death penalty.[108]

The court employed an interesting method in *Hill* to conduct its proportionality review. First, the court compared the only two previous cases in which the defendant had been convicted when an aggravating circumstance had been the commission of a "capital felony . . . against a law enforcement officer."[109] When this comparison proved fruitless, the court did not try to compare *Hill* with cases in the pool based on other nonstatutory variables, such as the existence of a "struggle" in the case or the presence of alcohol. Instead, the court proceeded to distinguish *Hill* from dissimilar death penalty cases. The court grouped these dissimilar cases into five categories: "heinous" murder cases, cases of torturous crimes, cases in which the crime was part of a violent course of conduct, felony murder cases, and cases in which the crime had been coldly

101. *Id.* at 693-94, 309 S.E.2d at 182-83.

102. *Id.*

103. *Id.* at 693 n.1, 309 S.E.2d at 182 n.1.

104. 311 N.C. 465, 319 S.E.2d 163 (1984).

105. The police officer stopped to check Hill's parked car, which earlier had been observed circling the block. Apparently, Hill was trying to locate the house of an acquaintance. *Id.* at 467, 319 S.E.2d at 165. Hill did not testify, *id.* at 467, 319 S.E.2d at 166, so it is unclear why he fled from the police officer.

106. *Id.* at 477, 319 S.E.2d at 171. The two other cases in the proportionality pool in which policemen were the victims were State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983) (defendant received life imprisonment for the shooting of a police officer during the course of an armed robbery) and State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981) (death penalty affirmed for defendant who shot and killed two officers who came to defendant's home to investigate a domestic disturbance).

107. *Hill*, 311 N.C. at 477-78, 319 S.E.2d at 171 (The "great disparity of sentences in those two cases renders any meaningful comparison in this limited pool virtually impossible.").

108. *Id.* at 479-80, 319 S.E.2d at 172.

109. *Id.* at 477, 319 S.E.2d at 171 (construing N.C. GEN. STAT. § 15A-2000(e)(8) (1983)).

calculated.[110] The court did not explain why cases in these categories were considered sufficiently similar to be appropriate for use in comparative proportionality. Thus, *Hill* implicitly approved a procedure in which proportionality review can be conducted primarily by distinguishing dissimilar death penalty cases in the absence of relevant similar cases with which to compare the case under review.[111]

The North Carolina Supreme Court vacated a death sentence on proportionality grounds for the fourth time in *State v. Young*.[112] In conducting the

110. *Id.* at 478, 319 S.E.2d at 172.

111. Two strong dissents by Justices Meyer and Mitchell criticized the manner in which the majority conducted the proportionality review. Justice Meyer argued that the court erred in comparing *Hill* only with brutal murder cases and cases in which the jury had found more than two aggravating circumstances because these two types of cases were not sufficiently similar to *Hill* to yield relevant comparison. He suggested instead that the court focus on the "targeted victim, the motive for the killing, and important policy considerations" in the case under review. *Id.* at 484, 319 S.E.2d at 175 (Meyer, J., dissenting). The killing of a law enforcement officer should warrant the death penalty "[i]n the absence of *compelling circumstances* which would militate against a sentence of death" because "the effective administration of justice requires that some murders must indeed be treated as different 'in kind and not merely in degree from other murders.' " *Id.* at 485, 319 S.E.2d at 175 (Meyer, J., dissenting) (quoting *Hill*, 311 N.C. at 488, 319 S.E.2d at 177 (Mitchell, J., dissenting)) (emphasis added).

Justice Mitchell also argued that the majority's comparison was flawed. Mitchell would have upheld the jury's death penalty in this case based on the lack of relevant similar cases for comparison purposes and on public policy supporting effective law enforcement. He noted:

> The murder of a law enforcement officer *engaged in the performance of his official duties* differs in kind and not merely in degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public—the body politic—and is a direct attack upon the rule of law which must prevail if our society as we know it is to survive.
>
> A jury having found after solemn consideration that the defendant killed a law enforcement officer engaged in the performance of his official duties and that this aggravating circumstance outweighed the mitigating circumstances and called for the penalty of death, I do not believe that we should hold the penalty disproportionate.

Id. at 488, 318 S.E.2d at 177 (Mitchell, J., dissenting).

The dissents' arguments are erroneous for two reasons. First, the statute clearly requires that the case under review be compared to similar cases. *See supra* notes 14-17 and accompanying text. Any analysis that depends primarily on policy considerations instead of similar cases is inappropriate. To rely on policy considerations under these circumstances is to apply the wrong standard of review: the statute does not require a finding that the death penalty is appropriate for a certain *kind* of crime, such as murders of police officers, but instead requires a finding that the case is sufficiently similar to other cases in the comparison pool to warrant imposition of the death penalty.

Second, the court may use its discretion to give the factors in a proportionality review different weight, depending on the facts and circumstances in each case. An analysis that adopts a single factor as controlling for comparison purposes, however, is erroneous under the Supreme Court's prohibition against any "automatic" imposition of the death penalty without consideration of all the facts and circumstances of the particular case. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976). In Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam), the United States Supreme Court held that a Louisiana statute imposing a mandatory death penalty for the murder of a police officer was unconstitutional. The Court recognized the state's special interest in protecting public servants, but insisted that other circumstances must be taken into consideration before the imposition of a death sentence will be deemed constitutional. The Court did not require that these circumstances be "compelling." *Id.* at 637; *cf. Hill*, 311 N.C. 485, 319 S.E.2d at 175 (Meyer, J., dissenting).

112. 312 N.C. 669, 325 S.E.2d 181 (1985). In *Young* defendant suggested that he and two accomplices go to the victim's house to rob and kill him. The three men gained entrance to the victim's house on a pretext, whereupon defendant stabbed the victim twice in the chest, and one accomplice stabbed the victim several times in the back. *Id.* at 672, 325 S.E.2d at 184.

proportionality review the court focused on the two statutory aggravating circumstances found by the jury: murder committed for pecuniary gain,[113] and murder committed while defendant was engaged in the commission of an armed robbery.[114] The court cited twenty-three robbery-murder cases in which the jury sentenced the defendant to life imprisonment and five robbery-murder cases in which the defendant was sentenced to death.[115] The court wished to make it "*abundantly clear*," however, that the mere difference in the number of cases in which life imprisonment was imposed and the number of cases in which death was imposed was not dispositive in determining proportionality.[116] The court found the death penalty to be disproportionate because "[t]he facts presented by this appeal more closely resemble those cases in which the jury recommended life imprisonment than those in which the defendant was sentenced to death."[117] The court then specifically compared *Young* with three cases: two in which life imprisonment was imposed for robbery-murder and one in which the death penalty was vacated on proportionality grounds.[118] The court noted that in the two life imprisonment cases, the juries had found four and six aggravating circumstances (including, in both cases, the two aggravating circumstances found in *Young*) and still had declined to impose the death penalty.[119] The court also compared *Young* to *Jackson*, in which the death penalty was vacated on proportionality grounds,[120] and found the two cases similar.[121] Finally, the court examined a group of robbery-murder cases in which the defendant received the death penalty and found the cases dissimilar.[122] This finding of dissimilarity was based on the facts that the *Young* murder was not as "egregious" as the murders in the comparison cases, that the defendant in *Young* had not been engaged in a course of conduct which included the commission of violence against another person, and that the murder in *Young* was "not especially heinous, atrocious or cruel."[123]

The proportionality review conducted in *Young* clearly is superior to the perfunctory review conducted by the court in many previous death penalty cases. The court cited not only relevant cases in which the death penalty had been affirmed but also relevant life imprisonment cases and a case in which the death penalty had been vacated on proportionality grounds. In addition to citing these cases, the court discussed the factors in the cases that made them relevant for comparison purposes. This approach not only evidences a thorough

113. *Id.* at 690, 325 S.E.2d at 192. *See* N.C. GEN. STAT. § 15A-2000(e)(6) (1983).

114. *Young*, 312 N.C. at 690, 325 S.E.2d at 192. *See* N.C. GEN. STAT. § 15A-2000(e)(5) (1983).

115. *Young*, 312 N.C. at 687-88 n.1, 325 S.E.2d at 192 n.1.

116. *Id.* at 688, 325 S.E.2d at 193.

117. *Id.*

118. *Id.* at 689-90, 325 S.E.2d at 193-94. The court compared *Young* to State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983) (death penalty vacated on proportionality grounds); State v. Whisenant, 308 N.C. 791, 303 S.E.2d 784 (1983) (defendant sentenced to life imprisonment); and State v. Hunt, 305 N.C. 238, 287 S.E.2d 818 (1982) (defendant sentenced to life imprisonment).

119. *Young*, 312 N.C. at 689-90, 325 S.E.2d at 193-94.

120. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

121. *Young*, 312 N.C. at 690, 325 S.E.2d at 194.

122. *Id.*

123. *Id.*

consideration by the court of the particular facts and circumstances of the case under review in comparison to the facts and circumstances of prior cases, but also gives the bar necessary guidance as to which factors are important in comparative proportionality review.

A clear conclusion emerges from an analysis of cases in which the North Carolina Supreme Court has applied the comparative proportionality review to uphold or vacate a death penalty. Although the court recognizes the importance of a meaningful proportionality review,[124] its performance has been strikingly inconsistent. The cases in which the court has conducted an in-depth analysis of the similarities of both the relevant death penalty and life imprisonment cases[125] sharply contrast with the cases in which the court has applied a perfunctory review as a mere formality in affirming a death sentence.[126] Although the court has clearly indicated that it does not feel compelled to cite every relevant case from the proportionality pool in conducting its review,[127] at least some guidance is necessary in every decision. Without any analysis of, or citations to, the controlling cases, the bar can only speculate about the factors relevant to sentencing decisions at the appellate level.[128]

In summary, the court has recognized that certain factors are important for comparison purposes in proportionality review. These include the statutory aggravating[129] and mitigating[130] circumstances, the general type of crime,[131] the number of victims involved,[132] the defendant's character, background, physical and emotional condition,[133] the manner in which the victim died,[134] and whether the murder was especially heinous or bloodthirsty.[135] The court also has held that special policy considerations may apply in witness elimination and police murder cases.[136] Overall, the court has tended to compare cases under

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124. "[A]ny imposition of the death penalty . . . should be searchingly reviewed . . . to insure the absence of unfairness, arbitrariness or caprice in the result." State v. Johnson, 298 N.C. 47, 63, 257 S.E.2d 597, 610 (1979). "[W]e consider the responsibility placed on us by [N.C. GEN. STAT.] § 15A-2000(d)(2) as serious as any responsibility placed upon an appellate court." State v. Rook, 304 N.C. 201, 236, 283 S.E.2d 732, 753 (1981), *cert. denied*, 455 U.S. 1038 (1982).

125. *See, e.g.*, State v. Young, 312 N.C. 699, 325 S.E.2d 181 (1985); State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984).

126. *See, e.g.*, State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984).

127. State v. Williams, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 104 S. Ct. 202 (1983).

128. *See* State v. Pinch, 306 N.C. 1, 61, 292 S.E.2d 203, 254 (Exum, J., dissenting) ("The bar is entitled to know upon what basis we are conducting the proportionality review. . . . We should not continue to keep the manner in which we perform this duty shrouded in mystery."), *cert. denied*, 459 U.S. 1056 (1982).

129. *See, e.g.*, State v. Young, 312 N.C. 699, 325 S.E.2d 181 (1985); State v. Hill, 311 N.C. 465, 319 S.E.2d 163 (1984); State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984).

130. *See, e.g.*, State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984); State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 104 S. Ct. 197 (1983).

131. *See, e.g.*, State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 105 S. Ct. 363 (1984); State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984).

132. *See, e.g.*, State v. Young, 312 N.C. 699, 325 S.E.2d 181 (1985); State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 105 S. Ct. 1232 (1985).

133. *See, e.g.*, State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984).

134. *See, e.g.*, State v. Boyd, 311 N.C. 408, 319 S.E.2d 189 (1984).

135. *See, e.g.*, State v. Young, 312 N.C. 699, 325 S.E.2d 181 (1985); State v. Hill, 311 N.C. 465, 319 S.E.2d 163 (1984); State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984).

136. *See, e.g.*, State v. Hill, 311 N.C. 465, 319 S.E.2d 163 (1984); State v. Maynard, 311 N.C. 1,

review with relevant death penalty cases more often than with relevant life imprisonment cases. The court, however, has not developed a framework for deciding which variables should be controlling for comparison purposes or how these variables should be chosen for any particular case. This lack of a consistent approach to comparative proportionality review is arguably an unconstitutional exercise of "unbridled discretion" by the court in affirming sentencing decisions in capital cases. On the other hand, the court must not go too far in creating rigid guidelines by which to assess the similarities between cases because such inflexibility also is constitutionally suspect.[137]

There are two compelling reasons for the continued development and application of a meaningful comparative proportionality review. First, proportionality review provides a vital safeguard against the arbitrary and capricious infliction of the death penalty by ensuring that the penalty will not be imposed on a defendant when there "is no principled way to distinguish [the] case, in which the death penalty [would be] imposed, from the many cases in which it was not."[138] Second, because it requires analysis and comparison of both death penalty and life imprisonment cases, proportionality review is the only effective way for the reviewing court to be certain that its sentencing decisions reflect contemporary attitudes about which crimes and which defendants warrant the death penalty.[139] The North Carolina Supreme Court has made tremendous progress in giving the statutorily mandated proportionality review depth and substance. A clearly defined, consistent framework[140] for approaching the comparative analysis, however, still is needed as an additonal safeguard in the application of the death penalty.[141] In developing such a framework the court should emphasize the need to consider more life imprisonment cases as a part of the comparative review. Case comparisons must be full, multifaceted examinations

301 S.E.2d 308, *cert. denied*, 105 S. Ct. 363 (1984); State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

137. "[N]either unbridled, unguided discretion, nor the absence of all discretion in the imposition of the death penalty is constitutionally permissible." State v. Johnson, 298 N.C. 47, 58, 257 S.E.2d 597, 607 (1979).

138. Godfrey v. Georgia, 446 U.S. 420, 433 (1980).

139. *See supra* note 4.

140. Such a framework could emphasize the totality of circumstances approach articulated in *Bondurant*, *see* text accompanying note 103, while setting forth a specific method of review. For example, the court might first look to the proportionality pool for cases in which the aggravating and mitigating factors are similar. Next, the court might examine cases in the pool of the same general type as the case under review, such as similar domestic relations murder cases or similar struggle cases. Third, the court could compare the case under review with other cases on any variables deemed relevant in the particular case, such as intoxication or age of the defendant. Last, the court could balance these comparisons in a totality of circumstances approach to decide whether the death penalty should be affirmed.

141. Such a framework becomes more critical as the pool, already containing 88 cases, continues to grow, making relevant comparisons absent any analytical framework extremely unwieldly. The court has recognized that "[a]n analysis which involves . . . inquiry into the endless combinations, variations, permutations, and nuances that an indepth review of every case in the pool would yield would be a fruitless endeavor." State v. Vereen, 312 N.C. 499, 519, 324 S.E.2d 250, 263 (1985). Thus a framework is imperative to help narrow the pool of cases to be compared and to focus the court's attention on the particular factors relevant to similarity comparisons in each case. Without some method of limiting the number of cases to be compared in the proportionality review, the burden imposed by the ever-growing pool of cases may encourage the court to return to the perfunctory comparative proportionality review that characterized the review of earlier death penalty cases.

of the similarities and dissimilarities between relevant cases. Although there can be "no perfect procedure for deciding in which case governmental authority should be used to impose death,"[142] the court must attempt to strike a balance between unbridled discretion and inflexibility to ensure effective comparative proportionality review.

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142. Pulley v. Harris, 104 S. Ct. 871, 881 (1984).

APPENDIX

These 88 cases comprise the proportionality pool, *see supra* notes 17-19 and accompanying text. Included are all applicable cases tried under N.C. GEN. STAT. § 15A-2000 (1983) from 1977 to January 30, 1985. Subsequent case histories are omitted in the interest of space.

This pool was compiled in part from records kept in the offices of the North Carolina Supreme Court. The cases are divided into five categories for ease of reference.

I. DEATH SENTENCE AFFIRMED

State v. Vereen, 312 N.C. 499, 324 S.E.2d 250 (1985)
State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984)
State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984)
State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984)
State v. Boyd, 311 N.C. 408, 319 S.E.2d 189 (1984)
State v. Maynard, 311 N.C. 1, 316 S.E.2d 197 (1984)
State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984)
State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983)
State v. Williams, 308 N.C. 47, 301 S.E.2d 335 (1983)
State v. McDougall, 308 N.C. 1, 301 S.E.2d 308 (1983)
State v. Brown, 306 N.C. 151, 293 S.E.2d 569 (1982)
State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982)
State v. Smith, 305 N.C. 691, 292 S.E.2d 264 (1982)
State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982)
State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981)
State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981)
State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981)
State v. Martin, 303 N.C. 246, 278 S.E.2d 214 (1981)
State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981)
State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980)
State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979)

II. DEATH SENTENCE VACATED ON PROPORTIONALITY GROUNDS

State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985)
State v. Hill, 311 N.C. 465, 319 S.E.2d 163 (1984)
State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983)
State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983)

III. DEATH SENTENCE VACATED FOR ERROR

State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984)
State v. Beal, 3ll N.C. 555, 319 S.E.2d 557 (1984)
State v. Stanley, 310 N.C. 332, 312 S.E.2d 393 (1983)
State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980)

IV. LIFE SENTENCE—JURY RECOMMENDATION

State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985)
State v. Harold, 312 N.C. 787, 325 S.E.2d 219 (1985)
State v. McCray, 312 N.C. 519, 324 S.E.2d 606 (1985)
State v. Hannah, 312 N.C. 286, 322 S.E.2d 148 (1984)
State v. Withers, 311 N.C. 699, 319 S.E.2d 211 (1984)
State v. Wilson, 311 N.C. 117, 316 S.E.2d 46 (1984)
State v. Price, 310 N.C. 596, 313 S.E.2d 556 (1984)
State v. Murray, 310 N.C. 541, 313 S.E.2d 523 (1984)
State v. Bauguss, 310 N.C. 259, 311 S.E.2d 248 (1984)
State v. Hinson, 310 N.C. 245, 311 S.E.2d 256 (1984)
State v. Corley, 310 N.C. 40, 311 S.E.2d 540 (1984)
State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983)
State v. Martin, 309 N.C. 465, 308 S.E.2d 277 (1983)
State v. Booker, 309 N.C. 446, 306 S.E.2d 771 (1983)
State v. Bare, 309 N.C. 122, 305 S.E.2d 513 (1983)
State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983)
State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983)
State v. Franklin, 308 N.C. 682, 304 S.E.2d 579 (1983)
State v. Hill, 308 N.C. 382, 302 S.E.2d 202 (1983)
State v. Tysor, 307 N.C. 679, 300 S.E.2d 366 (1983)
State v. Barnett, 307 N.C. 608, 300 S.E.2d 340 (1983)
State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982)
State v. Brock, 305 N.C. 532, 290 S.E.2d 566 (1982)
State v. Davis, 305 N.C. 400, 290 S.E.2d 574 (1982)
State v. Fox, 305 N.C. 280, 287 S.E.2d 887 (1982)
State v. Hunt, 305 N.C. 238, 287 S.E.2d 818 (1982)
State v. Lake, 305 N.C. 143, 286 S.E.2d 541 (1982)
State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981)
State v. Adcox, 303 N.C. 133, 277 S.E.2d 398 (1981)
State v. Miller, 302 N.C. 572, 276 S.E.2d 417 (1981)
State v. Hawkins, 302 N.C. 364, 275 S.E.2d 172 (1981)
State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981)
State v. Smith, 301 N.C. 695, 272 S.E.2d 852 (1981)
State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980)
State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980)
State v. King, 301 N.C. 186, 270 S.E.2d 98 (1980)
State v. Crawford, 301 N.C. 212, 270 S.E.2d 102 (1980)
State v. Weimer, 300 N.C. 642, 268 S.E.2d 216 (1980)
State v. Clark, 300 N.C. 116, 265 S.E.2d 204 (1980)
State v. Franks, 300 N.C. 1, 265 S.E.2d 177 (1980)
State v. Horton, 299 N.C. 690, 263 S.E.2d 745 (1980)
State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980)
State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980)
State v. Ferdinando, 298 N.C. 737, 260 S.E.2d 423 (1979)

State v. Atkinson, 298 N.C. 673, 259 S.E.2d 858 (1979)
State v. Heavener, 298 N.C. 541, 259 S.E.2d 227 (1979)
State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979)
State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979)

V. Life Sentence—Imposed by the Trial Court Judge Because Jury Unable to Agree

State v. McDonald, 312 N.C. 264, 321 S.E.2d 849 (1984)
State v. Jenkins, 311 N.C. 194, 317 S.E.2d 345 (1984)
State v. Heptinstall, 309 N.C. 231, 306 S.E.2d 109 (1983)
State v. Whisenant, 308 N.C. 791, 303 S.E.2d 784 (1983)
State v. Ladd, 308 N.C. 272, 302 S.E.2d 164 (1983)
State v. Norwood, 303 N.C. 473, 279 S.E.2d 550 (1981)
State v. Oxendine, 303 N.C. 235, 278 S.E.2d 200 (1981)
State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981)
State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980)
State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980)
State v. Carter, 296 N.C. 344, 250 S.E.2d 263 (1979)