

NORTH CAROLINA'S FAILURE TO PERFORM
COMPARATIVE PROPORTIONALITY REVIEW:
VIOLATING THE EIGHTH AND FOURTEENTH
AMENDMENTS BY ALLOWING THE ARBITRARY AND
DISCRIMINATORY APPLICATION OF THE DEATH
PENALTY

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ABSTRACT

This article argues that because of the North Carolina Supreme Court's failure to perform its statutorily mandated comparative proportionality review of all death sentences, North Carolina's imposition of the death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution. The article makes a two-part showing to demonstrate this violation: first, that the state supreme court does not meaningfully perform its statutorily mandated comparative proportionality review, and second, that under current United States Supreme Court precedent, this failure violates the Eighth and Fourteenth Amendments. While the U.S. Supreme Court has held that comparative proportionality review is not always necessary for a state's death penalty statutory scheme to be constitutional, it also made clear that the review would still be required where a state's capital sentencing system was so lacking in other checks as to allow arbitrariness and discrimination in death sentencing.

North Carolina's is just such a scheme. North Carolina Supreme Court opinions make clear that meaningful proportionality review is a primary mechanism under which the state purports to comply with the constitutional mandate to prevent discriminatory death sentences. More importantly, evidence brought forth by the recent Racial Justice Act cases demonstrates that the state has indeed failed to prevent discriminatory sentences when not following its statute and adequately performing the review. Because comparative proportionality review of all death sentences by the North Carolina Supreme Court is constitutionally required, and because the court fails to adequately perform that review, North Carolina's imposition of the death penalty violates the Eighth and Fourteenth Amendments to the Constitution.

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INTRODUCTION

This article argues that because of the North Carolina Supreme Court's failure to perform its statutorily mandated comparative proportionality review of all death sentences, North Carolina's imposition of the death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution. The article makes a two-part showing to demonstrate this violation: first, that the state supreme court does not meaningfully perform its statutorily mandated comparative proportionality review, and second, that under current U.S. Supreme Court precedent, this failure violates the Eighth and Fourteenth Amendments. The second point is demonstrated by North Carolina Supreme Court precedent affirming the review's constitutional necessity, and, more importantly, by recently revealed evidence that the state's death penalty scheme as currently enforced—effectively without comparative proportionality review—results in arbitrary and discriminatory death sentencing based on race.

Part I lays out the background that led North Carolina to adopt comparative proportionality review as part of an attempt to write a death penalty statute that passed constitutional muster. It begins with a discussion of *Furman v. Georgia*, the 1972 case in which the U.S. Supreme Court ruled the death penalty unconstitutional because of its arbitrary and discriminatory application, highlighting the role that the justices' concern with racial discrimination in death sentencing played in the decision. It continues with a discussion of the racial imposition of the death penalty in the United States historically, followed by a discussion of this history in North Carolina in particular. It concludes with a discussion of the U.S. Supreme Court's approval, in the 1976 case *Gregg v. Georgia*, of death penalty statutes that the Court believed would provide sufficient protections—including comparative proportionality review—against such discriminatory application, and North Carolina's adoption of such a statute.

Through an analysis of North Carolina Supreme Court decisions purporting to carry out this statutorily mandated review, Part II demonstrates that the court does not actually perform the review in any meaningful way. First, the court often does not appear to fulfill its mandate to consider "similar cases," instead relying too heavily on the very small group of cases in which death was previously found disproportionate. Second, the review's lack of transparency is itself unconstitutional in its violation of defendants' rights to due process. Third, the court's lack of a consistent methodology for performing the review, as well as its use of methods that contradict its stated methods for performing the review, render the review meaningless. Finally, the court's inconsistent record of finding death sentences disproportionate, while not dispositive, on its face suggests a failing process.

Part III explains why, even under *Pulley v. Harris*, the 1984 case in which the U.S. Supreme Court stated that comparative proportionality review is not always necessary for a state's death penalty statutory scheme to be constitutional, North Carolina's death penalty statutory scheme does not meet constitutional muster without the review. After *Pulley*, the question to ask when determining if comparative proportionality review is necessary for a state's death penalty statutory scheme to be constitutional is whether the scheme, absent the review, would adequately ensure that death sentences are not arbitrary and discriminatory. In the case of North Carolina, this question must be answered in the negative, based on two lines of evidence. First, North Carolina Supreme Court opinions, even after *Pulley*, make clear that meaningful proportionality review is still a primary mechanism under which the state purports to comply with the constitutional mandate to prevent discriminatory death sentences. Second, evidence brought forth by the recent Racial Justice Act ("RJA") cases demonstrates that the state has indeed failed to prevent discriminatory sentences when not following its statute and adequately performing the review.

Because comparative proportionality review of all death sentences by the North Carolina Supreme Court is constitutionally required and because the court is failing to adequately perform that review, North Carolina's current imposition of capital punishment violates the Eighth and Fourteenth Amendments to the U.S. Constitution.

I.

FURMAN V. GEORGIA, GREGG V. GEORGIA, AND THE BIRTH OF COMPARATIVE PROPORTIONALITY REVIEW

A. Furman v. Georgia: The Supreme Court Strikes Down the Death Penalty Because of Its Discriminatory Application

In 1972, the U.S. Supreme Court struck down the death penalty as it currently existed, finding it to be cruel and unusual punishment in violation of the Eighth Amendment as applied to the states through the Fourteenth Amendment. Two of the five concurring justices found the death penalty to be inherently cruel and unusual.¹ The three other concurring justices ruled that the death penalty was unconstitutional in the arbitrary and discriminatory manner in which it was being *applied*, due to the unguided discretion left to juries in making their sentencing decisions. One consistent theme of the five concurring opinions was the arbitrariness of the death penalty in application. Justice Stewart famously concluded, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he 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 so

1. *Furman v. Georgia*, 408 U.S. 238, 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

freakishly imposed.”² Justice White found the state of capital punishment in the United States to be such 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.”³

Driving the decision, however, was a concern not just with arbitrariness and unguided discretion in the abstract, but with the concrete way in which such arbitrariness manifested itself—in *discriminatory* death sentences against racial minorities and the poor. Justice Douglas, who found the death penalty unconstitutional as applied, wrote extensively about the Eighth Amendment’s prohibition on a death penalty that “discriminates against [a defendant] 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.”⁴ He stated that “equal protection is implicit in ‘cruel and unusual’ punishments,”⁵ and cited a Presidential Commission’s conclusion that “[t]he death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups”⁶ and a Texas study that revealed discrimination against African Americans in death sentencing.⁷ At numerous points pairing “arbitrary” with “discriminatory,” he wrote near the end of his opinion: “Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”⁸

Justice Marshall, who along with Justice Brennan would have struck down the death penalty outright, was clear: “[A] look at the bare statistics regarding executions is enough to betray much of the discrimination.”⁹ He listed the highly disproportionate execution rates for African Americans, noting, “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.”¹⁰ Perhaps most importantly, Justice Marshall drew a direct line from the allowance of

2. *Id.* at 309–10 (Stewart, J., concurring).

3. *Id.* at 313 (White, J., concurring).

4. *Id.* at 242 (Douglas, J. concurring) (“There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature.”).

5. *Id.* at 249.

6. *Id.* at 249–50 (citing THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967)).

7. *Id.* at 250–51 (citing Rupert C. Koeninger, *Capital Punishment in Texas, 1924–1968*, 15 CRIME & DELINQ. 132, 141 (1969)).

8. *Id.* at 256–57.

9. *Id.* at 364 (Marshall, J., concurring).

10. *Id.* (“A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population.”).

arbitrariness to the influence of discrimination: “Racial or other discriminations should not be surprising. In *McGautha v. California*, this Court held ‘that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is (not) offensive to anything in the Constitution.’ This was an open invitation to discrimination.”¹¹

Justice Stewart, striking down the death penalty based on its application, wrote, “[R]acial discrimination has not been proved, and I put it to one side. 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 so freakishly imposed.”¹² Yet he acknowledged the great likelihood that racial discrimination was behind the “wanton” and “freakish” imposition. Citing the opinions of Justices Douglas and Marshall, he wrote:

[T]he 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.¹³

Justice White, like Justices Douglas and Stewart, struck down the death penalty as applied, finding that there was “no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”¹⁴ While he did not explicitly mention race, his opinion reads as an implicit acceptance of the racial statistics highlighted in the other concurring opinions when he writes, “I need not restate the facts and figures that appear in the opinions of my Brethren.”¹⁵ Justice Brennan, performing an extensive analysis of the Cruel and Unusual Punishments Clause to join Justice Marshall in finding the death penalty inherently unconstitutional, likewise did not explicitly discuss racial discrimination. The prevention of inequality, however, was central to his view. “The more significant function of the [Cruel and Unusual Punishments] Clause . . .,” he wrote, “is to protect against the danger of [extremely severe punishments] arbitrary infliction,” and he contrasted arbitrariness with “the requirements of regularity and fairness.”¹⁶ He later noted, “The specter of race

11. *Id.* at 365 (quoting *McGautha v. California*, 402 U.S. 183, 207 (1971)) (internal citation omitted).

12. *Id.* at 310 (Stewart, J., concurring).

13. *Id.* at 309–10 (Stewart, J., concurring).

14. *Id.* at 313 (White, J., concurring).

15. *Id.* See also Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1200 (2000) (“Justice White’s comment that ‘there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not,’ frequently is cited as a statement of the principle of equality that ought to inform death sentencing.” (quoting *Furman*, 408 U.S. at 313)).

16. *Id.* at 276–77 (Brennan, J., concurring).

discrimination was acknowledged by the Court in striking down the Georgia death penalty statute in *Furman*.¹⁷

As one scholar has noted, “In spite of the diffuse nature of the decision, one theme emerges from the nine *Furman* opinions. The Justices sought to eliminate arbitrariness in jury death-sentencing in the interest of equality.”¹⁸

B. Racial Imposition of the Death Penalty in the United States Historically

There was good reason for this concern with equality. The death penalty in the United States has a long history as a tool of racial subjugation. Capital punishment is “one of America’s most prominent vestiges of slavery and racial violence.”¹⁹ While, as discussed in Part III, the U.S. Supreme Court has, since *Furman* and *Gregg*, made the standard of proof for demonstrating racial bias in capital sentencing almost impossibly high,²⁰ “only those oblivious to the brutal history of racial discrimination in American law would deny the danger of racial prejudice entering the decisions which lead to the imposition of a death sentence.”²¹ Stephen B. Bright, founder and president of the Southern Center for Human Rights, has catalogued much of this history, including the overtly racist use of the death penalty:

From colonial times until the Civil War, the criminal law in many states expressly differentiated between crimes committed by and against blacks and whites. For example, Georgia law provided that the rape of a white female by a black man “shall be” punishable by death, while the rape of a white female by anyone else was punishable by a prison term not less than two nor more than twenty years. The rape of a black woman was punishable “by fine and imprisonment, at the discretion of the court.”²²

The racist use of the death penalty replaced a decades-long post-Reconstruction regime of extralegal racial terror. Between the end of the Civil War and the late 1960s, at least 4,743 people in the United States were lynched.²³ Almost all of the attacks took place in the South and the victims were

17. *McCleskey v. Kemp*, 481 U.S. 279, 330 (1987).

18. Huigens, *supra* note 15, at 1200.

19. Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 433, 439 (1995) (“examin[ing] the historic relationship between racial violence and the death penalty, describ[ing] some of the ways in which racial prejudice continues to influence capital sentencing decisions, and discuss[ing] the failure of the courts to confront the racial bias that infects the criminal justice system.”).

20. See discussion of *McCleskey v. Kemp*, *infra* Part III.B.1.

21. Bright, *supra* note 19, at 438.

22. *Id.* at 439.

23. *Id.* at 440 (citing Tuskegee University’s documentation of lynchings, which began in 1882). See TUSKEGEE UNIVERSITY ARCHIVES, LYNCHINGS, WHITES AND NEGROES, 1882–1968

overwhelmingly African American.²⁴ Sociologist and law professor David Garland asserts that between four and five hundred of these were “public torture lynchings”—those that were “highly publicized, took place before a large crowd, were staged with a degree of ritual, and involved elements of torture, mutilation or unusual cruelty.”²⁵

In 2015, the Equal Justice Initiative (“EJI”) released a report further exposing the role of lynching as a tool of terror used to subjugate African Americans.²⁶ The report identified 3,959 “racial terror lynchings” of black people in twelve southern states between 1877 and 1950.²⁷ The report distinguished racial terror lynchings from acts of violence (including hangings) that followed some criminal process.²⁸ Instead, many victims of racial terror lynchings were never accused of any crime and “were killed for minor social transgressions or for demanding basic rights and fair treatment.”²⁹ White mobs used racial terror lynchings to traumatize African Americans in order to “create[] a fearful environment where racial subordination and segregation was maintained with limited resistance for decades.”³⁰ The EJI report described how states transitioned from lynching to capital punishment as a means of social control:

By 1915, court-ordered executions outpaced lynchings in the former slave states for the first time. Two-thirds of those executed in the 1930s were black, and the trend continued. As African Americans fell to just 22 percent of the South’s population between 1910 and 1950, they constituted 75 percent of those executed in the South during that period.³¹

It is not hyperbole to say that “[t]he death penalty is a direct descendant of lynching and other forms of racial violence and racial oppression in America”³²: “The threat that Congress might pass an anti-lynching statute in the early 1920s led Southern states to ‘replace lynchings with a more “[humane] . . . method of

(2010), available at <http://192.203.127.197/archive/> (follow “022 Lynching Information” hyperlink; then follow “Lynching, Whites & Negroes, 1882–1968”; then follow “Lynching 1882 1968.pdf” [sic]).

24. Bright, *supra* note 19, at 440 (“More than ninety percent of the lynchings took place in the South, and three-fourths of the victims were African-American.”).

25. David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 *LAW & SOC’Y REV.* 793, 797 (2005).

26. EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (2015).

27. *Id.* at 5.

28. *Id.* The category also excludes those rare acts of racial violence for which perpetrators were criminally prosecuted. *Id.*

29. *Id.* at 6.

30. *Id.* at 4.

31. *Id.* at 60. *See also* Bright, *supra* note 19, at 440 (noting that in the 1930s, two-thirds of those executed were black).

32. Bright, *supra* note 19, at 439.

racial control”—the judgment and imposition of capital sentences by all-white juries.”³³

In the just under fifty years leading up to *Furman*, Georgia executed 337 black people and seventy-five white people.³⁴ Since *Furman* and *Gregg*, juries and judges continue to sentence African Americans to death in overtly racist circumstances, including, among many others, in cases in which the defense attorney and two jurors stated they used the word “nigger,” the defense attorney had outspoken views about the inferiority of black people, and the judge and defense attorney referred to the defendant as “colored” and “colored boy” during the trial;³⁵ the judge referred in court to the defendant’s parents as the “nigger mom and dad”;³⁶ jurors used racial slurs during deliberations;³⁷ defense attorneys referred to their clients as “niggers;”³⁸ the prosecutor had a publicly announced policy of using peremptory strikes to “get rid of as many” black potential jurors as possible³⁹; and the prosecutor had divided prospective jurors into four lists—“strong,” “medium,” “weak,” and “black.”⁴⁰

These are merely a few of the most egregious and obvious examples. The most well-known documentation of the racist imposition of the death penalty was the Baldus study,⁴¹ presented to the U.S. Supreme Court in *McCleskey v. Kemp*.⁴² As discussed in Part III, the Court rejected the study as a means of proving racial discrimination in McCleskey’s sentence, but stark findings of the study are stated clearly in the Court’s opinion. Even after correcting for “variables that could have explained the disparities on nonracial grounds,”

33. *Id.* at 440 (quoting Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 80 (1990) (quoting MICHAEL BELKNAP, FEDERAL LAW AND SOUTHERN ORDER 2226 (1987))). See also Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2063–65 (2010) (discussing “speedy trials and death sentences under the threat of lynching,” sometimes termed “legal lynchings.”).

34. BRIGHT, *supra* note 19, at 441.

35. *Id.* at 444–45 (citing *Dobbs v. Zant*, 720 F. Supp. 1566, 1576–78 (N.D. Ga. 1989), *aff’d*, 963 F.2d 1403 (11th Cir. 1991), *rev’d*, 506 U.S. 357, 359–60 (1993)).

36. *Id.* at 447 (citing *Peek v. State*, 488 So. 2d 52, 56 (Fla. 1986)).

37. *Id.* (citing *Spencer v. State*, 398 S.E.2d 179 (Ga. 1990)).

38. *Id.* (citing Transcript of Opening and Closing Arguments, *Dungee v. Kemp*, 778 F.2d 1482 (11th Cir. 1985), *decided sub nom.*, *Isaacs v. Kemp*, 778 F.2d 1482 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986)); *Goodwin v. Balkcom*, 684 F.2d 794, 805 n.13 (11th Cir. 1982) (“Charlie Young, Curfew Davis, George Dungee, Terry Lee Goodwin and Eddie Lee Ross were all referred to as ‘niggers’ by their defense lawyers at some point in the trials during which they were sentenced to death.”).

39. BRIGHT, *supra* note 19, at 447–48 (citing *Edwards v. Scroggy*, 849 F.2d 204, 207 (5th Cir. 1988)).

40. *Id.* at 448 (citing *Alabama v. Jefferson*, Cir. Ct. Chambers County No. CC-81-77 (Order of Oct. 2, 1992)).

41. David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

42. 481 U.S. 279 (1987).

“defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks, . . . black defendants were 1.1 times as likely to receive a death sentence as other defendants,” and thus “black defendants . . . who kill white victims have the greatest likelihood of receiving the death penalty.”⁴³

*C. Racial Imposition of the Death Penalty in North Carolina Before Furman*⁴⁴

In North Carolina, this pattern holds. From 1726 to 1865, African Americans made up seventy-one percent of those executed, while executions of whites were so infrequent that “periods of up to twenty years passed” without any.⁴⁵ By statute, black men accused of raping white women were subject to the death penalty, but white men were not.⁴⁶ Most of the African Americans executed were part of the enslaved population.⁴⁷ While slave masters possessed and frequently exercised the legal right to punish enslaved African Americans through physical brutality, after 1774 this right did not include the power to summarily execute.⁴⁸ In that year, it became a crime to kill an enslaved person, but the punishments were mild, focused largely on compensating the slave owner if the killer was someone other than the owner, and exempted from punishment a death that occurred as the result of using physical force to “correct” an enslaved person.⁴⁹

Throughout the slavery era, however, masters killing their own slaves extrajudicially was relatively rare in comparison to “legal” executions.⁵⁰ It was not in slave owners’ economic interest to kill a person under their enslavement, but masters were financially compensated for slaves executed pursuant to an order from a court.⁵¹ And “many slave owners believed that public executions served an important purpose in deterring misbehavior among the slave population at large.”⁵² They “generally felt that the full power of the state had to be marshaled against slaves who committed serious crimes if proper order were to be maintained on the slave plantation.”⁵³ Those executions of African Americans that did occur in North Carolina during the slavery era were far more brutal than

43. *Id.* at 287 (citing Baldus, Pulaski & Woodworth, *supra* note 41).

44. *See infra* Part III for discussion of racial imposition of the death penalty in North Carolina after *Furman v. Georgia*, 408 U.S. 238 (1972).

45. Kotch & Mosteller, *supra* note 33, at 2044–45.

46. *Id.* at 2046.

47. *Id.* at 2044.

48. *Id.* at 2047; MARVIN L. MICHAEL KAY & LORIN LEE CARY, *SLAVERY IN NORTH CAROLINA, 1748–1775*, at 75–76 (1995) [hereinafter *SLAVERY IN NORTH CAROLINA*].

49. *SLAVERY IN NORTH CAROLINA*, *supra* note 48, at 75–76 (citing 23 *THE STATE RECORDS OF NORTH CAROLINA 975–76* (Walter Clark, ed., 1904)).

50. *Id.* at 76.

51. *Id.* at 73, 76.

52. Kotch & Mosteller, *supra* note 33, at 2047–48.

53. *SLAVERY IN NORTH CAROLINA*, *supra* note 48, at 74–75.

executions of whites. While all executed whites were hanged, African Americans were executed through torture, including being “chained alive in a gibbet to die slowly and horribly,” being castrated and then hanged, dying from castration, and being burned alive.⁵⁴ Five “outlawed runaways” drowned themselves to avoid such fates.⁵⁵

From the end of the Civil War to 1910, African Americans comprised 74% of people executed.⁵⁶ From 1910 to 1961, 78% of people executed by the state of North Carolina were African American, even though the state’s black population declined from 32% in 1910 to 25% in 1960,⁵⁷ presenting “a daunting challenge to explain on grounds that do not include race.”⁵⁸ In keeping with the Baldus study results, race of the victim played an important role: 75% of the victims in these cases were white.⁵⁹ As Kotch and Mosteller note, “[t]he race-of-the-defendant and race-of-the-victim percentages are so extreme as to make explanation by non-racial factors very unlikely.”⁶⁰ Further, “sixty-seven of the seventy-eight men executed for rape during this period were African American, and among those executions, it is possible to confirm that the victims were white in fifty-eight cases,” while no white man was executed for the rape of an African American woman.⁶¹ Finally, all twelve of the people executed for first degree burglary between 1910 and 1961 were African American, and “available reports . . . show that the homes they entered were likely exclusively occupied by whites.”⁶²

D. Gregg v. Georgia (1976): The Supreme Court’s Approval of Georgia’s Revised Death Penalty Statute Prompts North Carolina to Adopt Comparative Proportionality Review

In response to *Furman*, states quickly passed new death penalty statutes in attempts to comply with the decision’s strictures. Just four years after *Furman*, in *Gregg v. Georgia*, the U.S. Supreme Court reviewed Georgia’s new statute and effectively reinstated the death penalty, holding that Georgia’s new statute

54. *Id.* at 81.

55. *Id.*

56. Kotch & Mosteller, *supra* note 33, at 2053.

57. *Id.* at 2056 (noting that of the 362 people executed, 283 were black, and that when Native Americans are included, the proportion of those executed who were not white increases to eighty percent).

58. *Id.* at 2039.

59. *Id.* at 2056.

60. *Id.*

61. *Id.* at 2066. In fact, only “ten whites were executed for particularly horrific crimes against exclusively white victims, most of them adolescents or young girls.” *Id.* at 2066–67.

62. *Id.* at 2067. A sociologist who evaluated this practice in the 1940s wrote at the time, “[I]t is common knowledge that ‘first degree burglary’ is defined as a capital crime in several states as a threat to Negro offenders who enter a white residence after dark.” Guy B. Johnson, *The Negro and Crime*, 217 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 95 (1941) (arguing that both the definitions of crimes and the punishment applied depended on the race of the offender).

had corrected the flaws at issue in *Furman*.⁶³ The statute, the Court held, sufficiently guided juror and judge discretion and reduced its impact in a manner that would prevent the death penalty from being applied in an arbitrary or discriminatory manner.⁶⁴ The Court explained, “*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”⁶⁵ The Court found that Georgia’s new statute sufficiently guided jury discretion by mandating that the jury must find the presence of one of ten specified aggravating circumstances beyond a reasonable doubt in order to impose a death sentence, that the jury could consider any other aggravating or mitigating circumstances in making its decision, and that a jury recommendation of mercy would be binding on the trial court.⁶⁶ The Court found another distinct reason Georgia’s new statute avoided the problems of the one struck down in *Furman*:

As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State’s Supreme Court. That court is required by statute to review each sentence of death and 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*.⁶⁷

It is this last element noted by the Court in upholding Georgia’s statute in *Gregg*—known as “comparative proportionality review”—with which this article is concerned. North Carolina’s first attempt to comply with *Furman* was invalidated by the U.S. Supreme Court.⁶⁸ In *Woodson v. North Carolina*,⁶⁹ decided the same day as *Gregg*,⁷⁰ the Court struck down North Carolina’s first post-*Furman* statute, which had defined certain types of homicides as first degree murders and mandated the death penalty for all first degree murders.⁷¹ The Court held that the statute failed “to provide a constitutionally tolerable

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

64. *Id.*

65. *Id.* at 189.

66. *Id.* at 196–97.

67. *Id.* at 198 (emphasis added).

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

69. *Id.*

70. The Court decided five cases that day. It upheld death penalty statutes in *Gregg*, 428 U.S. 153; *Jurek v. Texas*, 428 U.S. 262 (1976); and *Proffitt v. Florida*, 428 U.S. 242 (1976). It struck down the statutes providing for mandatory death sentences in *Woodson*, 428 U.S. 280, and *Roberts v. Louisiana*, 428 U.S. 325 (1976).

71. *Woodson*, 428 U.S. at 286 (citing N.C. GEN. STAT. §§ 14–17 (Cum. Supp. 1975)).

response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences" in part because "there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences," holding that the statute "does not fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, *and make rationally reviewable* the process for imposing a sentence of death."⁷² After *Woodson*, North Carolina adopted a new statute, modeled on and virtually identical to Georgia's, including comparative proportionality review, in order to comply with the constitutional requirements laid out in *Furman* and *Gregg*.⁷³ North Carolina's statute uses language almost identical to that cited by the *Gregg* Court as supporting the constitutionality of Georgia's death penalty statutory scheme.⁷⁴ The new statute made comparative proportionality review of all death sentences automatic, stating: "The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court . . . 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."⁷⁵

II.

NORTH CAROLINA DOES NOT MEANINGFULLY PERFORM ITS STATUTORILY MANDATED COMPARATIVE PROPORTIONALITY REVIEW

A review of North Carolina death sentences demonstrates that the state supreme court has not been faithfully performing this review, and thus has violated the Eighth and Fourteenth Amendments' prohibition of arbitrary and discriminatory sentences under *Furman* and *Gregg*. In theory, the North Carolina Supreme Court engages in a broad form of comparative proportionality review. In 1983, the court articulated its methods for performing the review in *State v. Williams*:

In comparing "similar cases" for purposes of proportionality review, we use as a pool for comparison purposes *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

72. *Id.* at 303 (emphasis added).

73. See Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After Pulley v. Harris*, 70 U. COLO. L. REV. 813, 842-43 (1999).

74. For relevant portions of the North Carolina and Georgia statutes, see Appendices A and B, respectively.

75. N.C. GEN. STAT. ANN. § 15A-2000(d)(2) (West Supp. 2013).

upon a sentencing recommendation within a reasonable period of time.⁷⁶

A. The North Carolina Supreme Court's Method of Performing Comparative Proportionality Review Does Not Adequately Measure Proportionality Because It Does Not Consider All Similar Cases, Instead Relying Too Heavily on the Few Cases in Which Death Was Found Disproportionate

Published decisions highlight what appear to be serious shortcomings in the review actually conducted by the court. While the court in *Williams* emphasized the comprehensive nature of its announced form of review—"all of these 'similar cases'"⁷⁷—published opinions from the court suggest that the actual review conducted in death penalty cases since *Williams* has been far less comprehensive. In at least one instance, the court did not compare the case on review to any other case.⁷⁸

The only consistency in the court's reviews is that it generally includes comparisons to the very few cases (eight to date) in which it has previously found death disproportionate.⁷⁹ In some instances these are the only cases the

76. *State v. Williams*, 301 S.E.2d 335, 355 (1983). The court further clarified the parameters of the pool in *State v. Bacon*, 446 S.E.2d 542, 564 (1994) ("Because the 'proportionality pool' is limited to cases involving first-degree murder convictions, a post-conviction proceeding which holds that the State may not prosecute the defendant for first-degree murder or results in a retrial at which the defendant is acquitted or found guilty of a lesser included offense results in the removal of that case from the 'pool.' When a post-conviction proceeding results in a new capital trial or sentencing proceeding, which, in turn, results in a life sentence for a 'death-eligible' defendant, the case is treated as a 'life' case for purposes of proportionality review. The case of a defendant sentenced to life imprisonment at a resentencing proceeding ordered in a post-conviction proceeding is similarly treated. Finally, the case of a defendant who is either convicted of first-degree murder and sentenced to death at a new trial or sentenced to death in a resentencing proceeding ordered in a post-conviction proceeding, which sentence is subsequently affirmed by this Court, is treated as a 'death-affirmed' case.").

For a discussion of the North Carolina Supreme Court's record of performing comparative proportionality review from the first time it had occasion to do so in 1979 in *State v. Barfield*, 259 S.E.2d 510 (1979), until it laid out its methods in *Williams*, see Carolyn Sievers Reed, *The Evolution of North Carolina's Comparative Proportionality Review in Capital Cases*, 63 N.C. L. REV. 1146, 1146-52 (1984).

77. *Williams*, 301 S.E.2d at 356.

78. See *State v. Hufstetler*, 322 S.E.2d 110 (1984); *id.* at 129 (Exum, J., dissenting) ("The majority deals with this aspect of the case perfunctorily. It refers to the 'pool' of similar cases and says that it has compared the defendant and the crime to these cases without saying which of the cases in the pool it finds similar or to which cases it has compared the instant case. The majority simply describes the crime, without describing the defendant, and concludes that the sentence of death is not disproportionate. The majority seems to treat the issue as being one exclusively within this Court's unbridled discretion.").

79. There have been only eight cases in which the North Carolina Supreme Court has found a death sentence disproportionate. See *State v. Kemmerlin*, 573 S.E.2d 870 (N.C. 2002); *State v. Benson*, 372 S.E.2d 517 (N.C. 1988); *State v. Stokes*, 352 S.E.2d 653 (N.C. 1987); *State v. Rogers*, 341 S.E.2d 713 (N.C. 1986), *overruled in part on other grounds by State v. Gaines*, 483 S.E.2d 396 (N.C. 1997), and *State v. Vandiver*, 364 S.E.2d 373 (N.C. 1988); *State v. Young*, 325 S.E.2d

court even claims to include in its review.⁸⁰ In other instances, while the court lists for comparison only those few cases and compares the facts of the case under review only to the facts of those few cases, the court also makes mention of a broader comparison, stating some variation of, “This Court also compares the instant case with cases in which we have found the death penalty to be proportionate.”⁸¹ Often after such a statement, however, the court does not cite any of these cases for comparison.⁸²

Consider *State v. Allen*. After the court wrote that it compares the case under review to those in which it has found death disproportionate and then distinguished the facts of Allen’s case from two of the eight in which it previously had found death disproportionate, the rest of the court’s comparative proportionality review consisted entirely of the following:

Although we compare this case with the cases in which we have found the death penalty to be proportionate we will not undertake to discuss or cite all of those cases each time we carry out that duty. The imposition of death for this murder is proportionate when compared with our other cases. Therefore, we hold defendant’s sentence is neither disproportionate nor

181 (N.C. 1985); *State v. Hill*, 319 S.E.2d 163 (N.C. 1984); *State v. Bondurant*, 309 S.E.2d 170 (N.C. 1983); *State v. Jackson*, 305 S.E.2d 703 (N.C. 1983).

80. *See State v. Murrell*, 665 S.E.2d 61, 84–85 (N.C. 2008); *State v. Goss*, 651 S.E.2d 867, 878–79 (N.C. 2007).

81. *State v. Maness*, 677 S.E.2d 796, 818 (N.C. 2009).

82. In some reviews, the omission is easy to see, because the court does not even mention any such cases when discussing the facts of the case under review. *See State v. Cummings*, 648 S.E.2d 788, 812 (N.C. 2007); *State v. Allen*, 626 S.E.2d 271, 288–89 (N.C. 2006); *State v. McNeill*, 624 S.E.2d 329, 343–45 (N.C. 2006).

In others, the omission may not be as obvious to readers, because when discussing the facts of the case under review, the court does in fact name some cases in which it has previously found death proportionate. It only cites these cases, however, for specific propositions, and does not even purport to compare them to the case under review, a fact made clear by where the court cites them within the review. *See, e.g., State v. Wilkerson*, 683 S.E.2d 174, 206–07 (N.C. 2009); *State v. Polke*, 638 S.E.2d 189, 195–97 (N.C. 2006); *State v. Hyatt*, 566 S.E.2d 61, 79–80 (N.C. 2002); *State v. Peterson*, 516 S.E.2d 131, 137–38 (1999); *State v. Lyons*, 468 S.E.2d 204, 216–18 (N.C. 1996). In these reviews, the court uses a three-part structure. First, the court says that it compares the case under review to those in which it has found death disproportionate, and distinguishes the case under review from those cases. Then the court interjects a paragraph or paragraphs containing specific propositions supported by citations to cases, including some in which it previously has found death proportionate. *See, e.g., Wilkerson*, 683 S.E.2d at 207 (“This Court has never found a sentence of death disproportionate in a case where a defendant was convicted of murdering more than one victim.” (quoting *State v. Meyer*, 540 S.E.2d 1, 17 (2000)); *Hyatt*, 566 S.E.2d at 79 (“We have held that a finding of premeditation and deliberation indicates ‘a more calculated and cold-blooded crime.’” (quoting *State v. Lee*, 439 S.E.2d 547, 575, *cert. denied*, 513 U.S. 891 (1994)). *Only then* does the court state that it *also* compares the case under review with cases in which it has found death proportionate, and that the case under review is more similar to those in which it has found death proportionate, after which it concludes the review without citing any of those purportedly similar cases.

excessive considering the nature of defendant and the crime he committed.⁸³

Further, in such instances, the similarity of the language the court uses to say it is “comparing” the case on review to those in which it has previously found death proportionate is so consistent across opinions as to appear rote.⁸⁴

83. *Allen*, 626 S.E.2d at 288–89 (citations and internal quotation marks omitted).

The court often states that it will not undertake to cite to all cases it uses for comparison; thus one could argue that the court’s failure to cite specific cases does not mean that it is not performing comparisons to those cases. This argument, however, fails for several reasons, as discussed in the next section (Part III.B *infra*).

84. Compare these passages from several of the opinions listed in note 79:

We also compare this case with the cases in which we have found the death penalty to be proportionate. Although this Court reviews all of the cases in that pool when engaging in its duty of proportionality review, we have repeatedly stated that we will not undertake to discuss or cite all of those cases each time we carry out that duty. Whether a sentence of death is disproportionate in a particular case ultimately rest[s] upon the experienced judgments of the members of this Court. Accordingly, we conclude that this case is more similar to cases in which we have found the death penalty proportionate than to those in which we have found it disproportionate.

Hyatt, 566 S.E.2d at 80 (citations and internal quotation marks omitted).

This Court also compares the instant case with cases in which we have found the death penalty to be proportionate. After carefully reviewing the record, we conclude that this case is more analogous to cases in which we have found the sentence of death proportionate than to the cases in which we have found it disproportionate or cases in which juries have consistently recommended sentences of life imprisonment. Although defense counsel assiduously presented pertinent mitigating circumstances and aspects of this case, including defendant’s youth and difficult upbringing, we are nonetheless convinced that the sentence of death here is not disproportionate.

Maness, 677 S.E.2d at 818 (citations and internal quotation marks omitted).

This Court also compares the present case with cases in which we have found the death penalty to be proportionate. After carefully reviewing the record, we conclude that this case is more analogous to cases in which we have found the sentence of death proportionate than to the cases in which we have found it disproportionate or to the cases in which juries have consistently recommended sentences of life imprisonment. Although defense counsel presented evidence of several mitigating circumstances, including circumstances related to defendant’s childhood and substance addiction, and although at least one or more jurors found several of these mitigating circumstances to exist, we are nonetheless convinced that the sentence of death here is not disproportionate.

Wilkerson, 683 S.E.2d. at 207 (citations and internal quotation marks omitted).

We note as well that, after comparing defendant’s case with those in which we have found the death sentence to be proportionate, we find defendant’s case to be more analogous to these cases. After considering all cases which are roughly similar in facts to the instant case, although we are not constrained to cite each and every case we have used for comparison, our sound judgment and experience leads us to conclude that the death sentence imposed here is not excessive or disproportionate, taking into account both the crime and the defendant.

Lane, 707 S.E.2d at 230 (citations and internal quotation marks omitted).

Although we compare this case with the cases in which this Court has found the death penalty to be proportionate, we will not undertake to discuss or cite

The lack of comparisons to any cases but those few in which the court has previously found death disproportionate, along with the rote language used in reference to other cases, leave a strong impression that the court is performing comparisons only to the select few cases in which it has previously found death disproportionate.

The comparison of a case under review to only those few cases in which death has been found disproportionate is necessarily of limited value because it cannot answer the central question: whether the death sentence is proportionate when compared to *jury* sentences in which life and death verdicts were imposed. Regarding this question's centrality to proportionality review, the North Carolina Supreme Court has explained:

If, after making such comparison, we find that juries have consistently returned death sentences in factually similar cases, we will have a strong basis for concluding that the death sentence under review is not excessive or disproportionate. If juries have consistently returned life sentences in factually similar cases, however, we will have a strong basis for concluding that the death sentence in the case under review is disproportionate.⁸⁵

The court's focus on the small number of cases in which it has found death disproportionate on appellate review eliminates the court's ability to determine what sentences "juries have consistently returned" in factually similar cases, destroying the review's ability to serve its constitutionally mandated purpose. In *Gregg*, the U.S. Supreme Court emphasized comparative proportionality review's special ability to prevent arbitrary and discriminatory sentences specifically by serving as a check on "the possibility that a person will be sentenced to die by the action of an aberrant *jury*."⁸⁶ By only comparing to the

all of those cases each time we carry out that duty. Whether a sentence of death is disproportionate in a particular case ultimately rests upon the experienced judgments of the members of this Court. Based upon the crime defendant committed and the record in this case, we are convinced the sentence of death, recommended by the jury and ordered by the trial court, is not disproportionate or excessive.

Polke, 638 S.E.2d at 196–97 (citations and internal quotation marks omitted).

Although we compare this case with the cases in which we have found the death penalty to be proportionate we will not undertake to discuss or cite all of those cases each time we carry out that duty. We have compared defendant's case to other cases in which we have found the death penalty to be proportionate and find no reason to hold defendant's sentence is disproportionate.

McNeill, 624 S.E.2d at 345 (citations and internal quotation marks omitted).

85. *State v. Green*, 443 S.E.2d 14, 46, 198 (N.C. 1994) (quoting *State v. McCollum*, 433 S.E.2d 144, 163 (N.C. 1993)).

86. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (emphasis added) ("The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially

few cases in which it has previously found a death sentence disproportionate, the North Carolina Supreme Court *does not compare to any jury sentences*, making it impossible for comparative proportionality review to fulfill its constitutional mandate.

Further, even when the court considers not only cases in which it found *death* sentences to be disproportionate but also those in which it found *death* sentences to be proportionate, the court still rarely includes comparisons to cases in which juries handed down *life* sentences. In the same passage from *Gregg* quoted above, the Supreme Court upheld Georgia's statute on the condition that "[i]f a time c[ame] when juries generally [did] not impose the death sentence in a certain kind of murder case," comparative proportionality review would "assure that no defendant convicted under such circumstances w[ould] suffer a sentence of death."⁸⁷ By not including comparisons to life cases, however, North Carolina's review cannot offer that assurance and can in no way actually measure the comparative proportionality of sentences. Justice Stevens, who voted to uphold Georgia's statute in *Gregg*, wrote that in making that decision the Court "assumed that the [reviewing] court would consider whether there were 'similarly situated defendants' who had *not* been put to death because that inquiry is an essential part of any meaningful proportionality review."⁸⁸ The inclusion of life sentences is "essential" because "quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court."⁸⁹ Indeed, research has since confirmed that "whether and to what extent a reviewing court considers life-sentenced cases will directly affect the likelihood of finding a death sentence disproportionate."⁹⁰

Different states have used different methods for proportionality review.⁹¹ It is beyond the scope of this article to evaluate these different approaches, and others have done much of that work already.⁹² Certainly, however, if North

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

87. *Id.*

88. *Walker v. Georgia*, 555 U.S. 979, 980 (2008) (Stevens, J., statement respecting denial of certiorari) (continuing, "That assumption was confirmed a few years later in *Zant v. Stephens*." (citation omitted)).

89. *Id.* at 980–81.

90. Donald Wallace & Jonathan Sorensen, *Comparative Proportionality Review: A Nationwide Examination of Reversed Death Sentences*, 22 AM. J. CRIM. JUST. 13, 19 (1997) [hereinafter *Comparative Proportionality Review*].

91. *Id.* at 27–34.

92. See generally 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 (1996) (examining different state high courts' approaches to proportionality review); Donald H. Wallace & Jonathon R. Sorensen, *Missouri Proportionality Review: An Assessment of a State Supreme Court's Procedures in Capital Cases*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281

Carolina is to measure the proportionality of a death sentence against the sentences of defendants in “similar circumstances,” at the very least it must look at those other sentences, which include both life and death sentences.

B. Lack of Transparency

One might argue that the court is actually performing the comparisons but is simply not citing to the comparison cases in its opinions. In *Williams*, the court hinted it might do as much, stating:

[T]his Court will not necessarily feel bound during its proportionality review to give a citation to every case in the pool of “similar cases” used for comparison. We have chosen to use *all* of these “similar cases” for proportionality review purposes. The Bar may safely assume that we are aware of our own opinions filed in capital cases arising since the effective date of our capital punishment statute, 1 June 1977.⁹³

The court has included similar disclaimers in subsequent opinions.⁹⁴

There are, however, four problems with this theory. First, it does not make sense in the face of the court’s proportionality reviews. As noted above, the court only consistently cites for comparison the previous cases in which it has found death disproportionate. The explicit decision to cite these cases but not others suggests that the court compares the case under review only to those cases, or at the very least puts more emphasis on them. The inclusion of comparisons to only those cases in the written opinions, in other words, suggests that other cases are being excluded from comparison.

(1994) (examining one state high court’s proportionality review methods, concluding that they are inadequate, and making recommendations for improvement); Baldus, Pulaski & Woodworth, *supra* note 41, at 669 (recommending a three-step method in which “[f]irst, the court decides which features of the death sentence case under review will govern the selection of other cases as ‘similar.’ Second, using those criteria, the court identifies those other ‘similar’ cases and determines the frequency with which defendants received death sentences in those similar cases. Finally, the court decides whether death sentences were imposed so infrequently in this class of similar cases as to make imposition of the death penalty in the case under review comparatively excessive.”).

93. *State v. Williams*, 301 S.E.2d 335, 356 (N.C. 1983).

94. *See, e.g., State v. McNeill*, 624 S.E. 2d 329, 345 (N.C. 2006) (“Although we compare this case with the cases in which this Court has found the death penalty to be proportionate, we will not undertake to discuss or cite all of those cases each time we carry out that duty.” (citations and internal quotation marks omitted)); *State v. Polke*, 638 S.E.2d 189, 196–97 (N.C. 2006) (same language as in *McNeill*); *State v. Hyatt*, 566 S.E.2d. 61, 80 (N.C. 2002) (“Although this Court reviews all of the cases in that pool when engaging in its duty of proportionality review, we have repeatedly stated that we will not undertake to discuss or cite all of those cases each time we carry out that duty.” (citations and internal quotation marks omitted)); *State v. McCollum*, 433 S.E.2d 144, 164 (N.C. 1993) (“Although we review all of the cases in the pool of ‘similar cases’ when engaging in our statutorily mandated duty of proportionality review, we have previously stated, and we reemphasize here, that we will not undertake to discuss or cite all of those cases each time we carry out that duty.”).

Second, as part of its assessment of how comparative proportionality review helped Georgia's statute prevent arbitrary and discriminatory sentences, the Court in *Gregg* specifically noted that the Georgia Supreme Court was "required to specify in its opinion the similar cases which it took into consideration."⁹⁵

Third, the lack of citation to all cases included for comparison in written opinions means defense counsel has no way to determine which cases were in fact considered, thus depriving counsel of the ability to meaningfully challenge a state supreme court's decision.

Fourth, and relatedly, the procedural disadvantage the court creates by its lack of transparency violates defendants' rights under the Due Process Clause of the Fourteenth Amendment. The minimum requirements of due process include disclosure of the evidence against one and a written statement by the fact finders as to the evidence and reasoning relied upon.⁹⁶ Once a state has granted prisoners a liberty interest, Fourteenth Amendment due process rights attach to that interest.⁹⁷ Given that it is a part of a criminal prosecution,⁹⁸ that there is no liberty interest greater than the preservation of one's life, and that there is no loss more "grievous"⁹⁹ than the loss of one's life, there can be no doubt that the minimal due process requirements apply to comparative proportionality review. Regardless of whether North Carolina were otherwise constitutionally required to perform comparative proportionality review, once the state established defendants' right to the review, due process protections attached to it "to insure that the [right to the review] is not arbitrarily abrogated."¹⁰⁰ Thus, whether the court is not actually performing comparisons to all "similar cases," as appears to be the case, or is performing the comparisons but is not citing them in its decisions, its method of performing comparative proportionality review is constitutionally insufficient. The fact that defendants cannot know which of

95. *Gregg v. Georgia*, 428 U.S. 153, 205 n.56 (1976) (citing GA. CODE ANN. § 27-2537(e) (Supp. 1975)).

96. See *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972). *Morrissey* deals specifically with the rights due at parole proceedings, with the Court indicating that defendants in a criminal prosecutions have greater rights. *Id.* at 480.

97. *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980) ("We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment. There is no 'constitutional or inherent right' to parole, but once a State grants a prisoner the conditional liberty properly dependent on the observance of special parole restrictions, due process protections attach to the decision to revoke parole. . . . Once a State has granted prisoners a liberty interest, we held that due process protections are necessary to insure that the state-created right is not arbitrarily abrogated." (citations omitted)).

98. See *Morrissey*, 408 U.S. at 480-84 (noting that prisoner was owed these due process rights even in revocation of parole, even though the parole revocation proceeding "is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations").

99. *Id.* at 481 ("Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring))).

100. *Vitek*, 445 U.S. at 489 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)).

those two scenarios is the case speaks precisely to the problems created by the lack of transparency.

C. Lack of a Consistent Methodology

Along with failing to compare each case under review to all “similar cases,” North Carolina Supreme Court opinions reveal a lack of a consistent or systematic method of performing comparisons. Whether comparing to the small number of cases in which death was found disproportionate, or comparing to a broader pool of cases, the court often makes the jury’s finding of one or more specific aggravating circumstances (“aggravators”), or the overall number of aggravators found by the jury, determinative of proportionality. While in such reviews the court sometimes discusses the facts of the case, in some, it only uses those facts as evidence backing up the jury’s finding of aggravators.¹⁰¹ In its two-paragraph proportionality review in *State v. Morgan*, for example, after using one paragraph to state that the case under review was not similar to any of the eight cases in which the court had found death disproportionate, the court concluded its proportionality review with this paragraph:

Several factors support the determination that the imposition of the death penalty in this case was neither excessive nor disproportionate. The evidence indicated that defendant’s attack on the victim was unprovoked, that defendant began the affray with a knife and then switched to a bottle to hit, stab, and slash the victim numerous times, and that at some point defendant had pulled down the victim’s pants. The jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation, which suggests a calculated and cold-blooded crime. In addition, the jury’s finding of the (e)(3) aggravating circumstance was based upon defendant’s prior convictions of second-degree murder and robbery by sudden snatch. We have never held that a death sentence was disproportionate where a jury found the (e)(3) aggravating circumstance. Finally, the jury found the (e)(9) aggravating circumstance, which we have held is sufficient, standing alone, to affirm a death sentence. Considering defendant’s violent history and the brutal nature of the present crime, this case is more similar to cases in which we have found the sentence of death proportionate.¹⁰²

The discussion of the details of the “brutal nature of the present crime,” as well as the mention of “defendant’s violent history,” might seem to be the court’s evaluating the specific facts of the case. Without any comparison of these

101. *See, e.g.*, *State v. Morgan*, 604 S.E.2d 886, 911–12 (N.C. 2004); *State v. Polke*, 638 S.E.2d 189, 195–97 (N.C. 2006).

102. *Morgan*, 604 S.E.2d at 912 (citations and internal quotation marks omitted).

facts to the facts of any other cases, however, it is unclear what role those facts play in comparative proportionality review. With no such comparison, ultimately the recitation of the facts becomes redundant, because the facts about the brutal nature of the crime merely support the (e)(9) aggravator—“[t]he capital felony was especially heinous, atrocious, or cruel”¹⁰³—and the facts about prior convictions merely support the (e)(3) aggravator—previous conviction for a felony involving threat of violence.¹⁰⁴ (In fact, the court only notes the prior convictions in stating them as the basis for the jury’s finding the (e)(3) circumstance.) Removing those redundancies, the paragraph is left with the court making aggravators dispositive: “We have never held that a death sentence was disproportionate where a jury found the (e)(3) aggravating circumstance. Finally, the jury found the (e)(9) aggravating circumstance, which we have held is sufficient, standing alone, to affirm a death sentence.”¹⁰⁵

The court’s focus on the presence and number of aggravating factors, however, contradicts its own stated standards for fulfilling its statutory and constitutional mandate: the court has stated that “[i]f we were to make *any* aggravating circumstance conclusive as to proportionality, we would thwart the comparative review mandate of G.S. 15A-2000(d)(2),”¹⁰⁶ and that “mere numerical comparisons of aggravators, mitigators and other circumstances” would not meet “the constitutional requirement of ‘individualized consideration’ as to proportionality.”¹⁰⁷ In fact, in announcing its method of comparative proportionality review in *Williams*, the court explicitly stated that it would *not* base its comparative proportionality review decisions on quantitative comparisons of “similar and dissimilar characteristics” among cases because, it apparently worried, such action would violate the U.S. Constitution.¹⁰⁸ The court

103. N.C. GEN. STAT. ANN. § 15A-2000(e)(9) (West Supp. 2013).

104. § 15A-2000(e)(3).

105. *Morgan*, 604 S.E.2d at 912 (citations omitted).

106. *State v. Stokes*, 352 S.E.2d 653, 666 (N.C. 1987).

107. *State v. Green*, 443 S.E.2d 14, 47 (N.C. 1994). *See also* *State v. McLaughlin*, 372 S.E.2d 49, 75 (N.C. 1988), *sentence vacated on other grounds*, 494 U.S. 1021 (1990) (“In making the comparison, the Court does not simply engage in rebalancing the aggravating and mitigating factors”); *State v. Bondurant*, 309 S.E.2d 170, 183 n.1 (N.C. 1983) (“In conducting our proportionality review, we will consider the totality of the circumstances presented in each individual case and the presence or absence of a particular factor will not necessarily be controlling.”).

108. *State v. Williams*, 301 S.E.2d 335, 356 (N.C. 1983) (emphasis added). The passage from *Williams* analyzed in the following paragraphs reads as follows:

Additionally, the categories of factors which would be used in setting up any statistical model for quantitative analysis, no matter how numerous those factors, would have a natural tendency to become the last word on the subject of proportionality rather than serving as an initial point of inquiry. After making numerical determinations concerning the number of similar and dissimilar characteristics in the case before it and in other cases in which the death sentence was or was not imposed, a reviewing court might well tend to disregard the experienced judgments of its own members in favor of the “scientific” evidence resulting from quantitative analysis. To the extent that a

expressed concern that if it used a “statistical model for quantitative analysis,” the “*categories of factors*” used to set up the model could become the “last word . . . rather than serving as an initial point of inquiry.”¹⁰⁹

“After making numerical determinations concerning *the number of similar and dissimilar characteristics in the case before it and in other cases in which the death sentence was or was not imposed,*” the court worried, “a reviewing court might well tend to disregard the experienced judgments of its own members in favor of the ‘scientific’ evidence resulting from quantitative analysis.”¹¹⁰ Such a result, the court wrote, would tend to deny a defendant the “individualized consideration” mandated by *Lockett v. Ohio*.¹¹¹ The court stated that this risk arose because “a close reading of the actual records of cases identified as ‘similar’ by a quantitative measure may reveal *factual distinctions* which make them legally dissimilar.”¹¹² In other words, a quantitative analysis of similar and dissimilar characteristics among cases might deny a defendant his constitutionally required individualized consideration by leading the state supreme court to ignore the *facts* of cases. Yet the court does use mathematical comparisons to justify its comparative proportionality review decisions. This use, combined with the one-sided focus on disproportionate cases discussed above,¹¹³ has a particularly pernicious effect: it lends the reviews the appearance of scientific certainty while simultaneously destroying their value.

A recent review illustrates the point. In finding death proportionate in *State v. Maness* (2009), the court wrote: “This Court has never found a death sentence to be disproportionate when the jury found more than two aggravating circumstances to exist, and has found the N.C.G.S. § 15A–2000(e)(11) circumstance, standing alone, sufficient to support a death sentence.”¹¹⁴ These observations, however, have no bearing on whether the sentence was “excessive or disproportionate to the penalty imposed in similar cases.”¹¹⁵

The court states that it has previously found the (e)(11) aggravator alone sufficient to support a death sentence. It does not evaluate, however, (1) how many capital trials resulted in *life* sentences when the (e)(11) aggravator was found, or (2) how many death sentences were found *disproportionate* when the (e)(11) aggravator was found. In fact, when the court wrote this review, juries

reviewing court allowed itself to be so swayed, it would tend to deny the defendant before it the constitutional right to “individualized consideration” as that concept was expounded in *Lockett v. Ohio*. This is so because, a close reading of the actual records of cases identified as “similar” by a quantitative measure may reveal *factual distinctions* which make them legally dissimilar.

Id. (citations and internal quotation marks omitted).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* (emphasis added).

113. *See supra* Part II(A).

114. *State v. Maness*, 677 S.E.2d 796, 818 (N.C. 2009).

115. N.C. GEN. STAT. ANN. § 15A-2000(d)(2) (West Supp. 2013).

had found the (e)(11) aggravator in one quarter (two out of eight) of the cases in which the court had previously ruled the death sentence disproportionate.¹¹⁶

Likewise, the court states that it has never found a death sentence to be disproportionate when the jury found more than two aggravators, but it does not examine how many capital trials resulted in *life* sentences when the jury found more than two aggravators. In fact, a jury had returned a life sentence in at least one case after finding *four* aggravators.¹¹⁷ Reinforcing the court's lack of a systematic or consistent approach to comparative proportionality review, the court had actually cited that four-aggravator life sentence case in one of the eight cases in which it had found death disproportionate. It used the comparison between the case it was reviewing and the four-aggravator life case as support for its finding that death was disproportionate: "[T]he jury in *State v. Abdullah* recommended a life sentence despite having found four aggravating circumstances and only one unspecified mitigating circumstance. . . . The facts and circumstances of the instant case simply do not rise to the magnitude of those in . . . *Abdullah*."¹¹⁸

D. *Facially Inconsistent Record of Reversals for Disproportionality*

This lack of a meaningful process of review is borne out in the results of the reviews over the life of the statute. In the twelve years from 1977 to 1988, a period in which 127 people were sentenced to death, the North Carolina Supreme Court found seven death sentences disproportionate.¹¹⁹ In the next twelve years (1989–2000), however, although more than twice as many people (264) were sentenced to death, the court found *zero* death sentences disproportionate.¹²⁰ In the third twelve-year period after reinstatement (2001–2012), the court found one more death sentence disproportionate. (Fifty-five people were sentenced to death during that period.)¹²¹ Thus, in its first twelve

116. *State v. Bondurant*, 309 S.E.2d 170, 174–75, 181, 183 (N.C. 1983); *State v. Rogers*, 341 S.E.2d 713 (N.C. 1986), *overruled in part on other grounds by State v. Gaines*, 483 S.E.2d 396 (N.C. 1997), and *State v. Vandiver*, 364 S.E.2d 373 (N.C. 1988). The (e)(11) aggravator is defined as follows: "The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." N.C. GEN. STAT. ANN. § 15A-2000(e)(11) (West Supp. 2013).

117. *State v. Abdullah*, 306 S.E.2d 100, 101 (N.C. 1983).

118. *State v. Hill*, 319 S.E.2d 163, 171 (N.C. 1984) (citation omitted) (citing *Abdullah*, 306 S.E.2d 100).

119. *Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited Sept. 13, 2015) [hereinafter *Death Sentences by State and Year*]. The seven cases were *State v. Benson*, 372 S.E.2d 517 (N.C. 1988); *State v. Stokes*, 352 S.E.2d 653 (N.C. 1987); *Rogers*, 341 S.E.2d 713; *State v. Young*, 325 S.E.2d 181 (N.C. 1985); *State v. Hill*, 319 S.E.2d 163 (N.C. 1984); *Bondurant*, 309 S.E.2d 170; and *State v. Jackson*, 305 S.E.2d 703 (N.C. 1983).

120. *Death Sentences by State and Year*, *supra* note 119.

121. *Id.* The one case in this period in which the court found a death sentence disproportionate was *State v. Kemmerlin*, 573 S.E.2d 870 (N.C. 2002). On both Lexis Nexis and

years operating under the statute, the court found 5.51% of death sentences disproportionate, but in the next twenty-four years, it found 0.31% of death sentences disproportionate.¹²²

On its face, this inconsistent record suggests a dysfunctional process. More importantly, the U.S. Supreme Court has found the percentage of death sentences reversed to be a compelling factor in evaluating the constitutional sufficiency of a state's death penalty statutory scheme.¹²³ While not dispositive, North Carolina's record of reversals on disproportionality grounds suggests that the review is not faithfully and adequately being performed.

III.

NORTH CAROLINA'S PROPORTIONALITY REVIEW IS STILL CONSTITUTIONALLY REQUIRED AFTER *PULLEY*

As discussed in Part II, after *Gregg* it would seem clear that North Carolina's failure to perform comparative proportionality review violates not only its own statute but also the United States Constitution. In a subsequent decision, however, the U.S. Supreme Court made the matter more complicated by holding that comparative proportionality review is not always necessary. In *Pulley v. Harris*, the U.S. Supreme Court held that the Eighth Amendment does not always require comparative proportionality review in the imposition of a death sentence.¹²⁴ Some have taken *Pulley* to be a reversal of the Court's endorsement of comparative proportionality review in *Gregg* and to mean that comparative proportionality review is *never* required.¹²⁵ In fact, however, there is reason to believe that under the Constitution, North Carolina's scheme requires comparative proportionality review even after *Pulley*. Two distinct lines of evidence, laid out below, support this view. The crux of this article is that the second of these two lines of evidence, which consists of new evidence from the

Westlaw, the most recent North Carolina Supreme Court proportionality review of a death sentence appears in *State v. Phillips*, 711 S.E.2d 122 (2011). As in every other proportionality review since *Kemmerlin*, the court in *Phillips* states that it has found death disproportionate in eight cases, with *Kemmerlin* being the most recent. *Id.* at 154.

122. The author acknowledges that these percentages based on time period may lack some precision because, for example, not all of the appeals of those sentenced to death from 1977 to 1988 would have been heard by 1988. If anything, however, accounting for this lag time would increase the disparities among time periods because, if fewer than 127 appeals were heard from 1977 to 1988, the seven sentences found disproportionate during that time period would represent an even greater percentage of reviews performed during that period.

123. *Proffitt v. Florida*, 428 U.S. 242, 259 (1976) (“[A]ny suggestion that the Florida court engages in only cursory or rubber-stamp review of death penalty cases is totally controverted by the fact that it has vacated over one-third of the death sentences that have come before it.”).

124. *Pulley v. Harris*, 465 U.S. 37, 50–51 (1984).

125. See, e.g., Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (with Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1163 (2001) (stating that “*Pulley* made abundantly clear [that] comparative review is not required”); Huigens, *supra* note 15, at 1202 (“In the case of *Pulley v. Harris* the Court concluded that the comparative proportionality review that it had commended in *Gregg* and its companion cases was not constitutionally required.”).

Racial Justice Act cases, makes clear that this view is correct, and thus that the North Carolina Supreme Court's failure to adequately perform comparative proportionality review is unconstitutional.

The *Pulley* Court ruled only that comparative proportionality review was not required *in every instance* in order for a given state's capital punishment statutory scheme to be constitutional. The defendant in *Pulley* had challenged the lack of comparative proportionality review in California's death penalty scheme, and the Court rejected this challenge.¹²⁶ The Court noted that on the same day that it upheld Georgia's revised statute containing comparative proportionality review in *Gregg*, it also upheld Texas's revised statute absent comparative proportionality view in *Jurek v. Texas*¹²⁷ and Florida's revised statute, in which "the appellate court performs proportionality review despite the absence of a statutory requirement," in *Proffitt v. Florida*.¹²⁸ This, however, did not mean that comparative proportionality review would never be required, because, as the Court explained, each state's statutory scheme would have to be examined on its own merits.¹²⁹ The *Pulley* Court "made clear that comparative proportionality review would be required where a 'capital sentencing system is so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.'"¹³⁰ Most importantly, the *Pulley* Court recognized that the Supreme Court "take(s) statutes as we find them," and that "each distinct system must be examined on an individual basis."¹³¹

After *Pulley*, then, asking whether comparative proportionality review is constitutionally required in North Carolina is equivalent to asking whether North Carolina's system absent comparative proportionality review (with no substitute mechanism) would adequately ensure that death sentences are not arbitrary and discriminatory. The answer is that it would not, for two reasons. First, the language in North Carolina's Supreme Court precedents, even after *Pulley*,

126. *Pulley*, 465 U.S. at 43–44.

127. 428 U.S. 262 (1976).

128. *Pulley*, 465 U.S. at 44 (citing *Proffitt*, 428 U.S. 242).

129. *Id.* at 45 ("We take statutes as we find them. To endorse the statute as a whole is not to say that anything different is unacceptable. As was said in *Gregg*, '[w]e do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis.'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 195 (1976))).

130. *Comparative Proportionality Review*, *supra* note 90, at 14–15 (quoting *Pulley*, 465 U.S. at 51).

131. *Pulley*, 465 U.S. at 45 (quoting *Gregg*, 428 U.S. at 195). *See also* *Walker v. Georgia*, 555 U.S. 979, 980 (2008) (Stevens, J., statement respecting denial of certiorari). In challenging the "utterly perfunctory" comparative proportionality review performed by the Georgia Supreme Court, Justice Stevens wrote that the Court's assertion in *Pulley* that the Eighth Amendment does not require comparative proportionality review of every capital sentence, "was intended to convey our recognition of differences among the State's capital schemes and the fact that we consider statutes as we find them; it was *not* meant to undermine our conclusion in *Gregg* and *Zant* that such review is an important component of the Georgia scheme." *Walker*, 555 U.S. at 982–84 (emphasis added) (citation omitted).

makes clear that meaningful proportionality review is a primary mechanism through which the state purports to comply with the constitutional mandate to prevent discriminatory death sentences. Second, evidence recently brought forth by the Racial Justice Act cases demonstrates that the state has indeed failed to prevent discriminatory sentences when it has failed to follow its statute and perform the review.

A. Under North Carolina Supreme Court Precedent, Meaningful Proportionality Review Is a Primary Mechanism Under Which the State Purports to Comply with the Constitutional Mandate to Prevent Discriminatory Death Sentences

In defining its method of comparative proportionality review in *State v. Williams*, the North Carolina Supreme Court recognized the review's constitutional necessity, quoting both *Gregg*'s reasoning for finding Georgia's revised statute constitutional—"We believe that the use of these methods for comparison of 'similar cases' in our proportionality review 'substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury,'"¹³²—and *Furman*'s rationale for finding Georgia's earlier statute unconstitutional—"[W]e believe that the use of the pool of 'similar cases' which we announce today for purposes of our proportionality review provides a meaningful basis for distinguishing in a principled way the few cases in which the death penalty is imposed from the many cases in which it is not imposed."¹³³

Since *Williams*, and, more importantly, after *Pulley*, the North Carolina Supreme Court has continued to acknowledge the constitutional necessity of its comparative proportionality review. It sometimes notes this necessity explicitly:

Our determination of whether the sentence of death is excessive or disproportionate requires us to review all of the cases in the 'pool' of similar cases for comparison. Such a review eliminates "the possibility that a person will be sentenced to die by the action of an aberrant jury." We have previously classified the responsibility placed upon us by N.C.G.S. § 15A-2000(d)(2) to be as serious as any responsibility placed upon an appellate court. In carrying out our duties under the statute, we must be sensitive not only to the mandate of the Legislature, but also to the constitutional dimensions of our review.¹³⁴

132. *State v. Williams*, 301 S.E.2d 335, 356 (N.C. 1983) (emphasis added) (quoting *Gregg*, 428 U.S. at 206).

133. *Williams*, 301 S.E.2d at 355 (emphasis added) (citing *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Gregg*, 428 U.S. 153); cf. *Furman*, 408 U.S. at 312 ("[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.").

134. *State v. Kemmerlin*, 573 S.E.2d 870, 897-98 (N.C. 2002) (quoting *Gregg*, 428 U.S. at 206). See also *State v. Hill*, 319 S.E.2d 163, 170 (N.C. 1984) ("The purpose of proportionality review is to serve as a check against the capricious or random imposition of the death penalty. . . . In carrying out our duties under the statute, we must be sensitive not only to the mandate of our legislature but also to the constitutional dimensions of our review.").

More often, it does so implicitly, citing the core constitutional reasons for such review discussed in *Gregg*: “The purpose of proportionality review is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.”¹³⁵ “Proportionality review is intended to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.”¹³⁶ “The purpose of proportionality review is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury. . . . Proportionality review also acts as a check against the capricious or random imposition of the death penalty.”¹³⁷ “One purpose of proportionality review is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury. Another is to guard against the capricious or random imposition of the death penalty.”¹³⁸ “The purpose of our review is to eliminate ‘the possibility that a person will be sentenced to die by the action of an aberrant jury.’”¹³⁹

Further, the North Carolina Supreme Court has defended its proportionality review methods against charges of inadequacy by explicitly claiming the review’s constitutional sufficiency under the Eighth Amendment. Responding to a defendant’s “urg[ing the] Court to adopt several procedures to assist appellate review of the proportionality of the death sentence,” it stated: “[T]he review mandated by G.S. 15A–2000(d)(2) . . . provides a sufficient constitutional safeguard against the unconstitutional imposition of cruel and unusual punishment.”¹⁴⁰ Because North Carolina’s statute was modeled on Georgia’s,¹⁴¹ in taking it “as we find [it],”¹⁴² looking to the U.S. Supreme Court’s evaluation of the Georgia statute is especially useful. As noted in Part I.D, in upholding Georgia’s statute, the Court called the automatic state supreme court review of death sentences, including comparative proportionality review, “an important additional safeguard against arbitrariness and caprice.”¹⁴³ Perhaps more importantly, the Court used the existence of comparative proportionality review in Georgia’s statute to rebut *Gregg*’s specific claim “that the capital-sentencing procedures adopted by Georgia in response to *Furman* do not eliminate the dangers of arbitrariness and caprice in jury sentencing that were held in *Furman*

135. *State v. Badgett*, 644 S.E.2d 206, 223 (N.C. 2007).

136. *State v. Allen*, 626 S.E.2d 271, 288 (N.C. 2006) (citations and internal quotation marks omitted).

137. *State v. Lawrence*, 530 S.E.2d 807, 827–28 (N.C. 2000) (citations and internal quotation marks omitted).

138. *State v. Simpson*, 462 S.E.2d 191, 216–17 (N.C. 1995) (citations and internal quotation marks omitted).

139. *State v. Rogers*, 341 S.E.2d 713, 732 (N.C. 1986) (citations and internal quotation marks omitted), *overruled in part on other grounds by* *State v. Gaines*, 483 S.E.2d 396 (N.C. 1997), *and State v. Vandiver*, 364 S.E.2d 373 (N.C. 1988).

140. *State v. Pinch*, 292 S.E.2d 203, 229 (N.C. 1982) *overruled on other grounds by* *State v. Benson*, 372 S.E.2d 517 (N.C. 1988), *and State v. Robinson*, 443 S.E.2d 306 (N.C. 1994).

141. *See supra* Part I.D.

142. *Pulley v. Harris*, 465 U.S. 37, 45 (1984).

143. *Furman v. Georgia*, 408 U.S. 238, 250–51 (1972).

to be violative of the Eighth and Fourteenth Amendments.”¹⁴⁴ The Court noted Gregg’s argument “that the requirements of Furman are not met here because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case.”¹⁴⁵ The Court rejected that contention by saying that it “ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes.”¹⁴⁶ Given its similarity to, and history in relation to, the Georgia statute, the North Carolina statute, when taken “as we find it,” depends on comparative proportionality review to be constitutional.

In accordance with this, the North Carolina Supreme Court has explicitly stated that even after *Pulley* its proportionality review has constitutional dimensions:

Proportionality review is intended to serve as a check against the capricious or random imposition of the death penalty. By requiring this Court to compare penalties imposed in similar cases, the legislature has provided us with a mechanism for addressing and, insofar as we are able, eliminating disparities in capital sentencing that might occur because of, for example, improper racial, sexual, socioeconomic, or regional discrimination. Although comparative proportionality review is not always required by the federal Constitution, *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed.2d 29 (1984), it promotes consistency in capital sentencing.¹⁴⁷

In (1) noting that proportionality review is not *always* required by the Constitution; (2) juxtaposing that statement with the consistency in capital sentencing that the review provides; and (3) noting that “the review is intended to serve as a check against the capricious or random imposition of the death penalty,” as required by *Furman* and *Gregg*, the North Carolina Supreme Court clearly acknowledged the post-*Pulley* constitutional dimensions of the review.

B. Evidence of Arbitrary and Discriminatory Death Sentencing in North Carolina: Fruits of the Racial Justice Act (2012)

As discussed in Part I.C, racial discrimination in North Carolina death sentences was pervasive leading up to *Furman*. Since *Furman* and *Gregg*, some

144. *Gregg v. Georgia*, 428 U.S. 153, 200 (1976).

145. *Id.* at 203.

146. *Id.* (“Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.”).

147. *State v. Stokes*, 352 S.E.2d 653, 663 (N.C.1987) (citations and internal quotation marks omitted).

of these statistics have slightly improved, but the death penalty is still used significantly disproportionately against African Americans in North Carolina. Forty-nine percent of those sentenced to death have been black, and forty-four percent white.¹⁴⁸ Moreover, the discrepancy with respect to the race of the victim has remained almost identical to that before *Furman*, with at least one white victim in 67.3% of death sentences and exclusively white victims in 64.2%.¹⁴⁹

The continuation of racially discriminatory sentencing after *Furman* should come as no surprise. North Carolina's statute allows race to enter the process through the discretion it still leaves to the prosecutor and the jury. For a jury to have the option to sentence a defendant to death, it must find at least one statutory aggravating circumstance.¹⁵⁰ In order for the jury to find that circumstance, the prosecutor must charge it (i.e., ask the jury to find it).¹⁵¹ Because "aggravating factors are not always clearly present in the facts of the case for charging purposes[, t]he effort to develop marginal or non-obvious aggravators may be either vigorously or tepidly pursued," leaving a broad range of prosecutorial discretion that allows race to enter.¹⁵² While there are cases in which "the jury exercises virtually no discretion because the strength or weakness of aggravating factors usually suggests that only one outcome is appropriate," there are also "cases reflecting an 'intermediate' level of aggravation, in which the jury has considerable discretion in choosing a sentence."¹⁵³ There is evidence that it is in these "intermediate" cases that race can play the greatest role.¹⁵⁴ Moreover, some of the aggravating factors necessary for a death sentence are inherently ambiguous, giving prosecutors and juries even more discretion in charging and finding them. The clearest example

148. Kotch & Mosteller, *supra* note 33, at 2088.

149. *Id.* at 2099. Given the proportions of white and black people in North Carolina's population, these statistics may not look problematic on their face. Kotch and Mosteller explain, however, why they are: "Since slightly more than 70% of the state's population is white, the fact that a heavy majority of victims are white among those sentenced to death and executed in North Carolina should not come as a surprise. In addition, the vast majority of murders occur between members of the same race (intra-racial crime) rather than with victims and defendants from different racial groups (inter-racial). Thus, one would normally expect that most white defendants would have murdered white victims, and most African American defendants murdered other African Americans and not whites. However, since African American and other minority defendants predominate on death row, the overall heavy majority of white victims suggests a disparate impact based on race." *Id.* at 2097-98.

150. N.C. GEN. STAT. ANN. § 15A-2000(b) (West Supp. 2013).

151. Kotch & Mosteller, *supra* note 33, at 2086.

152. *Id.*

153. *McCleskey v. Kemp*, 481 U.S. 279, 325 (1987) (Brennan, J., dissenting) (citing Baldus, Pulaski, & Woodworth, *supra* note 41).

154. *Id.* ("In such cases, death is imposed in 34% of white-victim crimes and 14% of black-victim crimes, a difference of 139% in the rate of imposition of the death penalty.").

is the especially ambiguous and broadly interpreted “especially heinous, atrocious, or cruel” aggravating circumstance.¹⁵⁵

Until recently, however, proving racial discrimination in the application of the death penalty has remained nearly impossible. In the past few years, however, new evidence of the role of race in North Carolina death sentences has come to light. This evidence can best be understood through a description of the groundbreaking legislative and judicial events under which it arose.

1. The Racial Justice Act Cases Have Produced New Evidence that Race Continues to Play a Significant Role in the Application of North Carolina's Death Penalty

Since 1987, the major hurdle to those attempting to bring claims of race discrimination in capital sentencing has been the U.S. Supreme Court's decision in *McCleskey v. Kemp*.¹⁵⁶ Despite its rulings in *Furman* and *Gregg* making clear that capital punishment statutes allowing for racial discrimination violated the Constitution, the Court in *McCleskey* made such discrimination nearly impossible to prove. The Court held that statistics of racial disparities in death penalty sentencing alone were not enough to show a violation of the Equal Protection Clause of the Fourteenth Amendment or the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Court wrote that in order “to prevail under the Equal Protection Clause, [a defendant] must prove that the decisionmakers in *his* case acted with discriminatory purpose.”¹⁵⁷ The Court rejected McCleskey's equal protection claims, refusing to, based on statistics, “infer a discriminatory purpose on the part of the State of Georgia” or any of the decisionmakers in McCleskey's case.¹⁵⁸ Addressing McCleskey's Eighth Amendment cruel and unusual punishment claim, the Court held that “[s]tatistics at most may show only a likelihood that a particular factor extended into some decisions.”¹⁵⁹ Given the difficulty of finding evidence of overt racial intent by individual actors in a criminal prosecution, and thus the importance of statistical evidence, *McCleskey* has served as a massive obstacle to relief for defendants whose sentences were impacted by racial bias.¹⁶⁰

155. Kotch & Mosteller, *supra* note 33, at 2083–84 (describing the treatment of the “especially heinous, atrocious, or cruel” aggravating circumstance by the U.S. Supreme Court and North Carolina Supreme Court); N.C. GEN. STAT. ANN. § 15A-2000(e)(9) (West Supp. 2013).

156. 481 U.S. 279.

157. *Id.* at 292.

158. *Id.* at 299, 297.

159. *Id.* at 308. The Court further stated: “At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . [T]he Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.” *Id.* at 312–13.

160. See, e.g., Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 103 (2012) (“The decision was a serious setback to those challenging racial discrimination in the criminal justice system, and the basis of the opinion was viewed by the courts

In 2009, the North Carolina legislature attempted to statutorily correct the problems caused by *McCleskey* by passing the Racial Justice Act.¹⁶¹ The Act stated in part,

If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.¹⁶²

The Act was most groundbreaking in its requirements for proof of discrimination:

N.C. Gen. Stat. § 15A-2011. Proof of racial discrimination.

(a) A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.

(b) Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial

as sufficiently broad that it stopped in their tracks innovative development of statistics-based remedies.”).

161. See Kotch & Mosteller, *supra* note 33, at 2112–13 (“[W]ithout this legislation, previous attempts to raise this issue would have been to no avail because of the *McCleskey* decision. . . . The *McCleskey* decision . . . said that while statistics may show race discrimination, it doesn’t rise to the level of being a constitutional violation of the equal protection clause and specifically directed that if states wanted to provide this additional protection and making it a means by which someone could prove racial discrimination, then they could do it. And that’s what we’re doing here today. I want to step back and explain, very quickly, where this idea of using statistics to prove race discrimination comes from and why it’s needed. Race discrimination is very hard to prove. Rarely, particularly in today’s time, do people outright say, ‘I am doing this because of the color of your skin.’ Imagine if our civil rights act that was passed in ‘64 said that the only way that you can prove race discrimination is that kind of evidence—an admission by the person engaging in racial discrimination. We would have had very little change in our society and culture in terms of the hiring practices. What we did in the civil rights act in ‘64 is said, ‘In addition to using direct evidence in proving discrimination, you could use statistics.’ And, in fact, what we did, and there’s a parallel to what we’re doing in this bill.” (quoting Sen. Doug Berger, Senate Floor Debate on Racial Justice Act (May 14, 2009) (transcript on file with the North Carolina Law Review))).

For a description of the process that led to the passage of the Racial Justice Act, see Barbara O’Brien & Catherine M. Grosso, *Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go Where the *McCleskey* Court Wouldn’t*, 2011 MICH. ST. L. REV. 463 (2011).

162. North Carolina Racial Justice Act, § 15A-2012(a)(3), S.L. 2009-464, 2009 N.C. Sess. Laws 1213, 1214 (repealed 2012).

division, or the State at the time the death sentence was sought or imposed may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:

- (1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.
- (2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.
- (3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.¹⁶³

As scholar Robert Mosteller has explained, the Racial Justice Act “eliminate[d] the requirement to prove intentional discrimination against the particular defendant.”¹⁶⁴ Instead, it required a defendant to show that race was a “significant factor” in decisions to seek or employ the death penalty in prosecutorial units relevant to the defendant’s case, and it allowed the defendant to use statistical evidence to make this showing.¹⁶⁵ Further, it “allow[ed] statistical evidence to shift the burden of production to the prosecution by a *prima facie* showing of discrimination.”¹⁶⁶ If the prosecution was unable to rebut that *prima facie* case, the defendant was to be sentenced to life without the possibility of parole.¹⁶⁷

On April 20, 2012, Marcus Reymond Robinson became the first defendant to obtain relief under the RJA. In a landmark opinion by Cumberland County Superior Court Judge Gregory Weeks, the court found that race was a significant factor in Robinson’s death sentence because it was a significant factor in the state’s use of peremptory strikes statewide, in his judicial division, in his county, in his prosecutorial district, *and* in his individual trial.¹⁶⁸ The court relied on

163. § 15A-2011(a)–(b) (2009) (amended 2012) (repealed 2013).

164. Mosteller, *supra* note 160, at 118–21 (discussing North Carolina Racial Justice Act § 15A-2011 (2009) (repealed 2013); § 15A-2012 (2009) (repealed 2012)).

165. § 15A-2011(a)–(b) (2009) (amended 2012) (repealed 2013); § 15A-2012(a)(3) (2009) (repealed 2012). *See also* Mosteller, *supra* note 160, at 120 (citing § 15A-2011(b) (2009) (amended 2012) (repealed 2013)).

166. Mosteller, *supra* note 160, at 121.

167. *Id.*

168. Order Granting Motion for Appropriate Relief at 160–65, *State v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012) [hereinafter *Robinson Order*], *available at* https://www.aclu.org/files/assets/marcus_robinson_order.pdf. The Court further held “that a defendant need not prove intentional discrimination to prevail under the RJA,” *id.* at 35, but, as discussed later in this article, also found that intent was present in Robinson’s case.

both statistical and non-statistical evidence. The key statistical evidence on which the court relied was a study on jury selection in North Carolina by Barbara O'Brien and Catherine Grosso, professors at the Michigan State University (MSU) College of Law.¹⁶⁹

The study found that, statewide, black venire members¹⁷⁰ were 2.05 times more likely to be struck than white venire members, and that “the probability of that disparity occurring in a race-neutral jury selection process is less than one in ten trillion. . . . [T]he State’s statistical expert . . . concurred that this disparity is statistically significant.”¹⁷¹ The study found similar statistically significant disparities in the judicial division, prosecutorial district, and county in which Robinson’s trial took place, as well as in his trial itself.¹⁷² The controlled regression analyses demonstrated that these disparities were not affected by “factors that correlate with race but that may themselves be race-neutral,”¹⁷³ and the court found that “the State has not rebutted these findings.”¹⁷⁴ Thus, the court found that race was “a significant factor in decisions to exercise peremptory challenges during jury selection by prosecutors when seeking to impose death sentences in capital cases” at the state, judicial division, and county levels, and in Robinson’s individual trial.¹⁷⁵ Further, while as noted above, the RJA did not require a finding of intentional discrimination, the court found that the statistical evidence of disparities, both before and after being adjusted for non-racial factors, was so stark as to permit an inference of intentional discrimination by prosecutors statewide and at every applicable judicial sublevel including the judicial division, the county, and Robinson’s individual case.¹⁷⁶

The court also found Robinson’s non-statistical evidence to be “convergent with the MSU Study.”¹⁷⁷ This evidence included affidavits from prosecutors

169. *Id.* at 44; Barbara O’Brien & Catherine M. Grosso, Report on Jury Selection Study (2011), available at <http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1330&context=facpubs>. The statewide study consisted of two parts:

(1) a complete, unadjusted study of race and strike decisions for 7,421 venire members drawn from the 173 proceedings for the inmates of North Carolina’s death row in 2010; and (2) a regression study of a 25% random sample drawn from the 7,421 venire member data set that analyzed whether alternative explanations impacted the relationship between race and strike decisions. The MSU Study also conducted a regression study of 100% of the venire members from the Cumberland County cases.

Robinson Order, *supra* note 168, at 44.

170. A “venire member” is a potential juror. The venire is the panel from which jurors are chosen.

171. *Robinson* Order, *supra* note 168, at 58.

172. *Id.* at 58–69.

173. *Id.* at 71–88.

174. *Id.* at 107.

175. *Id.* at 70, 87, 95, 108, 162–64.

176. *Id.* at 70–71, 87–88, 95, 108, 164–66.

177. *Id.* at 159–60.

about allegedly race-neutral reasons for striking black jurors when similar non-black jurors were passed,¹⁷⁸ trial transcripts of voir dire,¹⁷⁹ and training materials given to prosecutors “to provide ‘race-neutral’ reasons for a peremptory strike against an African-American venire member.”¹⁸⁰ The court concluded, “Robinson’s non-statistical evidence amply supports a finding that race has been a significant factor in prosecutor strikes of African-American citizens for two decades. As well, Robinson’s case examples in particular show that explanations offered by prosecutors for their strikes of African-Americans are pretextual.”¹⁸¹

The court’s discussion of the non-statistical evidence spanned fifty-one pages,¹⁸² with a large portion focused on case examples of discrimination in jury selection in capital cases.¹⁸³ The court found that the examples constituted both “some evidence that race played a role in the exercise of peremptory strikes by North Carolina prosecutors and some evidence of intentional discrimination.”¹⁸⁴ The court described nine categories of pretextual strikes of African Americans during jury selection. The first category, “Cases in which prosecutors struck African-American venire members because of their membership in an organization or association with an institution that is historically or predominantly African-American,”¹⁸⁵ included a case in which a prosecutor attempted to strike a venire member based on his membership in the NAACP¹⁸⁶ and a case in which a prosecutor struck a venire member in part because she was a graduate of North Carolina State A&T University.¹⁸⁷

The second category, “Instances when prosecutors in North Carolina and in Cumberland County struck African-American jurors after asking them explicitly race-based questions,”¹⁸⁸ included a case in which the prosecutor directed questions about the potential impact of racial bias only to the black venire members, Melody Hall and Chalmers Wilson, and did not ask those questions to non-black venire members. In addition, the prosecutor specifically asked Hall, “Would the people . . . you see every day, your black friends, would you be the

178. *Id.* at 119–55 (explaining the process through which the affidavits were obtained and then detailing the court’s findings of racially discriminatory preemptory strikes based on those affidavits, trial transcripts, and testimony).

179. *Id.*

180. *Id.* at 157.

181. *Id.* at 159.

182. *Id.* at 109–60.

183. *Id.* at 132–55.

184. *Id.* at 132.

185. *Id.*

186. *Id.* (citing Transcript of Trial Proceedings at 98, 107–08, *State v. Fletcher*, Nos. 94 CRS 6290, 6291, 6671 (N.C. Super. Ct. Rutherford Cnty. 1996)).

187. *Id.* at 132–33 (citing Transcript of Trial Proceedings at 68–72, 83, 89, *State v. Robinson*, Nos. 86 CRS 207, 225, 390 (N.C. Super. Ct. Guilford Cnty. 1992)).

188. *Id.* at 133.

subject of criticism if you sat on a jury that found these defendants guilty of something this serious?”¹⁸⁹

In another case, the prosecutor asked a potential juror about a prior driving offense, “Is there anything about the way you were treated . . . as a young black male . . . that in any way caused you to feel that you were treated with less respect than the respect you felt you were entitled to . . . ?”¹⁹⁰

“Instances when prosecutors in North Carolina and in Cumberland County have subjected African-American venire members to different questioning during voir dire”¹⁹¹ included a prosecutor’s singling out an African American venire member for questions about her son’s father and whether he was paying child support¹⁹² and a prosecutor’s singling out an African American venire member for questioning about his familiarity with Haile Selassie and Bob and Ziggy Marley.¹⁹³

“Instances when prosecutors in North Carolina and Cumberland County have struck African-American venire members for patently irrational reasons”¹⁹⁴ included striking a venire member in part because he was a U.S. Army veteran,¹⁹⁵ striking a venire member in part because “he answered questions ‘Yeah’ 6 times during questioning,”¹⁹⁶ and striking a venire member because he “did not feel like he had been a victim even though his car had been broken into at Fort Bragg and his CD player stolen.”¹⁹⁷ The court found that “[t]he reasons offered by prosecutors in these four cases lack any rational basis. The notion that a citizen who has served his country is – by virtue of that fact – unacceptable for jury service is particularly troubling to the Court.”¹⁹⁸

“Instances when prosecutors in North Carolina and in Cumberland County have struck African American venire members for pretextual reasons based on demeanor”¹⁹⁹ highlighted four cases in which trial courts had found purportedly race-neutral explanations from the State regarding a venire member’s demeanor

189. *Id.* (quoting Transcript of Jury Selection at 340–42, 365–66, *State v. Barnes*, Nos. 92 CRS 11151, 11152, 11970, 11971, 11972, 11154, 11155, 11976, 11977, 11978, 11149, 11150, 11973, 11974, 11975 (N.C. Super. Ct. Rowan Cnty. 1994)).

190. *Id.* at 133–34 (quoting Transcript of Jury Selection at 2073, *State v. Golphin*, Nos. 97 CRS 47312, 47314 (N.C. Super. Ct. Cumberland Cnty. 1998) [hereinafter *Golphin* Transcript]).

191. *Id.* at 134.

192. *Id.* (citing Transcript of Record at 984–86, *State v. Sanders*, No. 81 CRS 2850 (N.C. Super. Ct. Transylvania Cnty 1995)).

193. *Id.* at 135 (citing *Golphin* Transcript, *supra* note 190, at 2083–84).

194. *Id.*

195. *Id.* (citing Affidavit of Nicholas Vlahos, *State v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Cumberland Cnty. 2012)).

196. *Id.* (citing Transcript of Record at Vol. IV, 44–54, *State v. Thibodeaux*, 98 CRS 17279 (N.C. Super. Ct. Forsyth Cnty. 1999)).

197. *Id.* (quoting Affidavit of Charles Scott, *Robinson*, No. 91 CRS 23143).

198. *Id.* at 136.

199. *Id.*

to be pretextual.²⁰⁰ In one case a prosecutor indicated his reason for striking a venire member was that her “body language, lack of eye contact, laughter, and hesitancy established ‘physical indications of an insincerity in her answers,’” a reason the trial court found neither credible nor race-neutral.²⁰¹ In another, the prosecutor attempted to strike a potential juror because he “folded his arms and sat back in the chair and away,” sometimes closed his eyes and blinked, and seemed “evasive” and “defensive.”²⁰² The trial judge found the proffered reasons pretextual, believing to the contrary that the venire member’s demeanor indicated he was determined to “make sure he understood exactly what question was being posed before he answered.”²⁰³

“Differential treatment of African-American venire members”²⁰⁴ described “numerous instances when prosecutors throughout North Carolina have struck African-American venire members for a purportedly objectionable characteristic but accepted non-black venire members with comparable or even identical traits.”²⁰⁵ In one such instance, a prosecutor struck a black venire member who, when asked if he could impose the death penalty, spoke very quietly and said, “Well, in some cases,” and “Yes, I think so,” but accepted a non-black member who also spoke softly and said, “Yes, I think I could”; a non-black member who said, “I guess I could. Yes”; and a non-black member who said, “I think so.”²⁰⁶ In another case, the prosecutor struck a black venire member because she had worked in the home of defense counsel for a brief time (at most three months) twenty-five years earlier (when defense counsel was a child, and the venire member had had no contact with defense counsel or the family since), but accepted non-black venire members who had retained defense counsel fifteen or sixteen years earlier for a criminal matter and twelve years earlier for a house closing, respectively.²⁰⁷ Similarly, in another case a prosecutor struck a black venire member because defense counsel had represented her ex-husband in their divorce fifteen years earlier, but the State accepted a non-black venire member whose wife defense counsel had represented in her divorce from her former husband only a year earlier, and whom she had recently hired to do a prenuptial

200. *Id.*

201. *Id.* (quoting Transcript of Superior Court Hearing, October 24, 1997 at 50–51, 75–77, *State v. Fowler*, Nos. 96 CRS 2809, 2810, 7490 (N.C. Super. Ct. Mecklenburg Cnty. 1997)).

202. *Id.* at 137 (quoting Transcript of Record at 445, *State v. Parker*, No. 96 CRS 4093 (N.C. Super. Ct. Cumberland Cnty. 1998) [hereinafter *Parker* Transcript]).

203. *Id.* (quoting *Parker* Transcript, *supra* note 202, at 450–51, 455).

204. *Id.*

205. *Id.*

206. *Id.* at 138–39 (quoting Affidavit of Gregory Clement Butler, *State v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Cumberland Cnty. 2012) [hereinafter *Butler* Affidavit]); Transcript of Record at 245–49, 526, 538–39, 553, 579, *State v. Barden*, Nos. 98 CRS 3716, 3718 (N.C. Super. Ct. Sampson Cnty. 1999)).

207. *Id.* at 139 (citing Transcript of Trial at 265–66, 456–58, *State v. Anderson*, Nos. 98 CRS 9949, 11355 (N.C. Super. Ct. Craven Cnty. 1999)).

agreement.²⁰⁸ In yet another case, the prosecutor struck a black venire member in part because she was a teacher but accepted two non-black venire members who were teachers.²⁰⁹ The court described numerous other examples.²¹⁰

“Instances where the prosecutor’s characterization of the voir dire answers of African-American jurors was inaccurate or misleading”²¹¹ included a case in which the prosecutor struck a venire member because she expressed hesitancy about the death penalty, when in fact the record showed that after initial confusion about the prosecutor’s questions she “repeatedly and unequivocally expressed her belief in the death penalty and willingness to follow the law.”²¹² In another case the prosecutor struck a venire member allegedly because she would not impose the death penalty in a case where the defendant was provoked,²¹³ when in fact the record showed that she “supported the death penalty except in cases of accident or unintentional murder. She expressed a willingness to follow the law and never spoke of provocation.”²¹⁴

“Instances when the prosecutor relied on improper, unconstitutional reasons for striking African-American venire members other than race, namely gender”²¹⁵ included cases in which African American women were struck because the State was “looking for strong male jurors”²¹⁶ and was “looking for male jurors and potential foreperson (sic),”²¹⁷ respectively. These instances led the court to find that the prosecutor’s statements “constituted some evidence of a willingness to consciously and intentionally base strike decisions on discriminatory reasons, and some evidence that race was a significant factor in prosecutor strike decisions.”²¹⁸

Finally, the court described “[i]nstances when prosecutors in North Carolina were unable to identify race-neutral reasons for striking African-American venire members.”²¹⁹

208. *Id.* (citing Affidavit of Michael Dean Maulsby, *State v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Cumberland Cnty. 2012); Transcript of Record at 265, 517, *State v. Hyde*, Nos. 96 CRS 21443, 21444, 21445, 21477 (N.C. Super. Ct. Onslow Cnty. 1998)).

209. *Id.* at 140 (citing Affidavit of Thomas M. King, *Robinson*, No. 91 CRS 23143; Transcript of Record at 539, 547–48, 772–74, 791, 793–95, *State v. Campbell*, Nos. 92 CRS 9558, 1083–40 (N.C. Super. Ct. Rowan Cnty 1993)).

210. *Id.* at 137–49.

211. *Id.* at 149–52.

212. *Id.* at 150–51 (citing Affidavit of William D. Wolfe, *Robinson*, No. 91 CRS 23143; Transcript of the Motions Hearing at 272–83, *State v. Jennings*, No. 89 CRS 9322 (N.C. Super. Ct. Wilson Cnty. 1990)).

213. *Id.* at 151 (citing Affidavit of Paul Jackson, *Robinson*, No. 91 CRS 23143).

214. *Id.* (citing Transcript of Record at 1476–88, *State v. Guevara*, Nos. 95 CRS 12696, 12695 (N.C. Super. Ct. Johnston Cnty. 1996)).

215. *Id.* at 152.

216. *Id.* at 152–53 (citing Butler Affidavit, *supra* note 206).

217. *Id.* at 153 (citing Butler Affidavit, *supra* note 206).

218. *Id.* at 152–53.

219. *Id.* at 153.

The court also noted evidence that prosecutors received training from the Conference of District Attorneys “focused on how to avoid a finding of a *Batson* violation in case of an objection by opposing counsel” and evidence that prosecutors used these training materials during jury selections to offer race-neutral reasons that were pretextual.²²⁰ In an excerpt from the jury selection in one case, the court recounted, “The prosecutor told the judge ‘. . . just to reiterate, those three categories for *Batson* [sic] justification we would articulate is (sic) the age, the attitude of the defendant (sic) and the body language.’”²²¹ The court continued:

These reasons are set out as ‘justifications’ 3, 4, and 5 in the training materials given to prosecutors at a capital case seminar on jury selection in March of 1995. The Court finds that this evidence is circumstantial evidence that race was a significant factor in the exercise of peremptory strikes by prosecutors in North Carolina.²²²

In 2012, a legislature that had changed party control from Democrat to Republican passed amendments to the Racial Justice Act (over the veto of the Democratic governor who had signed the original) that the Act’s supporters said “gutted” it.²²³ On July 2, 2012, the amended Racial Justice Act was enacted into law. Three changes significantly limited the RJA’s scope. First, under the amended RJA, a *prima facie* showing that race was a significant factor in the *state* or in the *judicial division* was insufficient. For relief under the amended RJA, the defendant had to prove race was a significant factor in his *trial*, the *county*, or the *prosecutorial district*.²²⁴ Second, the amended RJA stated that statistical evidence alone was not enough to show that race was a significant factor.²²⁵ Third, while the original RJA did not contain a time restriction, the amendments stated that the court must find race was a significant factor “at the time the [defendant’s] death sentence was sought or imposed.”²²⁶ Still, on

220. *Id.* at 156–57.

221. *Id.* at 157 (quoting *Parker* Transcript, *supra* note 202, at 447).

222. *Id.* (citing *Parker* Transcript, *supra* note 202, at 443–455).

223. Mosteller, *supra* note 160, at 105–06; Gary Robertson, *Veto Override Scuttles N.C. Racial Justice Act*, CHARLOTTE POST (July 3, 2012), <http://www.thecharlottepost.com/index.php?src=news&refno=4765>; Craig Jarvis, *Lawmakers Override Veto of Racial Justice Act Revamp*, NEWS & OBSERVER (July 3, 2012), <http://www.newsobserver.com/2012/07/03/2174838/senate-overrides-veto-of-racial.html>; Sarah Preston, *North Carolina’s Historic Racial Justice Act Gutted*, ACLU (July 3, 2012, 2:42 PM), <https://www.aclu.org/blog/capital-punishment-racial-justice/north-carolinas-historic-racial-justice-act-gutted>.

224. Act to Amend Death Penalty Procedures, § 15A-2011(a) & (c), S.L. 2012-136, 2012 N.C. Sess. Laws 471, 471 (amending North Carolina Racial Justice Act, § 15A-2011, S.L. 2009-464, 2009 N.C. Sess. Laws 1213, 1214) (repealed 2013).

225. § 15A-2011(e) (2012) (repealed 2013).

226. § 15A-2011(a) (2012) (repealed 2013) (defining “at the time the death sentence was sought or imposed” as “the period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence”).

December 13, 2012, despite these restrictions, the Superior Court for Cumberland County granted relief to three defendants under the amended RJA: Tilmon Golphin, Christina Walters, and Quintel Augustine.²²⁷

While the court's analysis included the statistical evidence from the same study presented in *Robinson*,²²⁸ as well as other evidence, the court's "conclusion [was] based primarily on the words and deeds of the prosecutors involved in Defendants' cases."²²⁹ In a testament to the power of the Racial Justice Act, even as amended, to expose evidence of racism in the capital system, the court wrote: "In the writings of prosecutors long buried in case files and brought to light for the first time in this hearing, the Court finds powerful evidence of race consciousness and race-based decision making."²³⁰ Former Cumberland County prosecutors Margaret B. Russ and Calvin W. Colyer had each prosecuted numerous murder and capital cases during their nearly twenty-five-year careers. Russ had prosecuted Golphin, Waters, and Augustine; Colyer had prosecuted Augustine and Golphin.²³¹

With regard to Colyer, the court found several pieces of evidence significant. First was his race-based jury selection research and notes in *Augustine*. His six pages of "Jury Strikes" notes, which he prepared before jury selection and used during jury selection, focused disproportionately on African Americans.²³² He also designated several people on the list as "blk," which he admitted meant black, but never designated anyone on the list as white.²³³

The court also found Colyer focused on race in a very different way when selecting juries for the capital prosecutions of two white supremacist "skinheads," Malcolm Wright and James Burmeister.²³⁴ While Colyer struck four black venire members in *Golphin* and five black venire members in *Augustine*,²³⁵ in *Burmeister*, he and his co-counsel, John W. Dickson, "used nine of 10 strikes to excuse non-black potential jurors. They struck one black venire member and passed eight. In *Wright*, Colyer and Dickson used 10 of 10 strikes against non-black venire members. The State struck not a single black venire

227. Order Granting Motions for Appropriate Relief at 2, *State v. Golphin*, Nos. 97 CRS 47314–15 (N.C. Super. Ct. Dec. 13, 2012) [hereinafter *Golphin* Order] (citing Act to Amend Death Penalty Procedures § 15A-2011(a), (c) (2012) (amending North Carolina Racial Justice Act § 15A-2011 (2009)) (repealed 2013)), available at https://www.aclu.org/files/assets/rja_order_12-13-12.pdf.

228. *Id.* at 136.

229. *Id.* at 3.

230. *Id.*

231. *Id.* at 47–48.

232. *Id.* at 50–51 (noting that, while "African Americans made up approximately 14 percent of the population of the county in which Augustine was tried, [o]f the potential jurors for whom race could be determined, more than 40 percent were African Americans" and "nine of the 10 neighborhoods and street designations listed on the 'Jury Strikes' notes were all inhabited predominantly by African Americans.").

233. *Id.* at 51–52.

234. *Id.* at 54–59.

235. *Id.* at 49.

member in *Wright*.²³⁶ The court stated that “*Burmeister* and *Wright* are complete anomalies. They stand in stark contrast to Colyer and Dickson’s claim that they approached voir dire the same way in every case.”²³⁷ Further, unlike in *Augustine* and *Golphin*, “in *Burmeister* and *Wright*, Colyer and Dickson consistently passed black venire members with significant misgivings about the death penalty and/or involvement with the criminal justice system.”²³⁸ The court found this evidence to “undermine[] [Colyer’s] claim that, in all cases, he consistently bases strikes on death penalty reservations, and not on race.”²³⁹ All told, the court concluded from its review of the evidence and testimony regarding *Burmeister* and *Wright*, that in Colyer’s and Dickson’s strike decisions in those cases, “the salient fact, the determining fact, could only be race.”²⁴⁰

The court also offered five examples, unrebutted by the state, of Colyer’s disparate treatment of black jurors: instances of his stated reason for striking a black juror being equally applicable to a non-black juror who was not struck.²⁴¹

With respect to prosecutor Russ, the evidence was potentially even more damning, as is apparent from the court’s introduction of its review of that evidence:

[T]he Court will review the following evidence: an utter lack of independent recollection of her strikes and resulting vague testimony concerning her explanations, Russ’ denial of misconduct in a case reversed by the Court of Appeals, a similar denial of wrongdoing when she violated *Batson*, Russ’ clear reliance on a prosecution training “cheat sheet” to circumvent *Batson*, her false testimony concerning her consultation with counsel for the State, her shifting explanations for strikes on black venire members, and finally, her racially-disparate treatment of black and non-black venire members.²⁴²

One of the most compelling pieces of evidence was Russ’s reliance on a “cheat sheet” designed to help prosecutors defeat *Batson* challenges.²⁴³ Among the materials handed out at a trial advocacy course conducted by the North Carolina Conference of District Attorneys and called *Top Gun II*, which Russ attended, was a one-page handout titled “*Batson* Justifications: Articulating Juror Narratives.”²⁴⁴ The handout consisted of “a list of reasons a prosecutor might

236. *Id.* at 56. “Excusing” a juror is the same as striking her. “Passing” a juror is allowing her to stay in the pool, i.e., not striking her.

237. *Id.*

238. *Id.* at 57.

239. *Id.* at 58.

240. *Id.* at 59.

241. *Id.* at 66–67.

242. *Id.* at 68.

243. *Id.* at 73–77.

244. *Id.* at 73.

proffer in response to a *Batson* objection.”²⁴⁵ The court determined from reading the transcript of a 1998 capital case, *State v. Parker*, that “Russ utilized the *Top Gun II* ‘cheat sheet’ in attempting to justify her strike of African American venire member Bazemore.”²⁴⁶ “The explanations Russ offered . . . track this list, even using some of the identical language from the handout.”²⁴⁷ The court found that “during the colloquy with the trial judge, Russ used language and unwieldy phrases that leave little doubt that she was reading from the handout”:

At one point, Russ said, “Judge, just to reiterate, those **three categories** for *Batson justification* we would **articulate** is the age, the attitude of the defendant (sic) and the body language.” . . . Later, Russ referred to “body language and attitude” as “*Batson justifications, articulable reasons* that the state relied upon.” At another point, after the trial judge asked Russ to show him case law concerning demeanor-based reasons, Russ said, “Judge, I have the summaries here. I don’t have the law with me.” It is apparent to the Court that the so-called “summaries” included the *Top Gun II* handout and that Russ was unwilling to share that handout with the trial judge.²⁴⁸

The following legislative session, a legislature that had shifted even farther to the right repealed the Racial Justice Act, and the recently elected Republican governor signed the repeal into law.²⁴⁹

245. *Id.*

246. *Id.* at 71–73.

247. *Id.* at 74. According to the court:

The categories included in relevant part:

Age – Young people may lack the experience to avoid being misled or confused by the defense

Attitude – air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney

Body Language – arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies

Juror Responses – which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination

The explanations Russ offered in *Parker* track this list, even using some of the identical language from the handout. As already discussed, Russ began her attempted justification of the Bazemore strike by citing Bazemore’s age. She then moved to his “body language” and noted that Bazemore “folded his arms,” and sat back in his chair. Russ then described Bazemore as “evasive” and “defensive” and said he gave “basically minimal answers.”

Id.

248. *Id.* at 74–75.

249. *Racial Justice Act Repealed by North Carolina Lawmakers*, HUFFINGTON POST (June 19, 2013, 8:29 PM), http://www.huffingtonpost.com/2013/06/19/racial-justice-act-repealed_n_3469039.html; Cassandra Stubbs, *In the Battle of Racial Bias vs. Racial Justice in North Carolina, Governor Insists on Bias*, AM. CIV. LIBERTIES UNION (June 21, 2013, 1:32 PM), <https://www.aclu.org/blog/capital-punishment-racial-justice/battle-racial-bias-vs-racial-justice-north-carolina-governor>.

2. *The New Evidence Demonstrates that North Carolina's Current Death Penalty Scheme Requires Comparative Proportionality Review in Order to Satisfy the Eighth and Fourteenth Amendments Under Furman, Gregg, and Pulley*

The evidence of racial discrimination in capital trials brought forth by the Racial Justice Act cases shows that North Carolina's death penalty has been functioning in a racially discriminatory manner that does not comport with the constitutional requirements articulated in *Furman* and *Gregg*. As demonstrated in Part II, the North Carolina Supreme Court has failed to perform its statutorily mandated comparative proportionality review. As such, the state has effectively been operating its death penalty scheme without comparative proportionality review. As discussed in the introduction to Part III, after *Pulley* the question to ask when determining if comparative proportionality review is necessary for a state's death penalty statutory scheme to be constitutional is whether the scheme—absent the review—would adequately ensure that death sentences are not arbitrary and discriminatory. The answer with respect to North Carolina's scheme is that it would not, because it has not. The evidence from the Racial Justice Act cases reveals that without that review, North Carolina's capital sentencing scheme is of precisely the type imagined in *Pulley*: one "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."²⁵⁰ Thus, the state supreme court's failure to perform the review has in fact rendered the state's imposition of the death penalty unconstitutional.

Some may object to this conclusion by arguing that the evidence being relied upon is statistical and therefore would not overcome the hurdle of *McCleskey* to demonstrate racially discriminatory intent. The objection fails on two points. First, the sentences at issue in the RJA cases were not found to be discriminatory based on statistical evidence alone. As outlined above, they were found to be discriminatory also based on extensive non-statistical evidence of direct, intentional discrimination in the defendants' individual cases.²⁵¹ The allowance of statistical evidence to show that race was a significant factor was one of the most significant aspects of the RJA, but the RJA cases brought forth extensive non-statistical evidence of racial discrimination as well. Under the amended RJA, the court *could not* find race was a significant factor based on statistics *alone*, and in fact stated that its decision was based primarily on the specific race-based actions of particular prosecutors.

250. *Pulley v. Harris*, 465 U.S. 37, 51 (1984).

251. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987) ("He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study. *McCleskey* argues that the Baldus study compels an inference that his sentence rests on purposeful discrimination. *McCleskey's* claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black.").

Second, the statistical evidence introduced in the RJA cases may be sufficient to establish discriminatory intent even under *McCleskey*. The Court in *McCleskey* explained its rejection of the Baldus study by contrasting it with the “certain limited contexts” in which “[t]he Court has accepted statistics as proof of intent to discriminate,” namely “proof of an equal protection violation in the selection of the jury venire in a particular district” and proof of statutory violations of Title VII.²⁵² The Court contrasted these uses of statistics with *McCleskey*’s use of the Baldus study, saying, “the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case. In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.”²⁵³ But the MSU Law study presented in the Racial Justice Act cases did not have this “flaw.” The researchers performed their analysis at the state, county, prosecutorial district, judicial division, and individual trial level. The Court’s complaint about generality in *McCleskey* would not hold up if applied to the MSU Law study.

Another difference the *McCleskey* Court noted between the cases in which it had allowed statistics to carry the burden of proof and *McCleskey*’s case was “that, in the venire-selection and Title VII contexts, the decisionmaker has an opportunity to explain the statistical disparity.”²⁵⁴ Again, the use of statistics in the RJA cases did not suffer this flaw. The Act itself provided for the State’s opportunity to rebut the defendant’s evidence.²⁵⁵ And in both RJA cases, the court consistently noted the failure of the State to rebut the statistical evidence.²⁵⁶ The U.S. Supreme Court’s rejection of statistical evidence in *McCleskey* would not hold up against the presentation of statistical evidence in the RJA cases.

Thus, both (1) the responsibility for preventing discriminatory sentences that North Carolina has placed on comparative proportionality review, and (2) the evidence, from the RJA cases, of discriminatory sentences occurring while the state’s death penalty scheme has been effectively operating without comparative proportionality review, demonstrate that comparative proportionality review is constitutionally required in North Carolina. By failing to faithfully perform

252. *Id.* at 293–94.

253. *Id.* at 294–95.

254. *Id.* at 295.

255. North Carolina Racial Justice Act, § 15A-2011(c), S.L. 2009-464, 2009 N.C. Sess. Laws 1213, 1214 (repealed 2013) (“The defendant has the burden of proving that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed. The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence. The court may consider evidence of the impact upon the defendant’s trial of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death.”).

256. *See, e.g., Robinson Order, supra* note 168, at 163; *Golphin Order, supra* note 227, at 202, 204, 206, 209.

comparative proportionality review, the state has rendered its use of the death penalty unconstitutional.

CONCLUSION

The North Carolina Supreme Court does not meaningfully perform its statutorily mandated comparative proportionality review of all death sentences. When the United States Supreme Court ruled that comparative proportionality review was not necessarily required by every death penalty statutory scheme, the Court made clear that the review would still be required in a scheme so lacking in other checks as to allow arbitrariness and discrimination in death sentencing. North Carolina's is such a scheme.

The North Carolina Supreme Court has affirmed the constitutional importance of the review in its own opinions. More importantly, within just the past three years, the Racial Justice Act cases revealed the existence of death sentences which resulted from a racially discriminatory process yet which survived North Carolina Supreme Court review. The existence of such cases demonstrates that North Carolina's death penalty process, effectively operating without comparative proportionality review, in fact does not prevent the arbitrary and discriminatory application of the death penalty. Because the state's death penalty statutory scheme does not contain sufficient checks on arbitrary and discriminatory sentences without comparative proportionality review, the North Carolina Supreme Court's failure to perform the review puts the state's imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

APPENDIX A

Applicable Portions of North Carolina's Death Penalty Statute**N.C. GEN. STAT. ANN. § 15A-2000**

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(a) Separate Proceedings on Issue of Penalty. –

(1) Except as provided in G.S. 15A-2004, upon conviction or adjudication of guilt of a defendant of a capital felony in which the State has given notice of its intent to seek the death penalty, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f) of this section. Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. - Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. The court shall give appropriate instructions in those cases in which evidence of the defendant's mental retardation requires the consideration by the jury of the provisions of G.S. 15A-2005. In all cases in which the death penalty may be

authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death.--When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. --

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that

the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or 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. The Supreme Court 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 this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances.--Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Division of Adult Correction of the Department of Public Safety, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances.--Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value.

APPENDIX B

Applicable Portions of Georgia's Death Penalty Statute as upheld by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976)²⁵⁷**GA. CODE ANN. § 26-3102 (Supp. 1975):**

26-3102. *Capital offenses; jury verdict and sentence.* Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

1973 Ga. Laws 159, 170.

GA. CODE ANN. § 27-2302 (Supp. 1975):

27-2302. *Recommendation to mercy.* - In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall mean imprisonment for life.

When the verdict is guilty without a recommendation to mercy it shall be legal and shall mean that the convicted person shall be sentenced to death. However, when it is shown that a person convicted of a capital offense without a recommendation to mercy had not reached his seventeenth birthday at the time of the commission of the offense the punishment of such person shall not be death but shall be imprisonment for life.

1963 Ga. Laws 1963, p. 122-23.

As amended by 1974 Ga. Laws 1974, p. 352-353, this now reads:

27-2302. *Recommendation to mercy.* - In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge.

257. The statutes reproduced here appear as quoted in Appendix A to the Brief for Respondent, *Gregg v. Georgia*, 428 U.S. 153 (1976) (No. 74-6257), 1976 WL 178714, at * 94 (internal quotations omitted). They have been reformatted for clarity.

GA. CODE ANN. § 27-2401 (1975 Supp.):

27-2401. *Stenographic notes; entry of testimony of minutes of court; transcript or brief.* - On the trial of all felonies the presiding judge shall have the testimony taken down, and, when directed by the judge, the court reporter shall exactly and truly record, or take stenographic notes of, the testimony and proceedings in the case, except the argument of counsel. In the event of a verdict of guilty, the testimony shall be entered on the minutes of the court or in a book to be kept for that purpose. In the event that a sentence of death is imposed, the transcript of the case shall be prepared at the earliest possible time and shall take priority in preparation over all other cases.

1973 Ga. Laws 159, 169.

GA. CODE ANN. § 27-2503 (1975 Supp.):

27-2503. *Presentence hearings in felony cases.* - (a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of 'guilty' by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas; Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in Code section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this Section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in Code section 27-2534.1, exist and

whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

1974 Ga. Laws 352, 358 (replacing former GA. CODE ANN. § 27-2534, as of July 1, 1974).

GA. CODE ANN. § 27-2528:

Section 1. Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in Code section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking.

1973 Ga. Laws 159, 171.

GA. CODE ANN. § 27-2534:

Section 1A. At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code Section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence

within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

1973 Ga. Laws 159, 162 (superseded by 1974 Ga. Laws 352, 358 (codified at GA. CODE ANN. § 27-2503)).

GA. CODE ANN. § 27-2534.1:

27-2534.1 *Mitigating and aggravating circumstances; death penalty.* - (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code section 27-2534.1(b) is so found, the death penalty shall not be imposed.

1973 Ga. Laws 159, 164.

GA. CODE ANN. § 27-2537:

27-2537. *Review of death sentences.* (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction

of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

1973 Ga. Laws 159, 164.