AN EXAMINATION OF COMPARATIVELY EXCESSIVE DEATH SENTENCES IN SOUTH CAROLINA 1979-1987

RAYMOND PATERNOSTER*
ANNMARIE KAZYAKA**

INTRODUCTION

In 1972 the United States Supreme Court invalidated existing state death penalty statutes in *Furman v. Georgia*.[1] Although *Furman* reflected the temperament of a highly divided court, with each of the nine justices writing his

* Associate Professor, Institute of Criminal Justice and Criminology, University of Maryland.
** Assistant Professor, Department of Criminal Justice, Temple University.
1. 408 U.S. 238 (1972).

own opinion, two positions within the plurality can be identified. Justices Marshall and Brennan adopted a *per se* position that capital punishment in any form was now offensive to the eighth and fourteenth amendments of the Constitution.[2] In addition to finding that capital sentencing patterns reflected both the arbitrary and discriminatory infliction of the death penalty, both justices also examined objective indicia which suggested that contemporary moral standards no longer tolerated death as an acceptable state sanction.[3] A second position of the Court's plurality can be found in the opinions of Justices Douglas, White, and Stewart.[4] Rejecting a *per se* position, these three justices noted that existing capital punishment statutes were constitutionally infirm in their *form*.[5] The statutes provided capital sentencers with unbridled discretion, producing capital sentencing patterns that could only be described as "wanton" or "freakish."[6] Although it is not at all clear if there is a *Furman* holding,[7] it is clear that if nothing else, *Furman* condemned the arbitrary and capricious infliction of the death penalty, 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."[8]

In response to *Furman*, state legislators drafted new death penalty stat-

2. Justice Marshall's *per se* objection was based in large part on his understanding of social science data indicating that capital punishment had been disproportionately imposed on the poor and on minorities. *Id.* at 364-66 (Marshall, J., concurring). It was not so much the systematic infliction of the death penalty that troubled Justice Brennan as its capriciousness. He noted that existing schemes are "little more than a lottery system." *Id.* at 293 (Brennan, J., concurring).

3. Justice Brennan argued that "the progressive decline in and current rarity of the infliction of death demonstrates that our society seriously questions the appropriateness of this punishment today." *Id.* at 299 (Brennan, J., concurring). Similarly, Justice Marshall felt that capital punishment is "morally unacceptable to the people of the United States at this time in their history." *Id.* at 360 (Marshall, J., concurring).

4. *Id.* at 240-57 (Douglas, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).

5. Justice Douglas argued that death penalty statutes at that time allowed the unbridled exercise of discretion such that they were "pregnant with discrimination." *Id.* at 257 (Douglas, J., concurring). To Justice Stewart, the capital punishment statutes were constitutionally infirm because they were capriciously imposed. He stated, "death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual." *Id.* at 309 (Stewart, J., concurring). Finally, Justice White objected both to the infrequency of death sentences relative to death eligible cases, and to the irrationality of the selection process in that "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring).

6. *Id.* at 248 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313-14 (White, J., concurring).

7. In his review of the Supreme Court's analysis in death penalty cases, Weisberg noted that "the historical uncertainty over *Furman* is not so much about how to interpret the decision, but about whether there really ever was such a thing as a *Furman* decision at all .... The problem, of course, is that there are nine separate opinions in *Furman*. It is not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias." Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 314-15 (1984).

8. *Furman*, 408 U.S. at 248-49 (Douglas, J., concurring); *id.* at 293-95 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 312-13 (White, J., concurring); *id.* at 364-68 (Marshall, J., concurring).

utes which attempted to restrict the discretion available to capital juries. These attempts to reform the administration of the death penalty took two general forms: guided discretion and mandatory statutes. Guided discretion statutes attempted to control sentencer discretion through the provision of enumerated aggravating and/or mitigating circumstances. These circumstances were intended to focus the sentencers' attention on relatively objective characteristics of the offense and offender upon which sentences could be based, thereby rendering death sentences more uniform. Mandatory statutes, on the other hand, attempted to eliminate most discretion by modifying the substantive criminal law of murder, making the imposition of capital punishment mandatory upon a defendant's conviction of a newly defined category of capital murder.

Soon after *Furman*, the Supreme Court had the opportunity to review the acceptability of both guided discretion and mandatory capital sentencing statutes. In *Gregg v. Georgia*,[9] *Proffitt v. Florida*,[10] and *Jurek v. Texas*,[11] the Court upheld guided discretion statutes, while in *Woodson v. North Carolina*[12] and *Roberts v. Louisiana*,[13] it struck down mandatory schemes. In the *Gregg* decision, Justice Stewart, joined by Justices Powell and Stevens, held that the Georgia scheme of providing capital sentencers with enumerated aggravating circumstances adequately directed the attention of the jury to relevant sentencing criteria.[14] Furthermore, consistency in capital sentencing would be enhanced under the Georgia scheme by the "important additional safeguard" of appellate review by the Georgia Supreme Court.[15] The statute specifically required the state supreme court to review each death sentence to determine: (1) whether the evidence supports the jury's finding of an aggravating circumstance, (2) whether the sentence was the product of passion, prejudice, or any other arbitrary factor, and (3) whether the sentence imposed is excessive compared with the sentence imposed in similar cases.[16]

A similar position can be found in Justice White's *Gregg* opinion, joined by Chief Justice Burger and Justice Rehnquist.[17] White expected that the

9. 428 U.S. 153 (1976).
10. 428 U.S. 242 (1976).
11. 428 U.S. 262 (1976).
12. 428 U.S. 280 (1976).
13. 428 U.S. 325 (1976).
14. 428 U.S. at 196-98 (plurality opinion).
15. *Id.* at 198.
16. The court is directed to consider "the punishment as well as any errors enumerated by way of appeal," and to 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 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."

428 U.S. at 166-67 (plurality opinion).
17. *Id.* at 207-26 (White, J., concurring).

Georgia statute's provision of aggravating circumstances would guide the discretion of the jury so that "it can no longer be said that the penalty is being imposed wantonly and freakishly."[18] Such a statute, he believed, "would escape the infirmities which invalidated [Georgia's] previous system under *Furman*."[19] Justice White did not, however, consider the provision of aggravating factors in the Georgia statute to be sufficient. He noted that such a system for guiding juries "might, but also might not, turn out in practice to result in death sentences being imposed with reasonable consistency."[20] As was true for Justice Stewart, the corrective to an aberrant jury for Justice White would be the review power of the Georgia Supreme Court, which had "the task of deciding whether *in fact* the death penalty was being administered for any given class of crime in a discriminatory, standardless, or arbitrary fashion."[21]

Both plurality opinions in *Gregg*, then, predicted that greater uniformity in capital sentencing would be achieved by a statutory scheme that provided capital sentencers with standards for making the decision whether to impose a life or death sentence and independent appellate review of that decision by a court with statewide jurisdiction. A similar position was taken in *Proffitt* and *Jurek*.[22]

In invalidating mandatory death penalty schemes in *Woodson* and *Rob-*

18. *Id.* at 222.

19. *Id.*

20. *Id.*

21. *Id.* at 223 (emphasis in original).

22. While *Gregg*, *Proffitt*, and *Jurek* suggested that comparative sentence review was an important element of a constitutionally valid capital sentencing scheme, what was unclear was whether the constitution *required* comparative sentence review by a state appellate court. Unlike the Georgia statute at issue in *Gregg*, the capital sentencing scheme in *Proffitt* did not specify the precise form that automatic review of death sentences would take, although the *Proffitt* plurality assumed that Florida's appellate review would function in the same manner as did Georgia's. *See* 428 U.S. at 251 (plurality opinion) (quoting State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), *cert. denied sub nom.*, Hunter v. Florida, 416 U.S. 943 (1974)). Likewise, while the Texas statute in *Jurek* did not explicitly provide for proportionality review, the plurality may have presumed that it would be provided in practice. *See* 428 U.S. at 276 (plurality opinion). As Goodpaster has pointed out, however, the Court in *Jurek* may have understood instead that Texas law provided for no form of appellate review of death sentences and found this to be constitutionally acceptable, because the definition of capital murder in the statute was sufficiently narrow to satisfy the requirements of *Furman* without appellate review. *See* Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 793 (1983).

In later cases, the Court continued to hint that comparative sentence review might be a necessary element in any constitutionally valid capital punishment scheme. *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 890 (1983) (Georgia's use of aggravating circumstances which left juries with considerable discretion in deciding whether to impose the death penalty was valid, in part, because "the mandatory appellate review of each death sentence by the Georgia Supreme Court" will "avoid arbitrariness" and "assure proportionality"). *Cf.* Solem v. Helm, 463 U.S. 277, 290 (1983) (comparative sentence review might be required in some non-capital cases).

Despite these prior holdings, in Pulley v. Harris, 465 U.S. 37, 45 (1984), the Court held that comparative sentence review is not a constitutional requirement for all capital sentencing schemes. Instead, the Court held that constitutionally valid capital punishment statutes need only provide some rational mechanism to narrow the pool of capital eligible cases. The Califor-

erts, a plurality of the Court (Justices Stewart, Powell, and Stevens) observed that even under mandatory capital punishment statutes sentencers continued to possess considerable discretion, because they could avoid imposing a death sentence by refusing to convict defendants of capital crimes.[23] The prospect of "jury nullification" caused by the failure of mandatory statutes to guide the discretion of the jury was exacerbated by a further defect: "there is no meaningful appellate review of the jury's decision."[24]

Not only did the mandatory statutes of North Carolina and Louisiana fail to provide an adequate remedy for the central infirmity of *Furman*, the unbridled discretion of juries, they contained a new defect. By failing to allow juries to consider the unique features of each offense and offender, mandatory statutes permitted the failure to treat human beings with the dignity they deserve.

If *Gregg*, *Proffitt*, and *Jurek* make clear the importance of consistent, proportionate application of capital sentences, across similar cases, then *Woodson* and *Roberts* make the appeal that capital sentences also must be proportionate in an individual sense. Absolute proportionality, which the *Woodson* plurality made clear is a "separate deficiency" from comparative proportionality,[25] requires capital sentences that are proportionate to the *individual's own culpability*. While *Gregg* requires that capital sentencing be *relatively proportionate*, then, *Woodson* requires that they also be *absolutely proportionate*.[26]

Determining whether a death sentence is absolutely proportionate can begin with the eighth amendment's prohibition against cruel and unusual pun-

---

nia statute at issue in *Pulley* met this standard by requiring an affirmative finding of a statutory aggravating circumstance before the death penalty could be imposed. *Id.* at 50.

But while comparative sentence review is not constitutionally required after *Pulley*, it may nonetheless be required by state law, as in *Gregg*. *See* 428 U.S. at 198 (plurality opinion); *id.* at 212 (White, J., concurring). This Article examines comparative sentence review in South Carolina, as required by a statute, *see* S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. 1985), which is virtually identical to the Georgia statute at issue in *Gregg*. *See* GA. CODE ANN. § 17-10-35(c)(3) (1982); *see also Gregg*, 428 U.S. at 167 (plurality opinion). Thus, although "proportionality review is constitutionally superfluous, it is nevertheless mandated by Sec. 16-3-25(C)(3) of the Code." State v. Koon, 285 S.C. 1, 3-4, 328 S.E.2d 625, 626, *cert. denied*, 471 U.S. 1036 (1985).

23. The *Woodson* plurality was concerned with granting unguided discretion to North Carolina juries because of the effect it would have in frustrating the evenhanded imposition of death sentences: "North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And 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." 428 U.S. at 303 (plurality opinion).

The Court in *Roberts* noted that the procedure adopted by Louisiana not only lacked standards to guide jury discretion, but it allowed jurors to disregard their oaths and choose a verdict for a lesser offense whenever they felt the death penalty was inappropriate. 428 U.S. at 334-36 (plurality opinion).

24. *Roberts*, 428 U.S. at 335-36 (plurality opinion).

25. *Id.* at 302 (plurality opinion).

26. The distinction made here between relative and absolute proportionality parallels the difference between comparative and absolute proportionality discussed by Radin in her discussion of the two forms of Kantian retributivism. *See* Radin, *Proportionality, Subjectivity, and Tragedy*, 18 U.C. DAVIS L. REV. 1165 (1985).

ishment. Since the definition of exactly what constitutes "cruel and unusual" is not fixed in time, but evolves with changing standards and moral beliefs, a measure of contemporary standards of morality and decency must be employed.[27] The Supreme Court has established that jury behavior plays a critical role in defining such contemporary standards, and that capital juries in particular "maintain a link between contemporary community values and the penal system — a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' "[28] A plurality of the Court in *Gregg* likewise emphasized that the "jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved in [administering the death penalty]."[29]

Just as appellate review has an important role to play in ensuring the consistency of capital sentences, it is also a central element in guaranteeing that they are proportionate to the individual's own culpability, given the nature both of the offense and offender. Inasmuch as juries are, according to the Court, the voices of prevailing standards of morality, courts reviewing the absolute proportionality of a death sentence in a given case can examine whether such a sentence reflects societal moral sentiments. The *Gregg* plurality stressed the importance of using appellate review to examine the degree of correspondence between the moral sentiments of a community and the penalty imposed for a particular class of homicide: "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 penalty of death."[30]

Thus, if juries have regularly imposed a sentence of death for a particular

27. In *Furman*, a majority of the Court adopted the position that the meaning of the "cruel and unusual" punishment clause is not fixed in time—restricted to penal abuses at the time the eighth amendment was framed. The meaning of "cruel and unusual" is derived from prevailing standards of morality and acceptable punishment. *See* 408 U.S. at 242 (Douglas, J., concurring); *id.* at 263 (Brennan, J., concurring); *id.* at 329 (Marshall, J., concurring); *id.* at 382-83 (Burger, C.J., dissenting). A plurality of justices in several subsequent death penalty cases have adopted Chief Justice Warren's description that the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). A plurality in *Woodson*, for example, concluded that "[i]t is now well established that the Eighth Amendment draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society.' " 428 U.S. at 301 (plurality opinion) (quoting *Trop*, 356 U.S. at 101 (plurality opinion)); *see also Gregg*, 428 U.S. at 173 (plurality opinion); Coker v. Georgia, 433 U.S. 584, 596 (1977) (plurality opinion).

28. Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) (quoting *Trop*, 356 U.S. at 101 (plurality opinion)).

29. *Gregg*, 428 U.S. at 181 (plurality opinion); *see also* Goodpaster, *supra* note 22, at 798.

30. *Gregg*, 428 U.S. at 206 (plurality opinion). Likewise, in *Coker v. Georgia*, the Court observed that "it is . . . important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." 433 U.S. at 596 (plurality opinion); *see also* Enmund v. Florida, 458 U.S. 782, 794 (1981) (juries' sentencing decisions indicate society's rejection of the death penalty for accomplice liability in felony murders).

type of offense, its imposition in a specific case may not be disproportionate, either relatively or absolutely. When, however, juries generally fail to sentence defendants charged with particular crimes to death — that is, when a life sentence no longer represents the isolated granting of mercy but is the usual sentence for such offenses — the imposition of the death penalty in a similar case is arguably both relatively and absolutely disproportionate and therefore excessive. As Dix noted in his study of Florida, Georgia, and Texas, appellate review can be an effective method of determining whether a given sentence of death is morally appropriate or proportionate to a given case: "Such a review implicitly includes an evaluation of whether reasonable persons would regard the death sentence as disproportionate to the offender's culpability, given the nature of the crime committed, the circumstances of its commission, and possible influences upon the defendant."[31]

In its 1976 cases, then, the Supreme Court set forth two principles to which capital sentencing schemes are required to adhere in order to pass constitutional scrutiny. *Gregg*, *Proffitt*, and *Jurek* stand for the principle that capital sentencing must be uniform and consistent. Statutes that lacked guidelines for the imposition of the death penalty, as in *Furman*, were infirm because they produced inconsistent, arbitrary sentences. *Woodson* and *Roberts* require that death sentences be proportionate to the individual's own culpability. Mandatory statutes which attempted to provide absolute uniformity were infirm because they failed to allow the jury to determine the appropriateness of the penalty for the unique case at hand.

Absolute and relative proportionality need not be mutually exclusive principles, as some have argued.[32] Capital sentences can be both relatively and absolutely proportionate, and extensive appellate review of capital sentences can be an appropriate method for determining the extent to which these two principles of capital sentencing are being applied in any state scheme.

This Article examines death sentences in one southern state, South Carolina, during the period from 1979 to 1987, to determine whether they are comparatively excessive. Section I will present the methodology used in analyzing comparative sentence review. Section II then will apply three different methods of identifying comparatively excessive death sentences to South Carolina homicide data. Finally, Section III will analyze the form of proportionality review actually conducted by the South Carolina Supreme Court. A significant discrepancy between the results of the empirical search for comparatively excessive death sentences and the comparative death sentence review performed by the South Carolina Supreme Court is found. We conclude that both the theory and practice of comparative sentence review conducted by the

31. Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 107 (1979).

32. *See* Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1148-55 (1980).

South Carolina court are inadequate for identifying comparatively excessive death sentences.

I.
METHODOLOGY FOR COMPARATIVE SENTENCE REVIEW

A sentence of death can be disproportionate in two different but related ways: (1) when it is more severe than the punishment imposed upon similarly culpable offenders, and (2) when it is more severe than that deserved by the culpability of the individual and the severity of the offense.[33] For relative proportionality review a sentence of death is compared with other sentences imposed on other defendants. For absolute proportionality review the death sentence is compared with the egregiousness of the offense and moral opprobrium of the offender.[34] These two types of comparative death sentence review are related, but conceptually different. Both are inextricably linked to the consistent and uniform imposition of the death penalty for a given class of offenses.

Instances of relatively disproportionate death sentences would be generally easy to identify. One could determine the frequency of life and death sentences within a pool of cases comparable to the one being reviewed. If almost all similarly situated defendants receive a death sentence, then the imposition of a death sentence in the case at hand could not reasonably be argued to be relatively disproportionate. Instances of absolutely excessive death sentences may, at first blush, appear more difficult to detect. How does one determine if a death sentence imposed in a given instance is "undeserved" in any moral sense? If based solely upon the ideology of reviewing judges, absolute proportionality review runs the risk of slipping into moral relativism. Since penal sentences are, among other things, designed to reflect the moral outrage among the citizenry, it may be desirable to link the determination of a deserved sentence to the prevailing standards of morality within the community.[35] Although various indicators could be employed (public opinion polls, legislative enactments), courts have traditionally relied upon jury behavior as a symbolic expression of community sentiment.[36] If, for example, juries regularly sentence to death defendants who during the course of a kidnapping rape and kill their victim, then it can be said that there is a degree of consensus in the community that *this* is the sort of offense that is deserving of the death penalty. The determination that both relatively and absolutely disproportionate death sentences are being imposed, then, can be made by examining *sentencing patterns* within the relevant jurisdiction.

The questions to be addressed are, therefore, mostly empirical ones. If the determination of relative and absolute proportionality requires a review of

33. *See supra* note 26 and accompanying text.
34. *Id.*
35. *See supra* note 27 and accompanying text.
36. *See supra* notes 28-31 and accompanying text.

sentencing patterns within categories of similar cases, one must first define the pool of comparable cases. Then it must be determined how frequently a death sentence must be applied before death is said to be the "regular penalty" for a particular offense. In examining capital sentencing patterns in South Carolina, one cannot rely on statutory guidance. The authorizing legislation merely requires that the state supreme court determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant;"[37] however, the statute does not disclose or even suggest what makes one case "similar" to another. Nor does the statute specify which circumstances of a crime or defendant should be considered in determining comparability.

The analysis here begins by reviewing three methods of estimating case comparability which have been suggested and employed in previous research.

A. Three Methods of Conducting an Empirically-Based Comparative Review of Death Sentences

In their work on capital sentencing, David Baldus and his colleagues have identified three different approaches to comparative review: a reasonableness, a precedent seeking, and a frequency approach.[38] In the reasonableness approach, a subjective assessment is made by the reviewing court as to whether the defendant in the case at hand deserves the death penalty considering both the offender's characteristics and the nature of the crime.[39] This method of comparative case review involves little more (presumably) than a weighing of the aggravating and mitigating circumstances, both statutory and non-statutory, and a subjective assessment as to whether or not this is the type of murderer who deserves a sentence of death.[40] The criteria which determine the appropriateness of the sentence in the reasonableness approach are all internal and are found in the moral sentiments of the members of the reviewing court. The reviewing court, without reference to external factors, employs its own values and moral principles about deserved punishment and reasonable retribution in determining whether a given sentence of death is excessive.[41] A comparatively excessive death sentence in either of its two meanings (relative or absolute) is one that transcends the moral egregiousness of the killing as assessed by the current members of the reviewing court.

The precedent seeking approach is similar to the reasonableness model in one important regard. It too involves an assessment of the overall egregious-

37. S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. 1985).

38. Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 668-71 (1983) [hereinafter *Comparative Review of Death Sentences*]; *see also* Baldus, Pulaski, Woodworth, & Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980).

39. *Comparative Review of Death Sentences*, *supra* note 38, at 668.

40. *Id.*

41. *Id.*

ness of the case being reviewed based upon characteristics of the offense and offender and a subjective determination that a particular offense is morally deserving of a death sentence.[42] In contrast to a strict reasonableness approach, however, a reviewing court applying the precedent seeking approach justifies the imposition of the death penalty by comparing the case at hand with comparable cases.[43] If the reviewing court determines in its moral evaluation that an offense is not deserving of the death penalty, then the court will cite arguably comparable cases which resulted in a penalty other than death.[44] Unless a systematic evaluation of previous cases is conducted, however, the cases cited as comparable are limited to those appealed cases that the court is familiar with or those that can be easily recalled.[45]

We can identify two different variants in the precedent seeking approach, depending on the method by which other cases are selected and cited as comparable. In one variant, cases are adjudged comparable by the reviewing court if they involve both a set of similar specific facts and a similar penalty. Using this precedent seeking-fact specific method, a case being reviewed which, for example, involves the armed robbery-murder of a lone victim by more than one offender, will include as comparable cases only other armed robbery-murder cases that the court finds (recalls) which include the same set of underlying circumstances and which resulted in an identical penalty. In the second variant, the precedent seeking-overall aggravation method, cases are considered by the court to be comparable if they resulted in the same penalty and involve a similar level of overall harm or seriousness, considering both the offense and offender, even though they may involve quite different specific features. For example, the armed robbery-murder discussed above might be compared with a kidnapping-murder or a burglary-murder involving lone female victims if the reviewing court determined that they were comparably egregious to the case being reviewed.

The frequency approach to determining comparatively excessive death sentences is fundamentally different from either the reasonableness or precedent seeking approach. The frequency approach involves an externally oriented, empirically-based estimation of case comparability involving three

42. *Id.*

43. *Id.*

44. *Id.*

45. Georgia's system of appellate review offers an interesting case study of this point. The Georgia statute does not explicitly limit the pool of comparable cases only to appealed life or death sentence cases. *See* GA. CODE ANN. § 17-10-35(c)(3) (1982). In fact, in commenting on the scope of proportionality review under Georgia law, the plurality in *Gregg* noted that the Georgia court has the authority to consider "nonappealed capital convictions where a life sentence is imposed and cases involving homicides where a capital conviction is not obtained." *Gregg*, 428 U.S. at 205 n.56 (plurality opinion). In practice, however, the scope of comparative review under Georgia law is quite restricted, generally excluding life sentence cases. In their empirical analysis of appellate review in Georgia, Baldus and his colleagues reported that "for eighty-eight percent of these cases, (60/68), every case cited as similar in the court's appendices was a death sentence case." *Comparative Review of Death Sentences, supra* note 38, at 711.

steps.[46] First, the reviewing court determines the characteristics of the larger population of cases from which the smaller sub-group of similar cases will be drawn. This larger universe could consist of a broad category of cases (*e.g.*, all homicides committed in the jurisdiction during a period of time) or a more restricted group (*e.g.*, homicides resulting in an arrest and conviction). A still more restricted group could be chosen (*e.g.*, homicide convictions resulting in an appeal of sentence, or homicides that eventually result in an affirmed death sentence). Theoretically, any of these could be construed as the first-level group of cases from which those most similar to the case being reviewed will be selected. As we will discover later, the definition of this first group of cases will provide a critical limitation in a later court's ability to identify comparatively excessive death sentences. The second step in the frequency approach is the selection of the sub-group of cases deemed most comparable to the case currently under review. As with the precedent seeking approach, these other cases may share similar specific circumstances of the offense or comparable overall egregiousness. The third and final step is determining the portion of these comparable cases that resulted in a death sentence. An assessment can then be made whether or not the proportion is low enough to deem the imposition of the death penalty in the case under review relatively excessive and whether the death penalty is so irregularly imposed that a capital sentence for the crime cannot be said to resonate prevailing community moral values (i.e. the sentence is not absolutely proportional).

In determining which of these three approaches (reasonableness, precedent seeking, or frequency) best identifies comparatively excessive death sentences in both forms, it is necessary to examine the limitations of each approach. The reasonableness approach is the least likely of the three to identify an excessive death sentence since it involves no comparison at all with sentences received in other cases. This approach produces a subjective assessment by the reviewing court that *it* believes the sentence imposed to be morally deserved. We are provided with no other information in those cases as to whether death sentences are regularly imposed in those kinds of cases, particularly if the reviewing court does not consider non-appealed life cases in its moral assessment of what is and is not a deserved punishment. For example, the reviewing court would not be privy to the fact that juries in a particular type of homicide render a death sentence only 5% of the time, proving that a capital sentence is an aberration rather than an accurate reflection of prevailing community moral standards.

Both forms of the precedent seeking approach suffer from an identical liability. While the reviewing court *could* examine non-appealed life sentences in identifying similar cases, in all likelihood appellate courts would not automatically review such cases.[47] Given the non-systematic compilation of data on life sentences, reviewing judges would have no comprehensive basis for de-

46. *See Comparative Review of Death Sentences, supra* note 38, at 669.
47. *Id.* at 716-23.

veloping a body of case law concerning when the penalty of death had been found to be appropriate and inappropriate. Only information on appropriate death penalties would be available.

A frequency approach to proportionality review holds the most promise of being able to identify comparatively excessive death sentences,[48] though, it is important to add, *this is not necessarily so.* An *extensive* form of comparative sentence review, where the selection of comparable cases comes from a pool of both life and death cases, can effectively distinguish between the regular imposition of the death penalty and the actions of an aberrant jury. A frequency approach with a broad universe can cull a group of comparable cases from a larger group of death-eligible cases. In this way, the proportion of life and death sentences within this similar group can be estimated and an empirical assessment of comparative excessiveness can be made. A frequency approach could break down, however, if the universe of cases were so narrowly restricted as to exclude death-eligible cases that resulted in a life sentence. It would also be inappropriate for the universe of cases in the frequency approach to be so broad as to include all homicides that were committed even if they did not result in an arrest or conviction. Since cases are not prosecuted as capital murders when sufficient evidence is lacking, it can be argued that those prosecutions not resulting in a conviction are qualitatively different from those that do. For the frequency method, the universe of comparable cases should be as similar as possible to those resulting in a death sentence. For this reason, the optimal universe of cases in a frequency model of proportionality review would be all capital homicides that resulted in a conviction, and were, therefore, *death-eligible* capital homicides. In the next section, we will attempt to construct and apply such a frequency approach.

B. Data and Methodology for a Frequency Assessment of Excessive Capital Sentences in South Carolina from 1979 to 1987[49]

1. Sample

Most of the data for comparative review analyses come from a larger study of capital sentencing in South Carolina. An initial data set consisting of every homicide committed in the state from June 8, 1977, the date the state's new death penalty statute took effect, until December 31, 1981, was constructed. The data included all information contained in the state Supplemental Homicide Report [hereinafter SHR], which includes victim and offender demographics; the date, time, and location of the offense; the relationship between the victim and offender; the number of victims and offenders; and a limited descriptive categorization of the homicide type.[50] To supplement this

48. *Id.* at 670.

49. We hope in this endeavor to complement the early work of Dix, *see supra* note 31, on Georgia, Florida, and Texas, as well as Baldus' more recent work on Georgia's capital sentencing system. *See generally Comparative Review of Death Sentences, supra* note 38.

50. The Supplemental Homicide Report [hereinafter SHR] is an enhanced police report of

data the original police incident report associated with the homicide and any additional investigation reports were obtained. The police report contained important and detailed data about the offense, victim, and offender if one was apprehended. Copies of newspaper articles dealing with most of the homicides committed during the 1977 to 1981 period were also obtained. In addition, booking reports from police departments and indictment and conviction information from the office of the attorney general were obtained. Finally, for each defendant that was convicted of homicide, criminal history data were collected from their "rap sheet" in the files of the state department of correction.

With this information, we were able to construct a fairly comprehensive portrait of each homicide that resulted in an arrest and conviction. This was done for each instance of capital homicide, that is, all acts of homicide that also involved the commission of a statutory aggravating circumstance.[51] From June 8, 1977 until December 31, 1981, there were 1,686 homicides with known offenders of which 321 (19%) were capital murders. Of these 321 capital murders, 135 resulted in a conviction for capital murder and were, therefore, eligible for the death penalty. This group of 135 homicide convictions

a homicide. It is completed by the local law enforcement agency investigating the homicide and includes: demographic characteristics about the victim and offender; characteristics of the crime; type of weapon used; circumstances of the crime (if there was an argument or if drugs or alcohol were involved); time of day, day of week, and location of the homicide; number of victims and offenders; relationships among parties; and any other contemporaneous crimes committed along with the homicide. The investigating law enforcement agency puts this information on a standard SHR form for each homicide. In South Carolina, these reports are then forwarded to a centralized state law enforcement agency, the South Carolina Law Enforcement Division [hereinafter SLED], where the data are computer coded and sent to the F.B.I.'s Uniform Crime Reporting Program. All local law enforcement agencies participate in the South Carolina SHR program so there is complete coverage of all homicides committed in the state.

51. The South Carolina statute specifies the aggravating circumstances as follows:

(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with attempt to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;

(3) The offender by his act of murder 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, solicitor, former solicitor, or other officer of the court 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 was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

S.C. CODE ANN. § 16-3-20(C)(a) (Law. Co-op. 1985). In 1986, this statute was amended to add multiple homicides and the murder of a child under the age of eleven as aggravating circumstances. *See* S.C. CODE ANN. § 16-3-20(C)(a) (Law. Co-op. Supp. 1989).

from 1977 to 1981 comprises the universe of cases from which the sub-group of comparable cases will be selected.

During the period 1979 to 1987, fifty-eight death sentences were reviewed on direct appeal by the South Carolina Supreme Court. The specific target group of this study consists of a subgroup of twenty-six cases involving defendants who had their convictions and sentences affirmed by the court. Defendants in these twenty-six cases, then, have had their death sentences reviewed for proportionality and approved. In some cases, either the defendant's conviction or sentence was reversed on direct appeal by the state supreme court and remanded for retrial or resentence, but the court did not conduct a proportionality review. If, however, a second conviction and death sentence was secured, it too was reviewed by the court on automatic direct appeal. If upon conducting its proportionality review the court affirmed the death sentence, the case was included in the affirmed category. Of the twenty-six death sentences affirmed, eighteen (69%) were affirmed on the first direct appeal, and eight were affirmed after a resentencing hearing (four cases) or retrial (four cases). With the data set at hand, this Article will compare the sentence received by a defendant whose conviction and sentence were affirmed any time before August, 1987 with a group of comparable murder cases from the years 1977 to 1981.[52]

2. *Determining Case Comparability*

Having restricted our universe of cases to those defendants convicted of a capital homicide from 1977 to 1981, it is necessary to consider the criteria according to which some of these will be selected as comparable to affirmed death penalty cases. As was true for the determination of the universe of cases, South Carolina's death penalty statute provides no guidance, declaring only that such cases should be similar "considering both the crime and the defendant."[53] As the previous discussion of different approaches to comparative sentence review suggested, homicides may be similar in the specific features of the offense and offender or in their overall level of aggravation. The empirical analyses to follow employ both methods of determining case comparability. Following the earlier work of Baldus and his colleagues in Georgia,[54]

52. A defendant who committed a capital murder after 1981 whose death sentence was later affirmed, however, will not appear in the convicted group of 135 defendants (1977 to 1981 cases). This should pose no analytical difficulties. In reviewing any case after 1981, the state supreme court would have had at its disposal all of the 1977 to 1981 cases in our data set. Adding post-1981 cases to the data set would only have the effect of increasing the available number of comparable cases. Since there were no major modifications of state law after 1981 that would have affected the character of post-1981 cases, the restriction of the universe to 1977 through 1981 cases should not alter the results in any substantial way. In addition, this Article assumes that there was no substantial change in prevailing moral standards (reflected in the patterns of jury decisions for categories of homicide) from 1981 to 1987.

53. S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. 1985).

54. *See supra* note 45 and accompanying text; *see also* Baldus, Woodworth & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985).

one type of fact-specific comparability and two types of comparability based on overall aggravation are constructed.

The fact-specific frequency method of comparability is based upon those characteristics of an affirmed case that appear to have been particularly salient in the jury's imposition of the death penalty.[55] The determination of which were the most salient features that led to a sentencer's decision to impose the death penalty is difficult. The opinions of the South Carolina Supreme Court provide almost no insight as to the rationale for the sentence and the "meaningful" differences between this defendant and those not sentenced to death. In many instances the reviewing court makes no affirmative statement as to which characteristics were salient. The assessment here is made on the basis of those features of the crime highlighted by the reviewing court in its own discussion of the proportionality of the sentence, features which presumably are discussed because they are perceived as the ones justifying the penalty. This approach can be illustrated with a South Carolina case. In its proportionality review in *State v. Spann*,[56] the South Carolina Supreme Court described the case in the following terms: "[a]ppellant broke into an elderly woman's home, stole money and jewelry, assaulted her sexually, and killed her by strangulation."[57] In this case, the important facts leading to the affirmation of defendant Spann's death sentence were: (1) robbery (2) and rape (3) of an elderly woman (4) after breaking into her home. The pool of comparable cases would then consist of those defendants like Spann who robbed and raped elderly women after breaking into their homes.

In addition to the difficulty in identifying which of the many features of an offense were most influential to the defendant being sentenced to death, the fact-specific method suffers from another disadvantage. In order to achieve correspondence between comparable cases and the reviewed case, it is preferable to correlate all possible salient features. As the number of such features increases, however, it becomes progressively difficult to find a sufficient number of cases with which to make an adequate comparative review.

In view of the fact-specific approach's liabilities, recent work by Baldus[58] and more general statistical work on case matching methods by Rosenbaum and Rubin[59] suggest an approach to matching cases based on an overall mea-

55. In their review of the Georgia sentencing system, Baldus and his colleagues referred to this method of determining case comparability as the Salient Factors Method. *See Comparative Review of Death Sentences, supra* note 38, at 681-84. The frequency-fact specific approach differs from the non-empirical precedent seeking-fact specific approach in two main ways. First, in the former method matched cases come from a broad pool of death-eligible cases while in the latter the search for comparable cases is more narrowly drawn. Second, the frequency approach estimates the proportion of comparable death eligible cases that actually receive the death penalty, while under the precedent seeking approach the reviewing court merely "string cites" a sufficient number of cases to justify its conclusion as to the excessiveness of the penalty in the case under review.

56. 279 S.C. 399, 308 S.E.2d 518 (1983), *cert. denied*, 466 U.S. 947 (1984).

57. *Id.* at 404, 308 S.E.2d at 521.

58. *See Comparative Review of Death Sentences, supra* note 38.

59. Rosenbaum & Rubin, *The Central Role of the Propensity Score in Observational Studies*

sure of case comparability. In this method, a single score is derived to reflect the probability of each case resulting in a death sentence given a set of predictors or covariates. Rosenbaum and Rubin have referred to this score as the propensity score, which is the conditional probability of a particular outcome event (i.e. being sentenced to death) given the set of covariates. In our case, a logistic regression equation is estimated with sentencing outcome (death/life sentence) as the binary dependent variable. The explanatory variables (covariates) would include those elements of the crime and defendant that could be considered relevant predictors (number of victims, brutality of the offense, number and type of contemporaneous felonies, etc.). The logistic regression would provide information as to which were the best predictors of sentencing outcome and an estimate of their independent effect (logit coefficients). The adequacy of such a matching model, and therefore, its utility in determining case comparability can be determined by its predictive validity and other statistical measures that reflect a good fit. Once such a model is estimated, and a list of significant determinants (explanatory factors) obtained, they can be used to assess the comparability of cases and employed as a matching method in two ways.

Using what Baldus and his colleagues called the main determinants method,[60] cases can be scored on the basis of the number of such significant factors present. For example, if the logistic regression model indicated that the significant determinants of a death sentence were: (1) the number of victims killed, (2) the prior violent record of the defendant, (3) the age of the victim, (4) the commission of rape as an aggravating circumstance, and (5) pre- and post-mortem abuse of the victim, then each homicide could be given a score from zero to five depending on the number of these factors contained in the offense. Similar cases from the general universe of cases would then be defined as those matched on the total number of such factors.

This regression based method is superior to the previously discussed method of matching on the presumed important features of the case because it provides an empirical, non-subjective assessment as to which offense/offender characteristics are most influential in explaining death sentences. It is important to note, however, that this method has its own limitations. First, it only reveals which explanatory factors are important *on average* for the universe of cases, not which were determinative in any *particular case*. Second, since any given total score can be arrived at by any number of various combinations of significant factors, the pool of comparable cases will be comprised of murders with very different fact patterns. Finally, as was true for the fact-specific empirical approach, as the number of significant factors to match increases, the size of the available comparable pool decreases.

---

for Causal Effects, 70 BIOMETRIKA 41 (1983); Rosenbaum & Rubin, *Constructing a Control Group Using Multivariate Matched Sampling Methods that Incorporate the Propensity Score*, 39 AM. STATISTICIAN 33 (1985).

60. *Comparative Review of Death Sentences, supra* note 38, at 684-89.

A different way to employ the results of the logistic regression analysis would be to weight differentially each factor according to its predictive importance. In this weighted index measure, each case is assigned a score comprised of the sum of the logit coefficients (the independent effects of each factor) corresponding to the significant factors contained in the case. This total score is the estimated conditional probability of the defendant being sentenced to death. This is the idea behind Rosenbaum and Rubin's "propensity score";[61] in this case the equation estimates the propensity or likelihood of a death sentence. It is also comparable to the index-method employed by Baldus and his colleagues (one of their regression-based scales of case comparability)[62] in their study of comparative sentence review under Georgia law. In this method, comparable cases will be those matched on the propensity score.

3. *Degree of Frequency Necessary for Proportionality*

To complete the empirical analysis it is necessary to decide an intractable question in assessing the proportionality of death sentences: to what degree of frequency must comparable defendants be sentenced to death before it can reasonably be said that imposition in the case at hand is (1) relatively disproportionate compared with other, comparable defendants, and (2) absolutely disproportionate because prevailing community standards of morality deem it excessive. Excessive and proportionate death sentences are generally easy to define and identify at the extremes. For example, if for a certain pool of ten comparable offenders eight were sentenced to death, one could defensibly argue that death is the regularly imposed penalty for this type of homicide, that its imposition in the instant case is a reflection of community moral standards, and that the two life sentences are constitutionally acceptable isolated grants of mercy.[63] If only one or two of ten eligible defendants are sentenced to death for a given offense, again it could be argued defensibly that the commu-

61. *See supra* text accompanying note 59.

62. *Comparative Review of Death Sentences*, *supra* note 38, at 689-92. A regression-based scale of case comparability is a technique used to assess how similar homicide cases are with respect to a given outcome variable. As an example we will use the outcome variable of the probability of being sentenced to death. To construct a regression-based comparability scale, one would first conduct a multiple regression analysis with the binary (no, yes) outcome variable "being sentenced to death" regressed on all relevant (and available) predictors, such as the brutality of the offense, the criminal history of the offender, the number of victims. The regression coefficients from such an analysis would constitute the "weights" for the comparability scale and all such weights would be summed (or a subset comprised of those variables which were statistically significant). Those homicides which have numerically similar summed weights would be deemed to be "comparable homicides."

63. The distinction between an arbitrary and capricious death sentence and the isolated grant of mercy is maintained by the plurality in *Gregg*: "[N]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and defendant." Gregg v. Georgia, 428 U.S. 153, 199 (1976) (plurality opinion), *citing* Furman v. Georgia, 408 U.S. 238 (1972).

nity's current standard of morality does not tolerate capital punishment for the offense, and its imposition in the instant case is both relatively and absolutely disproportionate. Away from these extremes, however, the determination of a "regularly" imposed sentence and the isolated grant of mercy becomes more difficult to define.

There is no guidance to be found on this subject from the Supreme Court's death penalty decisions. *Furman*'s insistence that capital sentencing be evenhanded[64] suggests that a relatively high proportion of death sentences should be imposed for a given offense type before it could be considered "regular." As Baldus and his colleagues correctly pointed out,[65] however, in his concurring *Furman* opinion Justice Stewart was more concerned with protecting defendants from the totally capricious and "freakish" death sentence.[66] These two approaches suggest divergent standards. Under the former standard, four out of ten sentences would not appear to reflect the evenhanded imposition of the death penalty; but a 40% probability certainly shows greater consistency than being struck by lightning, which was the analogy employed by Justice Stewart.

Baldus and his colleagues relied on Georgia case law to establish a working quantitative definition of an excessive death sentence. They noted that in *Coley v. State*[67] the Georgia Supreme Court invalidated a death sentence as excessive when only 36% of comparable defendants also received a death sentence. With this as a guide, Baldus and his colleagues adopted the convention that a death sentence is excessive if the death sentencing rate in the pool of comparable cases is .35 or less. Since there is no similar South Carolina case law to utilize as a guide, and the Georgia and South Carolina statutes are structurally similar,[68] this Article adopts the working definition of a dispro-

64. In commenting on the concurring opinions of Justices Stewart and White in *Furman*, Chief Justice Burger observed that "[t]he decisive grievance of the opinions . . . is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice." 408 U.S. at 398-99 (Burger, C.J., dissenting). This conclusion concerning the central infirmity of *Furman* was restated by Burger in his opinion in Lockett v. Ohio, 438 U.S. 586, 601 (1978) (plurality opinion) (quoting *Gregg*, 428 U.S. at 188) ("to comply with *Furman*, sentencing procedures should not create a 'substantial risk' that the death penalty will 'be inflicted in an arbitrary and capricious manner' "). *See also California v. Ramos*, 463 U.S. 992, 1000 (1983) ("excessively vague sentencing standards might lead to the arbitrary and capricious sentencing patterns condemned in *Furman*").

65. *Comparative Review of Death Sentences*, *supra* note 38, at 696.

66. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." 408 U.S. at 309 (Stewart, J., concurring).

67. 231 Ga. 829, 204 S.E.2d 612 (1974) (per curiam).

68. The South Carolina Supreme Court has held that "[o]ur present death penalty statutes, Section 16-3-20 through Section 16-3-28 . . . were enacted as Act No. 177 of the 1977 Acts of the General Assembly. Act No. 177 of 1977 was patterned after the death penalty statutes of our sister state Georgia." State v. Shaw, 273 S.C. 194, 199, 255 S.E.2d 799, 802 (1979), *cert. denied*, 444 U.S. 957 (1979), and 444 U.S. 1026 (1980). The court concluded "[t]he statutory death penalty complex adopted by the General Assembly in 1977 is constitutionally indistinguishable from the statutory complex approved by the United States Supreme Court in *Gregg*." *Id.* at 203, 255 S.E.2d at 803-04.

portionate death sentence employed by Baldus and his colleagues.[69] A similar standard in determining whether a sentence is both relatively and absolutely excessive is employed. This follows from the argument that the only way to determine if a particular death sentence is disproportionate in an absolute sense is to determine if juries in the state regularly sentence such defendants to death.

II.
RESULTS OF A FREQUENCY ASSESSMENT OF EXCESSIVE DEATH SENTENCES IN SOUTH CAROLINA FROM 1979 TO 1987

Table 1 provides the results of the South Carolina Supreme Court's review of fifty-eight death sentences on direct appeal. The results are reported by year for each of three outcomes: (1) reversal of conviction, (2) reversal of sentence, and (3) affirmed. This table counts each direct appeal as a unique case so that if a defendant had either a conviction or sentence reversed on her first direct appeal, the case would reappear as a second direct appeal if the defendant were resentenced to death.

These data suggest at first blush that the South Carolina Supreme Court is apparently taking its job of reviewing cases on direct appeal fairly seriously. Table 1 shows that during the period from 1979 to 1987, the court found sufficient procedural errors to reverse the convictions of three out of every ten cases it reviewed (seventeen of fifty-eight cases reviewed). In addition, it also found errors in more than one-fourth (fifteen of fifty-eight) of the penalty hearings necessitating a reversal and remand for resentencing. The second panel of Table 1 (1B2) reveals that of the forty-one cases with affirmed convictions, nearly forty percent (fifteen of forty-one) had the death sentence vacated and the case remanded for resentencing. In eighteen cases, the death sentence was affirmed by the court on the first direct appeal, and in eight others the sentence was affirmed after retrial (four) or resentencing (four).

The high rates of reversal shown over the period 1979 to 1987 might reflect the state prosecutors' lack of experience under the new statute and the legal ambiguity over appropriate and reversible trial practice. If this is true, we would expect to find reversal rates reduced over time as prosecutors become more familiar with death penalty law. This hypothesis may appear true, since the reversal rate for the first five years of the statute (1979 to 1983), is

69. In their analysis of capital sentencing in Georgia, Baldus and his colleagues "adopted the convention of classifying death sentences as presumptively comparatively excessive if the death-sentencing rate among similar cases is less than .35. If the death sentencing rate is .80 or greater, we classify the case as presumptively evenhanded. For cases involving death-sentencing frequencies between those two benchmarks, we adopt no formal classification." *Comparative Review of Death Sentences, supra* note 38, at 698.

This analysis of South Carolina sentencing patterns adopts Baldus and his colleagues' definition of a death-sentencing rate of .35 or lower as an indicator of a comparatively excessive death sentence. A sentence is non-excessive where the death-sentencing rate among comparable cases is at least .50. The latter is, then, a much more conservative measure than that employed by Baldus and his colleagues.

TABLE 1:
RESULTS OF DIRECT APPEALS IN CAPITAL CASES FROM SOUTH CAROLINA: 1979 TO 1987

A:	Year	Reversal of Conviction	Reversal of Sentence	Affirmed	Total
	1979	1	2	1	4
	1980	0	1	0	1
	1981	3	2	2	7
	1982	4	2	5	11
	1983	1	0	2	3
	1984	1	1	5	7
	1985	2	1	10	13
	1986	4	5	1	10
	1987	1	1	0	2
Total		17	15	26	58
%		29%	26%	45%	100%

B:		No.	%
	1. Convictions		
	Reversed	17	29%
	Affirmed	41	71%
		58	100%
	2. Sentences		
	Reversed on Procedural Grounds	15	37%
	Reversed on Substantive Grounds	0	0%
	Affirmed	26	63%
		41	100%

62% and declines to 50% from 1984 to 1987. The cause of this apparent trend, however, is one aberrant year, 1985, when the South Carolina court affirmed 77% (ten of thirteen) of the death sentences it reviewed. In the last two years for which we have data, 1986 to 1987, however, the court reversed 92% (eleven of twelve) of the death sentences it reviewed.

These reversal rates demonstrate a greater regard for careful scrutiny of capital sentences by the South Carolina Supreme Court than that shown by the Georgia Supreme Court in conducting its proportionality review. In their analyses of the Georgia court, Dix[70] and Baldus and his colleagues[71] reported that during the first few years of Georgia's new death penalty statute the Georgia Supreme Court reversed approximately 20% of the cases it reviewed,

70. Dix, *supra* note 31, at 118.
71. *Comparative Review of Death Sentences, supra* note 38, at 726-27.

by invalidating either the conviction or the sentence.[72] Table 1 indicates that the South Carolina Supreme Court reversed over one-half of the death sentences it reviewed because of errors at trial or during the penalty phase, and carefully reviewed at least the procedural component of capital sentencing in the state. With approximately one-third of the convictions reversed and another one-fourth of the penalty hearings resulting in a reversal of sentence, it cannot be argued that the court is simply rubber stamping trial court judgments in every case. The data also indicate quite vividly that appeals in death penalty cases are not merely perfunctory. The court has found merit in approximately one-half of all death penalty appeals during this period.

The findings reported in Table 1 are disturbing, however, since they reveal a great reluctance on the part of the South Carolina court to reverse a death sentence due to disproportionality. All fifteen of the sentence reversals were based on procedural grounds. In fact, since the inception of its new guided discretion death penalty statute in 1977, the South Carolina Supreme Court *has not vacated a single death sentence because it was comparatively excessive.* Alternatively, this may reflect either the fact that none of the death sentences that have been imposed were disproportionate, that such excessive sentences go unrecognized, or that they are reversed on procedural rather than substantive grounds. We will explore these possibilities later.

TABLE 2:
DISPOSITION OF CAPITAL CASES REVIEWED ON DIRECT APPEAL: 1979-1987

A: Reversal of Conviction (17):			
Reconviction	14	Resentenced to Life	7 (50%)
		Resentenced to Death	7 (50%)
			(4 subsequently affirmed)
Acquittals	1		
Prosecution Dropped	1		
Awaiting Retrial	1		
B: Reversal of Sentence (15):			
Resentenced to Life	4 (29%)		
Resentenced to Death	10 (71%)		(4 subsequently affirmed)
Awaiting Resentence	1		
C: Affirmed on Direct Appeal	26*		

* Eighteen cases were affirmed on their first appeal and eight other sentences were affirmed after a retrial (4 cases) or re-sentence (4 cases).

Table 2 provides a more detailed assessment of the data shown in Table 1,

72. The comparison of reversal rates in South Carolina will be made exclusively with regard to Georgia and will not include Florida or Texas. This is because of the similarity between the South Carolina and Georgia statutes, *see State v. Shaw*, 273 S.C. at 199, 203, 255 S.E.2d at 802, 803-04, and the comparable role of appellate review under the two laws. Reversal rates are substantially higher in Florida due mainly to the Florida court's review of the "jury override" power of the trial court in imposing the death sentence. *See* Dix, *supra* note 31; *see also* Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913 (1983).

reporting the ultimate disposition of those cases in Table 1 where either the conviction or sentence was reversed. Table 2 reveals that of the seventeen cases in which the conviction was reversed, fourteen (82%) resulted in a re-conviction; one resulted in the defendant being acquitted; one resulted in the prosecution being dropped (because the state secured a death sentence against the defendant on another murder charge); and one is currently awaiting re-trial. Of the fourteen people who were re-convicted, seven were resentenced to death; four of these sentences were subsequently affirmed by the state court. The probability of being resentenced to death is substantially higher for those whose convictions were initially affirmed and who only had their sentence vacated. Of fifteen initial sentence reversals, ten (71%) resulted in the defendant being resentenced to death, with one case awaiting a new sentencing hearing. Of the ten cases where another death sentence was imposed, four were subsequently affirmed. When combined with Table 1, then, an initial examination of these data indicate that the South Carolina court is quite active in reversing both convictions and sentences on procedural grounds, and that one-half of these reversals result in the defendant being resentenced to death (seventeen of thirty-two) with the odds slightly higher for those with a sentence reversal only (ten of fifteen).

Appendix A provides some descriptive information on the twenty-six cases whose death sentences the South Carolina Supreme Court ultimately affirmed.[73] The table reports the case, the date the case was affirmed by the court, and a brief description highlighting the features that the reviewing court thought to be the salient characteristics of each offense. Appendix B provides similar information on thirty-two cases where the initial direct appeal resulted in either the conviction or sentence being reversed.[74]

A. Fact-Specific Frequency Analysis

The empirical analysis of affirmed death sentences for proportionality begins with Table 3, which reports the results of the fact-specific frequency method. The results are first presented separately for each case. In addition to a review for comparative excessiveness in the individual case, the South Carolina capital sentencing system as a whole is then evaluated with a summary analysis of the number and proportion of affirmed death sentences at different levels of death sentence frequency. If a large proportion of affirmed capital cases falls into categories where death is the regularly applied sentence (*i.e.*, a much higher percentage of death relative to life sentences), then we can be better assured that the system as a whole is operating to enforce the principle of proportionality.

73. *See* Appendix A "Case Characteristics for South Carolina Affirmed Death Sentences: 1979 to 1987," *infra* p. 527.

74. *See* Appendix B "Case Characteristics for South Carolina Reversed and Remanded Death Sentences: 1979 to 1987," *infra* p. 530. In those cases where the defendant was eventually re-sentenced to death, and the sentence was subsequently affirmed, the first direct appeal is noted with a roman numeral.

TABLE 3:
PROPORTION OF DEFENDANTS RECEIVING A DEATH SENTENCE WITHIN SUBGROUPS OF COMPARABLE CASES DEFINED BY FACT SPECIFIC APPROACH: AFFIRMED CASES ONLY

A. *Case Analysis*	Number of Specific Facts Matched in Comparison Group:			
Case	One	Two	Three	Four
State v. Shaw & Roach	8/22	2/5	2/3	
	(.364)	(.400)	(.667)	
State v. Hyman	15/105	13/77	3/36	2/29
	(.143)	(.169)	(.083)	(.069)
State v. Gilbert & Gleaton	15/105	13/77	9/40	7/29
	(.143)	(.169)	(.225)	(.241)
State v. Thompson	15/105	13/77	9/40	7/29
	(.143)	(.169)	(.225)	(.241)
State v. Butler	8/22	6/13	3/8	
	(.364)	(.462)	(.375)	
State v. Copeland & Roberts	15/105	5/11	5/8	
	(.143)	(.455)	(.625)	
State v. Woomer	8/22	5/7	5/7	
	(.364)	(.714)	(.714)	
State v. Yates	15/105	13/77	9/40	7/29
	(.143)	(.169)	(.225)	(.241)
State v. Adams	10/17	8/13	5/7	
	(.588)	(.615)	(.714)	
State v. Spann	8/22	2/5		
	(.364)	(.400)		
State v. Plath & Arnold	8/22	7/11	5/7	
	(.364)	(.636)	(.714)	
State v. Koon	10/17	8/13	1/5	
	(.588)	(.615)	(.200)	
State v. Patterson	15/105	13/77	6/55	5/45
	(.143)	(.169)	(.109)	(.111)
State v. Truesdale	8/22	5/7	3/4	
	(.364)	(.714)	(.750)	
State v. Chaffee & Farrell	8/22	5/11	4/5	
	(.364)	(.455)	(.800)	
State v. Gaskins	1/3			
	(.333)			
State v. Lucas	15/105	4/22	1/7	
	(.143)	(.182)	(.143)	
State v. Singleton	8/22	7/11		
	(.364)	(.636)		
State v. Skipper	8/22	6/13		
	(.364)	(.462)		
State v. Damon	15/105	7/22	7/18	
	(.143)	(.318)	(.389)	

A. *Case Analysis*	Number of Specific Facts Matched in Comparison Group:			
Case	One	Two	Three	Four
State v. Elmore	8/22 (.364)	7/11 (.636)	5/7 (.714)	
State v. Plemmons	15/105 (.143)	8/83 (.096)	4/24 (.167)	
State v. South	2/4 (.500)			
State v. Jones	15/105 (.143)	5/11 (.455)		
State v. Smith	8/32 (.250)	5/11 (.455)		
State v. Kornahrens	10/17 (.588)	10/15 (.667)	5/6 (.833)	

B. *Summary: Proportion of Death Sentences Within Groups of Comparable Cases by Salient Characteristics: Affirmed Cases Only*

Probability of Death Sentence for Comparable Cases	Number of Affirmed Death Cases in This Category	Percent of Affirmed Death Cases
Less than .35	9/26	35%
.36 - .50	7/26	27%
.51 - .75	7.26	27%
.76 - 1.00	3/36	11%

A review of individual cases in Table 3 indicates that there is considerable variation in the proportionality of death sentences. In some cases the affirmed death sentence is clearly not disproportionate, in either its relative or absolute sense, according to this empirical method. For example, in the cases of *State v. Shaw*,[75] *State v. Copeland*,[76] *State v. Woomer (II)*,[77] *State v. Adams (II)*,[78] *State v. Plath (II)*,[79] *State v. Truesdale (II)*,[80] *State v. Chaffee*,[81] *State v. Singleton*,[82] *State v. Elmore (II)*,[83] and *State v. Kornahrens*,[84] over 60% of comparable cases also resulted in a sentence of death. It would appear, then, that in cases such as these the imposition of the death penalty is not excessive in the relative sense since a large proportion of comparable defendants share a simi-

75. 273 S.C. 194, 255 S.E.2d 799 (1979).
76. 278 S.C. 572, 300 S.E.2d 63 (1982), *cert. denied*, 460 U.S. 1103, and 463 U.S. 1214 (1983).
77. 278 S.C. 468, 299 S.E.2d 317 (1982), *cert. denied*, 463 U.S. 1229 (1983).
78. 279 S.C. 228, 306 S.E.2d 208, *cert. denied*, 464 U.S. 1023 (1983).
79. 281 S.C. 1, 313 S.E.2d 619, *cert. denied*, 467 U.S. 1265 (1984).
80. 285 S.C. 13, 328 S.E.2d 53 (1984), *cert. denied*, 471 U.S. 1009 (1985).
81. 285 S.C. 21, 328 S.E.2d 464 (1984), *cert. denied*, 471 U.S. 1009 (1985).
82. 284 S.C. 388, 326 S.E.2d 153, *cert. denied*, 471 U.S. 1111 (1985).
83. 286 S.C. 70, 332 S.E.2d 762 (1985), *vacated and remanded*, 476 U.S. 1101 (1986).
84. 290 S.C. 281, 350 S.E.2d 180 (1986), *cert. denied*, 480 U.S. 940 (1987).

lar fate. Also, since death sentences are regularly imposed in these types of murders they are proportionate in the absolute sense. It can reasonably be argued from this latter point that there is a community consensus that these killings are sufficiently egregious to warrant capital punishment. Some substance can be added by examining the case characteristics of these offenses: they most often involve more than one offender, and frequently involve a brutal rape or the accomplishment of murder with excessive and gratuitous violence, and often are committed against a vulnerable victim.[85]

In Table 3, however, there is a large proportion of cases where the death sentence apparently was comparatively excessive. For example, twenty-nine death eligible cases were identified that matched the *State v. Hyman*[86] case on four specific characteristics: the murder of a single, elderly, male victim during the commission of an armed robbery by more than one offender. Of these twenty-nine matched cases only two resulted in a sentence of death. Thus, only 7% of death eligible defendants committing a similar kind of crime as that committed by appellant Hyman were sentenced to death at the time the South Carolina Supreme Court determined that his sentence was not disproportionate and affirmed it.

Another example is *State v. Patterson (II)*,[87] where a pool of forty-five cases was found matching *Patterson (II)* on four specific characteristics: 1) armed robbery, 2) multiple offenders, 3) lone, 4) male victim. Within this pool of comparable cases a sentence of death was imposed five times. For *Patterson (II)*, then, only 11% of similar defendants were sentenced to death. Given that a sentence of death was imposed in less than one of nine instances where it could have been, a strong argument could be made that imposition of a capital sentence in *Patterson (II)* was comparatively excessive. A pool of forty-five comparable cases may, however, be too large to provide an accurate comparison because a match on even four relevant characteristics belies important differences. In view of this, a pool of twenty-three comparable cases matched on five specific characteristics were identified. Within this group of comparable cases, however, the proportion of defendants that were sentenced to death increased to only 13% (three of twenty-three).

Of course, even these twenty-three cases are similar only in terms of five case characteristics, and may, therefore, be different in other ways such as the time of day of the slaying or its geographic location. However, the method of fact-specific matching selects cases on those features that the court thought were most instrumental in sentencing the defendant to death. Other characteristics which may differentiate defendants are *not* the sort that should distinguish between those defendants who live and those who should die. The

85. *See* Appendix A, *infra* p. 527.

86. 276 S.C. 559, 281 S.E.2d 209 (1981), *cert. denied*, 458 U.S. 1122 (1982), *habeas corpus denied sub nom.*, Hyman v. Aiken, 606 F. Supp. 1046 (D.S.C.), *vacated and remanded*, 777 F.2d 938 (4th Cir. 1985), *vacated and remanded*, 478 U.S. 1016 (1986), *habeas corpus granted*, 824 F.2d 1405 (4th Cir. 1987).

87. 285 S.C. 5, 327 S.E.2d 650 (1984), *cert. denied*, 471 U.S. 1036 (1985).

critical consideration is not that such differentiating characteristics still remain, but whether they are of sufficient importance and relevance to justify the difference between a life and a death sentence. It is important to remember in this regard that an infirmity identified in *Furman v. Georgia* was 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."[88]

In terms of general sentencing practices, the *Hyman* and *Patterson (II)* cases are not unique. There are several others where the proportion of death sentences in the group of comparable cases is quite small: *State v. Gilbert (II)*,[89] *State v. Thompson*,[90] *State v. Yates*,[91] *State v. Koon (II)*,[92] *State v. Lucas*,[93] and *State v. Plemmons*.[94] What is interesting about these cases is that, with the exception of *State v. Koon (II)*, all of them involved armed robbery as an aggravating circumstance, and none can be said to be unusually brutal murders.

The summary of statewide sentencing patterns reported in Table 3B indicates that for a substantial number of homicides the proportion of death sentences in the group of comparable cases is fairly high. In ten of the twenty-six affirmed death cases (38%), the rate of death sentencing among similar cases was greater than 50%. As suggested earlier, an examination of the characteristics of these cases reveals that they frequently involve rape, or a particularly violent and brutal murder that often involves several statutory and nonstatutory aggravating circumstances. The data suggest that South Carolina juries find the penalty of death an acceptable punishment in those killings that involve the rape or brutal killing of another with gratuitous violence.

The jury is making an entirely different statement regarding other kinds of killings, however. Table 3B shows that in nine of twenty-six cases (35%)

88. 408 U.S. at 313 (White, J. concurring) (emphasis added). The South Carolina Supreme Court's brief discussion of sentence proportionality in *Patterson (II)* does not indicate with any precision what distinguished appellant Patterson from other, similar killers not deserving a death sentence. "The appellant shot the victim in cold blood for pecuniary gain. The victim's autopsy revealed 30 to 40 pellet wounds to the head in addition to the one by two inch hole." *Patterson (II)*, 285 S.C. at 9, 327 S.E.2d at 654. The first observation by the court cannot distinguish Patterson from other defendants convicted of capital murder involving armed robbery or larceny, since the jury's finding of a guilty verdict is sufficient to establish that the murder was premeditated and intentional ("in cold blood"), and the aggravating circumstance (armed robbery) determines that it was accomplished "for pecuniary gain." What apparently distinguished Patterson II from other cases in which there was an armed robbery-murder was the number of entry wounds caused by the type of weapon, a shotgun. If this is true, it is worth noting that in Godfrey v. Georgia, 446 U.S. 420 (1980), a plurality of the U.S. Supreme Court observed that the use of a shotgun in a murder is not a sufficiently meaningful characteristic to differentiate death from life sentences even if it results "in a gruesome spectacle." *Id.* at 433 n.16 (plurality opinion).

89. 277 S.C. 53, 283 S.E.2d 179 (1981), *cert. denied*, 456 U.S. 984 (1982).

90. 278 S.C. 1, 292 S.E.2d 581, *cert. denied*, 456 U.S. 938 (1982).

91. 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied*, 462 U.S. 1124 (1983), *denial of habeas corpus vacated sub nom.*, Yates v. Aiken, 474 U.S. 896 (1985).

92. 285 S.C. 1, 328 S.E.2d 625 (1985).

93. 285 S.C. 37, 328 S.E.2d 63, *cert. denied*, 472 U.S. 1012 (1985).

94. 286 S.C. 78, 332 S.E.2d 765 (1985), *vacated and remanded*, 476 U.S. 1102 (1986).

where the state supreme court has affirmed a death sentence, the rate of death sentencing in the group of comparable cases is lower than 35%. In over one-third of the cases affirmed as non-excessive by the South Carolina court, the jury imposed a sentence of death in fewer than four out of every ten comparable cases. An examination of these cases reveals them to be armed robbery-murders with few features that "meaningfully" separate them from those where a non-capital sentence was imposed. It would appear, at least from this method of assessing case comparability, that community standards of decency find the death penalty unacceptable for the non-egregious killing of an armed robbery victim.

These findings for South Carolina are comparable to those found under Georgia's similar statute by Baldus and his colleagues. In an early analysis of sixty-eight post-*Furman* cases using a similar fact-specific empirical method, they found that 25% of sixty-eight imposed death sentences had death sentencing rates that were less than .35. The percentage of comparatively excessive death sentences using this analysis is slightly higher (35%) in South Carolina. Baldus and his colleagues also found that in 40% of the cases reviewed the death sentencing rate was greater than .50, while in South Carolina the comparable figure is 38% of the cases.[95]

B. Overall Aggravation Frequency Analysis

In order to assess the reliability of these observations, two different methods of determining case comparability, based on overall aggravation, are also employed. A logistic regression equation with type of sentence (life/death) as the outcome variable and nine explanatory variables is constructed. The explanatory variables are the number of victims, number of offenders, defendant's criminal history, victim-offender relationship, presence of non-statutory felonies (not an aggravating circumstance under South Carolina's death penalty statute), number of statutory felony offenses (such felonies are listed in the South Carolina statute as aggravating circumstances, and include rape, assault with intent to ravish, kidnapping, armed robbery, larceny with a deadly weapon, housebreaking, and burglary), presence of mitigating circumstances, presence of brutality or pre/post-mortem abuse, type of weapon, race of victim and race of offender. The two race variables are included in the estimation of the equation in order to purge the non-race variables of any effect racial bias might have, but are not included in the construction of any of the final aggravation or propensity measures.

After estimating and fitting several equations the most parsimonious model is reported in Table 4:

95. *Comparative Review of Death Sentences, supra* note 38, at 704.

TABLE 4:
LOGISTIC REGRESSION FOR THE DECISION TO SENTENCE CONVICTED CAPITAL DEFENDANTS TO DEATH (N=135)

Variable	*Logit Coefficient*	*Odds Multiplier*
Number of Offenders	1.3966	4.04
Race of Victim	−1.7804	.16
Race of Offender	1.9285	6.88
Mitigating Circumstances	−1.8042	.16
Use of Handgun	.9119	2.48
Brutal Homicide	3.5472	34.72
Number of Felonies	1.2948	3.65
Constant	−3.6848	
Likelihood Ratio Test	56.35	
Degrees of Freedom	7	

CLASSIFICATION TABLE
Predicted Outcome

		Life	*Death*	*Totals*
Actual Outcome	Life	102	7	109
	Death	6	20	26
		108	27	135

Percent correctly predicted by the model: 90.37%
Percent correctly predicted by chance: 68.15%
Percent reduction in error relative to chance: 71.42%

Number of Aggravation Factors

	1	2	3	4	5	*Totals*
Sentence Imposed: Life	5	29	47	25	3	109
Sentence Imposed: Death	0	3	4	6	13	26
Probability of Death	.000	.094	.078	.194	.813	135

$\chi^2 = 47.02$ $p \leq .0001$
Gamma = .70

The logit analysis indicates that the imposition of the death penalty is influenced by the number of offenders, the presence of factors in mitigation, the use of a handgun in the killing, the brutality of the homicide, and the

number of felony offenses committed by the defendant during the murder. The associated likelihood ratio test for this equation suggests that the model provides a fairly good description of the data.[96] In order to determine how predictively useful the aggravation scale would be, the associated probabilities calculated from the estimated logit model are used to predict whether the defendant in each case would be sentenced to death. Table 4 reports the results of a classification table that compares the predicted outcome, based upon the logistic regression, with the observed outcome. These results indicate that the estimated equation fits the data well; the equation improves the prediction of the outcome event over chance (based on marginal distributions) by over 70%.

The equation suggests that five factors are important in predicting sentencing outcome. For each of the 135 capital murder cases a score measuring overall case aggravation of zero to five is assigned, based on the number of five possible aggravating factors that were present (the *absence* of a mitigating factor was scored as one). The third section of Table 4 reports the probability of a death sentence at each of these five levels. There is a statistically significant ($\chi^2 = 47.02$, $p < .0001$) and substantively strong (gamma = .70) relationship between these culpability/aggravation factors and the imposition of a death sentence.[97]

The data show that juries in South Carolina are generally reluctant to impose a death sentence until a murder becomes highly aggravated, and then they consistently do so. The probability of a death sentence does not become greater than .20 until the highest category of aggravation, where it is imposed in eight of ten cases. Across the state, most juries appear to be reserving capital punishment for the most heinous murders. This is not always the case since seven death sentences (27% of the total number of death sentences) were imposed in the three least aggravated categories where the overall probability of a death sentence was only .086.

96. The likelihood ratio test determines if any of the estimated structural effects is significantly different from zero. In this case, the test indicates that the effect of some of the included predictors is different from zero. A rejected ratio test would lead one to suspect that the specified model is incorrect.

97. The issue of statistical significance refers to the probability that the observed relationship between the culpability/aggravation factors and the imposition of a death sentence is due to chance alone. The reported probability level of .0001 indicates that the probability that the observed relationship is not a real one but instead due to chance is only one out of 10,000. Given such an unlikely event, the relationship is probably a true one.

Gamma measures the strength of the association between two ordinal level variables, in this case between the culpability score and the imposition of a death sentence. The absolute value of gamma has a proportional reduction in error interpretation. Gamma is one if knowledge of one's score on one variable allows perfectly accurate prediction of one's score on the other, and a gamma of zero means that the two variables are independent (not related to each other). The phrase "substantively strong" is used to imply that a gamma value of .70 means that the two variables here are strongly related to each other, that is, that knowledge of the culpability score of a homicide allows fairly accurate prediction (a 70% improvement over chance guessing) as to whether or not a death sentence will be imposed.

These results form the basis for two frequency/overall aggravation measures of case comparability. The first measure is based upon the number of aggravation factors present in the case (total aggravation factors). All cases that possessed *the same number* of aggravation factors identified by the logistic equation were considered to be comparable. Therefore, there were five groups of comparable cases. In this method of determining case comparability each aggravation factor carries the same weight so that cases may differ in the precise factors included. For example, the fifty-one cases at level three are those cases that included *any three* aggravation factors.

A second measure of case comparability was constructed similarly to Rosenbaum and Rubin's propensity score.[98] A total propensity score was obtained by summing the value of the logistic coefficients (plus the constant) for each aggravation factor that was present. In this way, each factor was assigned a differential weight corresponding to its importance in predicting sentencing outcome. This summed value is the likelihood of a defendant with these case characteristics being sentenced to death. A group of similar cases by this method would be comprised of those with identical or very proximate propensity scores.

Table 5 provides a case analysis and state-wide summary of the proportionality of the twenty-six affirmed death sentences according to the propensity score (column 1) and the number of aggravation factors (column 2):

TABLE 5:

PROPORTION OF DEFENDANTS RECEIVING A DEATH SENTENCE WITHIN SUBGROUPS OF COMPARABLE CASES WHERE COMPARABLE CASES ARE DEFINED IN TERMS OF OVERALL PROPENSITY SCORE (COLUMN 1) AND NUMBER OF AGGRAVATION FACTORS (COLUMN 2)

A. *Case Analysis* Case	(1) Overall Propensity Score	(2) Number of Aggravation Factors
State v. Shaw	9/11 (.818)	13/16 (.813)
State v. Hyman	1/12 (.083)	3/32 (.094)
State v. Gilbert	1/7 (.143)	6/31 (.194)
State v. Thompson	1/7 (.143)	4/51 (.078)
State v. Butler	1/19 (.053)	4/51 (.078)
State v. Copeland	9/11 (.818)	13/16 (.813)
State v. Woomer	9/11 (.818)	13/16 (.813)
State v. Yates	1/19 (.053)	4/51 (.078)
State v. Adams	1/5 (.200)	6/31 (.194)
State v. Spann	1/5 (.200)	6/31 (.194)
State v. Plath	9/11 (.818)	13/16 (.813)
State v. Koon	1/12 (.083)	3/32 (.094)

98. *See supra* note 59 and accompanying text.

A. *Case Analysis* Case	(1) Overall Propensity Score	(2) Number of Aggravation Factors
State v. Patterson	4/11 (.364)	4/51 (.078)
State v. Truesdale	7/9 (.778)	13/16 (.813)
State v. Chaffee	9/11 (.818)	13/16 (.813)
State v. Gaskins	1/18 (.056)	3/32 (.094)
State v. Lucas	1/10 (.100)	6/31 (.194)
State v. Singleton	4/11 (.364)	6.31 (.194)
State v. Skipper	1/18 (.056)	3/32 (.094)
State v. Damon	1/5 (.200)	4/51 (.078)
State v. Elmore	8/12 (.667)	13/16 (.813)
State v. Plemmons	1/10 (.100)	3/32 (.094)
State v. South	3/17 (.176)	3/32 (.094)
State v. Jones	4/11 (.364)	6/31 (.194)
State v. Smith	1/5 (.200)	6/31 (.194)
State v. Kornahrens	2/11 (.182)	4/51 (.078)

B. *Overall Propensity Summary: Proportion of Death Sentences Within Groups of Comparable Cases by Overall Propensity: Affirmed Cases Only*

Probability of Death Sentence for Comparable Cases	Number of Affirmed Death Cases in This Category	Percent of Affirmed Death Cases
Less than .35	16	62%
.36 - .50	3	12%
.51 - .75	1	4%
.76 - 1.00	6	23%

C. *Number of Aggravation Factors Summary: Proportion of Death Sentence Within Groups of Comparable Cases by Number of Aggravation Factors: Affirmed Cases Only*

Probability of Death Sentence for Comparable Cases	Number of affirmed Death Cases in This Category	Percent of Affirmed Death Cases
Less than .35	19	73%
.36 - .50		
.51 - .75		
.76 - 1.00	7	27%

Since both the propensity score measure and aggravation scores are derived from the same logistic regression analysis, they provide comparable results. The proportion of cases resulting in a death sentence in the pool most similar to the one being reviewed is approximately the same in both methods. In addition, for those cases at the margins (most and least aggravated), the substantive conclusions to be drawn from Table 5 are identical to those from Table 3. The cases which appear comparatively proportionate by the two

overall aggravation methods are also those that were found to be non-excessive by the fact-specific method: *State v. Shaw*,[99] *State v. Copeland*,[100] *State v. Woomer (II)*,[101] *State v. Plath (II)*,[102] *State v. Truesdale (II)*,[103] *State v. Chaffee*,[104] and *State v. Elmore (II)*.[105] By any of the three methods of estimating case comparability, these unusually egregious killings, which comprise approximately one-fourth (six of twenty-six) of the affirmed cases, are treated with consistent severity by South Carolina juries.

Table 5 also identifies cases where the proportion of death sentences in the group of similar cases is quite small, and these appear to be the non-brutal armed robbery slayings that were also identified by the fact-specific method (Table 3) to be comparatively excessive: *State v. Hyman*,[106] *State v. Gilbert (II)*,[107] *State v. Thompson*,[108] *State v. Yates*,[109] *State v. Patterson (II)*,[110] *State v. Lucas*,[111] and others. There is agreement in many instances, then, on these three methods of estimating case comparability as to which death sentences are proportionate and which are comparatively excessive. In both a relative and absolute sense of proportionality, cases that are particularly egregious, in that they involve excessive violence and brutality, are met with the consistent imposition of capital punishment, while those that can perhaps best be described as non-exceptional armed robbery-slayings are only rarely likely to result in the imposition of death.

The results of the two overall aggravation measures differ most from the fact-specific method in cases at the middle range of aggravation, where the overall aggravation analyses more often lead to the conclusion that the death sentences were comparatively excessive. As a result, Tables 5B and 5C suggest that over 60% of the twenty-six affirmed death cases should be characterized as comparatively excessive, while only 35% of the cases were deemed disproportionate by the fact-specific method.

The South Carolina Supreme Court reviewed these twenty-six sentences and found they were proportionate "to the penalty imposed in similar cases, considering both the crime and the defendant."[112] The next section explores why the theory and method of proportionality review by the South Carolina Supreme Court fails to identify the significant portion of comparatively exces-

99. 273 S.C. 194, 255 S.E.2d 799 (1979).
100. 278 S.C. 572, 300 S.E.2d 63 (1982).
101. 278 S.C. 468, 299 S.E.2d 317 (1982).
102. 281 S.C. 1, 313 S.E.2d 619 (1984).
103. 285 S.C. 13, 328 S.E.2d 53 (1984).
104. 285 S.C. 21, 328 S.E.2d 464 (1984).
105. 286 S.C. 70, 332 S.E.2d 762 (1985).
106. 276 S.C. 559, 281 S.E.2d 209 (1981).
107. 277 S.C. 53, 283 S.E.2d 179 (1981).
108. 278 S.C. 1, 292 S.E.2d 581 (1982).
109. 280 S.C. 29, 310 S.E.2d 805 (1982).
110. 285 S.C. 5, 327 S.E.2d 650 (1984).
111. 285 S.C. 37, 328 S.E.2d 63 (1985).
112. S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. 1985).

sive death sentences consistently found using the frequency method of analysis.

III.
THE THEORY AND METHOD OF PROPORTIONALITY REVIEW OF THE SOUTH CAROLINA SUPREME COURT

A. The South Carolina Supreme Court's Non-Empirical Review for Comparatively Excessive Death Sentences

The South Carolina Supreme Court is given minimal legislative guidance in conducting proportionality review of death sentences under the 1977 death penalty statute.[113] In parroting the Georgia statute[114] approved in *Gregg v. Georgia*,[115] the South Carolina Act simply asserts that the state court is to review each death sentence to determine if it is "excessive or disproportionate to the penalty imposed in similar cases."[116] The statutory language seems to imply that a given death sentence is to be compared with sentences imposed in similar cases.

There is some historical support for this interpretation of the South Carolina statute. First, appellate review of death sentences was one element designed to cure the infirmity of *Furman v. Georgia*.[117] This defect *was not* that defendants like Furman did not individually deserve death, but that the *patterns* of capital sentencing suggested that the death penalty was being imposed in an arbitrary and capricious manner.[118] Second, since it was deliberately modeled after Georgia's law, it would seem reasonable to believe that South Carolina legislators intended appellate review to have a function similar to the Georgia scheme. There were at least two early occasions where the Georgia Supreme Court explained the purpose of its proportionality review.[119]

113. *See* S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. 1985).

114. GA. CODE ANN. § 17-10-35(c)(3) (1982).

115. 428 U.S. 153 (1976).

116. S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. 1985).

117. 408 U.S. 238 (1972).

118. Each concurring opinion in *Furman* was based upon the justices' belief that the proportion of life to death sentences for types of capital offenses was too low to be constitutionally permissible. Under such schemes, death sentences were described as "pregnant with discrimination," 408 U.S. at 257 (Douglas, J., concurring), "smack[ing] of little more than a lottery system," *id.* at 293 (Brennan, J., concurring), "wantonly and . . . freakishly imposed," *id.* at 310 (Stewart, J., concurring), and "the pointless and needless extinction of life," *id.* at 312 (White, J., concurring).

119. There is also evidence to suggest that the Court in *Gregg* believed that the Georgia Supreme Court would engage in an extensive comparative proportionality review, comparing the proportion of life and death sentences within a group of comparable cases. "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. . . . 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." 428 U.S. at 206 (plurality opinion). "The Georgia Supreme Court has interpreted the appellate review statute to require it to set aside the death sentence whenever juries across the State impose it only rarely for the type of crime in question; but to require it to affirm death sentences

In *Coley v. State*,[120] the court noted that "if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive."[121] In *Moore v. State*,[122] the court asserted that "we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally . . . ."[123] In order to ascertain if the death penalty is "rarely imposed" or "imposed generally" for a particular category of capital murder, an assessment must be made of the proportion of death and life sentences that occur within that category. Since both *Coley* and *Moore* were handed down before the South Carolina capital punishment statute was drafted, it is reasonable to assume that proportionality review was to have the same purpose in South Carolina as it has in Georgia.[124]

In the first case that discussed proportionate capital sentencing, the South Carolina court suggested that it might conduct an empirical form of comparative sentence review. In *State v. Shaw*'s discussion of the proportionality of the death sentences handed down to appellants Shaw and Roach, the court "compared the death sentences imposed upon appellants with the sentences imposed in all prior capital cases tried under the current death penalty statute."[125] The court concluded, however, that since the death sentences given to defendants Shaw and Roach were the first imposed under the new statute, there were no other "comparable cases" to which the court could compare their sentence.[126] In spite of the fact that an exhaustive comparative sentence review could not be conducted, however, the South Carolina Supreme Court's holding that proportionality review should include an examination of "all prior capital cases" is significant. If the court were interested solely in a non-empirical form of absolute proportionality review, the absence of similar cases under a new statute would make little difference. Under a reasonableness approach, for example, the court would simply review the facts of the case and make a determination whether this was the type of offense that fell into the category of one deserving the death penalty.

---

whenever juries across the State generally impose it for the crime in question." *Id.* at 223 (White, J., concurring).

120. 231 Ga. 829, 204 S.E.2d 612 (1974) (per curiam).

121. *Id.* at 834, 204 S.E.2d at 616.

122. 233 Ga. 861, 213 S.E.2d 829 (1975) (per curiam), *cert. denied*, 428 U.S. 910 (1976).

123. *Id.* at 864, 213 S.E.2d at 832.

124. This, however, is clearly not what the Georgia Supreme Court actually does in conducting its proportionality review. Baldus and his colleagues have shown that the Georgia court rarely includes life sentence cases in its comparative sentence review. *See supra* note 45 and accompanying text.

125. 273 S.C. at 211, 255 S.E.2d at 807.

126. "Any system of review that requires a comparison of each case with all similar prior cases must have a beginning. There will be a first case for each type or category of capital case that may appear and that first case necessarily cannot be compared to any other similar cases. The first case must stand alone otherwise comparative sentence review would be forever impossible." *Id.*

In *State v. Hyman*,[127] the next opportunity at which the court had to review a death sentence for proportionality, however, it moved away from an empirical approach to comparative sentence review. Appellant Hyman's death sentence for the armed robbery-murder of an elderly man was reviewed by the state supreme court in the summer of 1981. Four years had passed since the new death penalty statute had taken effect and there were over twenty-five convictions for murder involving armed robbery during that time. Contrary to *Shaw*, then, the court could not claim that there were no comparable cases with which to compare defendant Hyman's case. However, in its discussion of the proportionality of Hyman's sentence, the court did not indicate any interest in an empirical approach to proportionality review. The court's entire discussion of proportionality was as follows: "The record clearly reflects appellant planned, prepared and committed a brutal crime for the purpose of obtaining money. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case."[128]

This sentence fulfilled the court's requirement that it review the factual validity of each death sentence. The court determined that sufficient evidence existed that Hyman committed a murder with an aggravating circumstance, armed robbery. The comparative review of the sentence, however, was devoid of analysis. There was no indication that the court was concerned with whether or not Hyman's death sentence was proportionate to that imposed in similar cases. The court simply asserted that it was proportionate *to a crime of this type*. It was not excessive, the court concluded, because defendants who plan, prepare, and commit a murder for monetary gain are within the category of persons deserving death. Such analysis merely begs the question of proportionality. The court failed to distinguish Hyman's conviction from other armed robbery-murder convictions for which defendants received non-death sentences. The court in *Hyman* failed to elaborate on its implicit measuring rod. It clearly was no longer interested in relative proportionality, either as a goal in itself or as a means to assess the absolute proportionality of a particular death sentence. Instead, the South Carolina Supreme Court applied a "reasonableness model" of proportionality review: given the characteristics of the crime, a penalty of death was reasonable.

The court's shift away from the analytical framework of *Shaw* was further revealed in *State v. Gilbert (II)*,[129] decided less than two months after *Hyman*. Affirming the death sentences for two defendants convicted of murder during the commission of an armed robbery, the court's one sentence proportionality analysis found that "the death penalty is proportionate to a crime of this nature and to the crime and defendants in this case."[130] The court again made an unexplained determination that some armed robbery-slayers

127. 276 S.C. 559, 281 S.E.2d 209 (1981).
128. *Id.* at 571, 281 S.E.2d at 215.
129. 277 S.C. 53, 283 S.E.2d 179 (1981).
130. *Id.* at 60, 283 S.E.2d at 182.

are morally deserving of the death penalty, and that these two particular offenders fell into that category. The court did compare the death sentences of defendants Gilbert and Gleaton with *Shaw* and *Hyman*, but these cases involved death sentences that were affirmed, and the court failed to examine comparable cases where the death penalty was *not* imposed. In the next two cases involving proportionality review, *State v. Thompson*[131] and *State v. Butler*,[132] the court conducted similar analyses.

In response to the defense bar's growing objection that its comparative sentence review was unduly narrow, the South Carolina Supreme Court provided a definitive explanation of its theory and methodology of proportionality review in *State v. Copeland*, calling their analysis "one final pronouncement on the proper interpretation" of proportionality review.[133] The court declared that the task of assessing the similarity of cases and determining the scope of any proportionality review is "plainly and properly left to this Court."[134] The court then presented a discussion of federal constitutional law on the death penalty, concluding that there is a "profound tension between the requirement of individualized sentencing and the notion of comparative review."[135]

The *Copeland* court resolved this "profound tension" through a selective reading of federal case law on capital punishment. Although *Gregg v. Georgia*[136] and its companion cases require *both* consistent and individualized capital sentencing, the *Copeland* court "resolved" the tension not by balancing the two, but by rejecting the consistency principle: "the final resolution of a given appeal, if sentence is to be affirmed, should rest upon the *unique correctness of the result in the given instance* rather than its coarse resemblance to other cases."[137]

In pronouncing that the ultimate objective of proportionality review is to ensure the "unique correctness" of each case, the court adopted an absolute model of proportionality based upon individual just deserts. The court in *Copeland* indicated that a death sentence is proportionate if it is morally deserved in an individual case even if other, comparable, cases are punished more leniently. In attempting to determine whether a particular death sentence is deserved or excessive, without depending solely on the idiosyncratic moral positions of changing court members, the court in *Copeland* did not

131. 278 S.C. 1, 292 S.E.2d 581 (1982).

132. 277 S.C. 452, 290 S.E.2d 1, *cert. denied*, 459 U.S. 932 (1982).

133. 278 S.C. 572, 586, 300 S.E.2d 63, 71 (1982).

134. *Id.* at 587, 300 S.E.2d at 72. The *Copeland* court went further and concluded that the "U.S. Supreme Court has declined to impose any specific model of [proportionality] review upon the states." *Id.* at 590, 300 S.E.2d at 74.

135. *Id.* at 587, 300 S.E.2d at 72. The court came to this conclusion because "[t]here is, after all, some logic to the view that the heinous crime is *sui generis*, simply beyond comparison." *Id.*

136. 428 U.S. 153 (1976).

137. 278 S.C. at 587, 300 S.E.2d at 72 (emphasis added). The *Copeland* court seemed to imply that a comparative review which sacrifices consistency for the individualization of death sentences is constitutionally acceptable. Such a scheme would perilously resemble those condemned by Furman v. Georgia, 408 U.S. 238 (1972).

completely abandon a comparative approach to proportionality review; it simply restricted the possible universe of comparable cases to those in which the defendant was convicted and sentenced to death. It adopted this approach as its moral barometer because the court was convinced that when a jury imposes a sentence of death it "has spoken unequivocally."[138] Noting that the voice of the jury is nullified when based on trial error, the *Copeland* court further narrowed the universe of comparable cases to affirmed death cases only.[139] Thus, if the instant case resembles one or more cases in which the jury favored death, and there was no error in this case, the sentence will be affirmed, even if the penalty diverges from sentencing patterns.

The *Copeland* court's method of proportionality review fails to explain how a reviewing court can distinguish between a jury which speaks unequivocally for death, thus presumably reflecting the moral sentiments of prevailing community standards, and the occasionally aberrant jury. What the *Copeland* court has tragically failed to comprehend is that when a jury speaks for life it too has "spoken unequivocally" by stating that this is not the type of crime it believes deserves death. By failing to consider cases in which the jury has imposed a life sentence, the South Carolina court has divorced itself from the very community standards of morality it wishes to gauge. If juries in South Carolina consistently impose life sentences for particular kinds of slayings, non-egregious armed robbery-murders for example, the state supreme court under its current method of comparative review will have no way to discover this trend, and will be unable to distinguish these cases from the few death sentences that may be imposed for such crimes in the state. Given the methodology outlined by the *Copeland* court, and applied in subsequent cases, the court would presume the latter cases in which death sentences were imposed to be an accurate assessment of community standards, even though it would more appropriately be described as a perversion of that standard.

The South Carolina court has failed to invalidate a single death sentence as comparatively excessive. This is not to say, however, that the court has consistently applied one specific approach to proportionality review. Although the court has followed a theory of absolute proportionality and employed a methodology that allows it to consider only previously affirmed death sentences as comparable cases, it has applied several different rationales in its comparative sentence review. Table 6 reports the model of proportionality review used in each of the twenty-six cases in which the state supreme court has affirmed a death sentence. The table reports the cases in chronological order along with the justice who authored each opinion, and the text of the court's discussion of proportionality review in each case.

In examining the opinions in these cases, what is most striking is the brevity of discussion concerning proportionality review. The absence of analytical discussion as to why death in each case was a deserved penalty provides

138. *Id.* at 591, 300 S.E.2d at 74.
139. *Id.* at 592, 300 S.E.2d at 75.

TABLE 6:
MODEL OF PROPORTIONALITY REVIEW APPLIED IN TWENTY-SIX AFFIRMED DEATH CASES: 1979 - 1986

Case	*Date Affirmed*	*Justice Writing Opinion*	*Model of Proportionality Review*
State v. Shaw	5/28/79	Justice Gregory	Any system of review that requires a comparison of each case with all similar prior cases must have a beginning. This case was the first death sentence reviewed on direct appeal by the state supreme court. In this first review, the court hinted that it saw its statutory function as conducting a *comparative review*: "There will be a first case for each type or category of capital case that may appear and that first case necessarily cannot be compared to any other similar cases. The first case must stand alone, otherwise *comparative sentence review* would be forever impossible." (p. 807, emphasis added)
State v. Hyman	7/22/81	Justice Ness	REASONABLENESS MODEL: "The record clearly reflects appellant planned, prepared and committed a brutal crime for the purpose of obtaining money. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case." (p. 215) No cases cited as comparable.
State v. Gilbert	9/14/81	Justice Ness	PRECEDENT SEEKING — OVERALL CULPABILITY MODEL: "Considering the record in this case and comparing it with *State v. Shaw* . . . and *State v. Hyman* . . . , we find the death penalty is proportionate to a crime of this nature and to the crime and defendants in this case." (p. 182)
State v. Thompson	1/07/82	Justice Harwell	PRECEDENT SEEKING — OVERALL CULPABILITY MODEL: ". . . we have determined that the sentence of death is neither excessive nor disproportionate to the peanlty imposed in similar cases. *State v. Shaw* . . . , *State v. Hyman* . . . , *State v. Gilbert* et al., . . ." (p. 584, n.1)
State v. Butler	2/22/82	Justice Ness	REASONABLENESS MODEL: "The record clearly reflects appellant maliciously and purposefully committed a brutal murder accompanied by rape. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case." (p. 4) No cases cited as comparable.

Case	*Date Affirmed*	*Justice Writing Opinion*	*Model of Proportionality Review*
State v. Copeland	11/10/82	Justice Gregory	PRECEDENT SEEKING — OVERALL CULPABILITY MODEL: "It is our conclusion that no 'similar' case exists that would permit meaningful comparative review of these death sentences. In view of the facts set forth above, however [a review of previously affirmed death cases], we are satisfied that the sentence of death imposed on each of these appellants was appropriate and neither excessive nor disproportionate in light of their crimes and their respective characters." (p. 77)
State v. Woomer	12/20/82	Justice Gregory	PRECEDENT SEEKING — FACT SPECIFIC MODEL: "All things considered, we conclude that the jury made a correct determination in this case and that the sentence of death is neither excessive nor disproportionate in light of this crime and this defendant. Further, given that we have upheld a comparable sentence in the comparable case of *State v. Shaw* . . . we are confident that the finding of this jury is by no means an aberration." (p. 321 - 322)
State v. Yates	12/22/82	Per Curiam	PRECEDENT SEEKING — FACT SPECIFIC MODEL: "We are satisfied that the penalty here imposed is neither excessive nor disproportionate in light of this crime and this defendant. Given that we have upheld a comparable sentence in the comparable case of *State v. Gilbert* . . . we are confident that the finding of this jury represents consistent application of the ultimate sanction in this category of capital crime." (p. 814)
State v. Adams	6/29/83	Justice Littlejohn	PRECEDENT SEEKING — OVERALL CULPABILITY MODEL: "Cases tried in this state under the death penalty statute resulting in capital punishment heretofore, involved factual situations and accused persons similarly atrocious to those involved in this case. It is our observation that a unanimous jury in South Carolina has ordered the death penalty in only those cases where the proof of facts is virtually undebatable and the nature of the wrongful killing is such as to shake the conscience of the community. The facts are not the same in any two cases and, accordingly, our review of the facts relate largely to degree of culpability of the defendant and the viciousness of the killing. In the case at hand, there is no semblance of an excuse for the wrongful killing, nor does the record reveal any facts relative to the accused person himself that would warrant leniency . . . We find that the penalty imposed is not disproportionate to the penalty imposed in other cases under the comparatively new death penalty statute. The jury had ample opportunity to weigh all of the evidence as might relate to mitigating circumstances and found none offsetting the aggravating circumstances." (p. 215 - 216) Referred to hereafter as *Adams* boilerplate.

Case	*Date Affirmed*	*Justice Writing Opinion*	*Model of Proportionality Review*
State v. Spann	10/13/83	Justice Harwell	PRECEDENT SEEKING — OVERALL CULPABILITY MODEL: "The facts here are sufficiently egregious to justify a penalty of death. Appellant broke into an elderly woman's home, stole money and jewelry, assaulted her sexually, and killed her by strangulation. The death penalty is fully justified. (See the capital cases cited in *State v. Adams*)." (p. 521)
State v. Plath	1/17/84	Justice Lewis	PRECEDENT SEEKING — FACT SPECIFIC MODEL: ". . . the recommended sentences are wholly commensurate with this crime. Lacking precisely identical cases with which to compare these verdicts, we are convinced that the sentence of death is neither excessive nor disproportionate in light of this crime and these defendants. The atrocious nature of this murder resembles in some respects the cases of *State v. Shaw* . . . , and *State v. Woomer* . . . ." (p. 630)
State v. Koon	4/03/84	Justice Gregory	PRECEDENT SEEKING — OVERALL CULPABILITY MODEL: "In determining whether or not the sentence imposed here is excessive or disproportionate in light of the crime and appellant, we have considered the previous cases where the death penalty was imposed by the trial court and affirmed by this court: [Twelve previously affirmed cases are cited]. . . . We find the death penalty neither excessive nor inappropriate in light of the circumstances of the crime and the character of the appellant." (pp. 626-27)
State v. Patterson	10/10/84	Justice Chandler	PRECEDENT SEEKING — OVERALL CULPABILITY MODEL: "We conclude that, in light of the nature of the crime and the appellant's character, the sentence must be affirmed. (See cases collected in *State v. Koon* . . .). The appellant shot the victim in cold blood for pecuniary gain. The victim's autopsy revealed 30 to 40 pellet wounds to the head in addition to the one by two inch hole." (p. 654)
State v. Truesdale	10/31/84	Justice Chandler	REASONABLENESS MODEL: "We find the sentence is not excessive or disproportionate to that imposed in similar cases. The death penalty is fully justified by the brutal homicide accompanied by rape, reflected in the evidence of this case." (p. 57) No cases cited as comparable.
State v. Chaffee	11/13/84	Per Curiam	PRECEDENT SEEKING — OVERALL CULPABILITY MODEL: *Adams* boilerplate.
State v. Gaskins	1/22/85	Per Curiam	PRECEDENT SEEKING — OVERALL CULPABILITY MODEL: *Adams* boilerplate.

Case	*Date Affirmed*	*Justice Writing Opinion*	*Model of Proportionality Review*
State v. Lucas	1/29/85	Justice Ness	PRECEDENT SEEKING — OVERALL CULPABILITY MODEL: "Upon examination of similar cases where we have approved imposition of the death peanlty, we conclude appellant's sentence must be affirmed. *State v. Plath* . . . ." (p. 66)
State v. Singleton	1/31/85	Justice Harwell	REASONABLENESS MODEL: "The appellant entered an elderly woman's home by night, robbed her of wedding bands and money, raped her twice, strangled her to death and stole her car. The facts support the jury's imposition of the death penalty and are proportionate to the brutal scenarios presented by this State's previous death penalty cases." (pp. 156-57) No cases cited as comparable.
State v. Skipper	2/12/85	Justice Chandler	REASONABLENESS MODEL: "We find the sentence is not excessive or disproportionate to that imposed in similar cases. The death penalty is fully justified by the evidence of this case." (p. 62) No cases cited as comparable.
State v. Damon	4/04/85	Justice Harwell	PRECEDENT SEEKING — OVERALL CULPABILITY MODEL: "We have compared the circumstances and vicious nature of Mr. Felder's murder to the facts in other death penalty cases and conclude that the sentence of death is appropriate. (See *State v. Chaffee*, et al., . . .) The appellant hit the victim in the head over 24 times with a hammer, penetrating the skull. The expert testimony established that death was not necessarily instantaneous and that pain would have been excruciating due to the highly sensitive nerves in the head." (p. 631)
State v. Elmore	5/16/85	Justice Gregory	PRECEDENT SEEKING — FACT SPECIFIC MODEL: "A comparison of the facts of this case with other death penalty cases demonstrates appellant's death sentence is not disproportionate. Mrs. Edwards was savagely attacked and brutally raped. She had multiple pre-mortem injuries all over her body. It is evident she suffered intense pain prior to death. Appellant's sentence was appropriate. See, *State v. Singleton* . . . , *State v. Chaffee and Ferrell* . . . , and *State v. Spann* . . . ." (p. 765)
State v. Plemmons	6/03/85	Justice Harwell	REASONABLENESS MODEL: "We conclude that the defendant's character and the crimes for which he was convicted justify the jury's recommendation of death." (p. 769) No cases cited as comparable.

Case	*Date Affirmed*	*Justice Writing Opinion*	*Model of Proportionality Review*
State v. South	6/04/85	Justice Gregory	REASONABLENESS MODEL: "We have reviewed the facts of other death penalty cases. The sentence in this case was appropriate, especially in light of the complete absence of provocation on the part of the victim." (p. 780) No cases cited as comparable.
State v. Jones	7/02/85	Justice Harwell	PRECEDENT SEEKING — OVERALL CULPABILITY MODEL: "We have compared the facts in this case with those in that growing collection of violent and evil misdeeds which have been punished by a sentence of death, (See cases collected in *State v. Chaffee and Ferrell* . . .) . . . imposition of the death penalty on this 22-year-old appellant is amply supported by this record." (p. 784)
State v. Smith	8/06/85	Justice Ness	REASONABLENESS MODEL: "We have examined other death penalty cases in South Carolina on the question of proportionality as required by Sec. 16-3-25. We conclude that the jury's recommendation of death was justified." (p. 279) No cases cited as comparable.
State v. Kornahrens	10/13/86	Justice Ness	PRECEDENT SEEKING — OVERALL CULPABILITY MODEL: "The death sentence is not excessive or disproportionate to the penalty imposed in similar cases." (Ten cases of widely different fact patterns are cited as comparable.) (p. 187)

no guidance to lower courts to ensure the consistent imposition of the death penalty. With but a few exceptions, the discussion of proportionality review in these twenty-six decisions is exceptionally brief, comprising no more than three to five sentences in most cases. After *Copeland* there is virtually no additional discussion of the court's position on proportionality review generally, or for the specific case under review. The proportionality discussion reported in Table 6 is, in most instances, the entire discussion provided by the court in the opinion.

It is apparent that the South Carolina court has never employed an empirically based model of proportionality review. Consistent with its position in *Copeland*, the court is not interested in ensuring the uniformity of capital sentencing. In those instances where similar cases are cited, *none* of them involve a life sentence. The "string citations" in most cases suggest a *pro forma* technical compliance with the requirement of the state statute, but provide no insight into the reasons for the court's decisions. The court's only apparent concern is that each death sentence be *deserved* based upon the facts of the individual case.

The court follows one of two models to justify the imposition of the death penalty in any given case. In some instances, the court simply determines that a death sentence is appropriate given the egregious facts of the case, and cites no other cases (the reasonableness model). In others, the court uses the facts of the case to find the defendant deserving of a capital sentence, and goes on to cite previously affirmed death cases in support of this position, either because the specific facts of the case are similar to those in a cited affirmed case (precedent seeking-fact specific model) or because of a similarity in the overall level of aggravation of the cases (precedent seeking-overall culpability model). By employing any of these models the court does not attempt to ascertain whether or not a death sentence is regularly imposed for a given type of homicide. It is sufficient to affirm a death sentence in a given case if it is morally deserved according to some standard of reasonableness, or if a death sentence was imposed at least one other time in a comparable case.

Table 7 shows that the South Carolina Supreme Court applied a reasonableness model of comparative sentence review in eight (32%) of the twenty-six affirmed death cases, a precedent seeking-fact specific model in four (16%) of the cases, and a precedent seeking-overall culpability model in thirteen (52%) of the cases.

TABLE 7

PROPORTIONALITY REVIEW OF SOUTH CAROLINA AFFIRMED DEATH PENALTY CASES BY JUSTICES: 1979-1986

A: *Proportion of Time that Each Model of Proportionality Review is Employed*

Type of Proportionality Review	No. of Cases*	% of All Affirmed Cases
Reasonableness	8	32%
Precedent Seeking - Fact Specific	4	16%
Precedent Seeking - Overall Culpability	13	52%
	25	100%

B. *Different Justices and Their Employment of Models of Proportionality Review Over Time*

Justice	Model of Proportionality Review	Case	Date Case Affirmed
Gregory	Precedent Seeking - Overall Culpability	State v. Copeland & Roberts	11/10/82
	Precedent Seeking - Fact Specific	State v. Woomer	12/20/82
	Precedent Seeking - Overall Culpability	State v. Koon	4/13/84
	Precedent Seeking - Fact Specific	State v. Elmore	5/16/85
	Reasonableness	State v. South	6/04/85
Ness	Reasonableness	State v. Hyman	7/22/81
	Precedent Seeking - Overall Culpability	State v. Gilbert & Gleaton	9/14/81
	Reasonableness	State v. Butler	2/22/82
	Precedent Seeking - Overall Culpability	State v. Lucas	1/29/85
	Reasonableness	State v. Smith	8/06/85
	Precedent Seeking - Overall Culpability	State v. Kornahrens	10/13/86
Harwell	Precedent Seeking - Overall Culpability	State v. Thompson	1/07/82
	Precedent Seeking - Overall Culpability	State v. Spann	1013/83
	Reasonableness	State v. Singleton	1/31/85
	Precedent Seeking - Overall Culpability	State v. Damon	4/04/85
	Reasonableness	State v. Plemmons	6/03/85
	Precedent Seeking - Overall Culpability	State v. Jones	7/02/85
	Precedent Seeking - Overall Culpability	State v. Patterson	10/10/84
Littlejohn	Precedent Seeking - Overall Culpability	State v. Adams	6/29/83
	Precedent Seeking - Overall Culpability	State v. Chaffee & Ferrell**	11/03/84
	Precedent Seeking - Overall Culpability	State v. Gaskins**	11/22/85
Lewis	Precedent Seeking - Fact Specific	State v. Yates***	12/22/82
	Precedent Seeking - Fact Specific	State v. Plath & Arnold	1/17/84
Chandler	Reasonableness	State v. Truesdale	10/31/84
	Reasonableness	State v. Skipper	2/12/83

* There are only twenty-five affirmed death penalty cases here. In the first case reviewed by the South Carolina Supreme Court, *State v. Shaw & Roach*, there was no model of proportionality review applied.

** This was a per curiam opinion. Inasmuch as the chief justice of the state supreme court at that time was Justice Littlejohn, and the fact that the discussion of proportionality review in this case is a virtual verbatim copy of Justice Littlejohn's opinion in *State v. Adams*, we attributed the opinion to him.

*** This was a per curiam opinion. At the time of the *Yates* opinion, Justice Lewis was the chief justice of the state supreme court. In addition, the model and style of the proportionality review in *Yates* is very similar to that used by Justice Lewis in *State v. Plath & Arnold*, which he did write.

Table 7 also indicates that this variation in the methods of comparative sentence review cannot be explained by variation among judges. There is substantial within-judge variation in the type of model employed. At different times, individual judges on the South Carolina court apply different models of proportionality review, with no discussion of their rationale for employing one model rather than another. For example, in *State v. Hyman*,[140] Justice Ness adopted a reasonableness model. Two months later he used a precedent seeking-overall culpability model in *State v. Gilbert (II)*,[141] and thereafter switched back and forth between the two. This variation cannot be explained as a shift away from the non-comparative reasonableness model to a precedent seeking model following the early years of the statute, when comparable cases were more readily available. A reasonableness model of proportionality review was utilized as late as 1985 in *State v. Singleton*,[142] *State v. Skipper*,[143] *State v. Plemmons*,[144] *State v. South*,[145] and *State v. Smith*.[146] When other models are used, there is very little discussion provided, and the familiar string citation of comparable cases is employed. Even in its later cases, the South Carolina court adheres largely to a legal formula, and has adopted a very detached role in reviewing the sentencing decisions of juries.[147]

B. Using Procedural Defects to Correct Comparatively Excessive Death Sentences

In his early examination of appellate review in Georgia, Dix suggested that the Georgia court may be using procedural errors to reverse comparatively excessive death sentences.[148] Baldus and his colleagues' subsequent empirical analysis confirmed Dix's suspicion, and found that reversal rates for homicides at lower levels of aggravation were approximately twice as frequent

140. 276 S.C. 559, 281 S.E.2d 209 (1981).
141. 277 S.C. 53, 283 S.E.2d 179 (1981).
142. 284 S.C. 388, 326 S.E.2d 153 (1985).
143. 285 S.C. 42, 328 S.E.2d 58 (1985), *rev'd*, 476 U.S. 1 (1986).
144. 286 S.C. 78, 332 S.E.2d 765 (1985).
145. 285 S.C. 529, 331 S.E.2d 775, *cert. denied*, 474 U.S. 888 (1985).
146. 286 S.C. 406, 334 S.E.2d 277 (1985), *cert. denied*, 475 U.S. 1031 (1986).
147. A vivid example of this is the court's application of proportionality review in three factually disparate cases: State v. Adams (II), 279 S.C. 228, 306 S.E.2d 208 (1983); State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984); and State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132, *cert. denied*, 471 U.S. 1120 (1985). In *Adams*, the defendant was convicted of kidnapping, housebreaking, and murder in the abduction and death of a 16-year-old. Chaffee and Ferrell were convicted of multiple counts of murder stemming from the kidnapping and "execution-style" murder of gas station attendants. The defendant in *Gaskins* was serving multiple life sentences when convicted of the "murder-for-hire" killing of a death row inmate. In each of the three cases Justice Littlejohn engaged in a virtually identical discussion of the proportionality of the penalty. *Compare Adams (II)*, 279 S.C. at 241-42, 306 S.E.2d at 215-16; *Chaffee*, 285 S.C. at 35-36, 328 S.E.2d at 472; *Gaskins*, 284 S.C. at 130, 326 S.E.2d at 146-47.
148. After noting the Georgia Supreme Court's high reversal rate on procedural issues and low reversal rates on substantive issues, Dix concluded that "the court is using procedural defects to justify the reversal of death sentences for unarticulated but more 'substantive' reasons." Dix, *supra* note 31, at 118.

as those among highly aggravated homicides.[149] They also noted that the effect of the Georgia court's reversals on procedural grounds was to reduce substantially the total number of death sentences identified as comparatively excessive.[150] It is conceivable that the South Carolina court follows a similar pattern since it reverses a large number of death sentences on procedural grounds (55%), but has yet to invalidate a sentence on the basis that it is comparatively excessive.

Appendix B reports the significant characteristics of the thirty-two cases in which the South Carolina court reversed either the defendant's conviction or sentence.[151] If the court is using procedural defects to reverse death sentences it believes are substantively excessive one would expect to find a large proportion of such excessive sentences within the group of cases ostensibly reversed on procedural grounds. Table 8 provides the summary of a fact-specific frequency analysis of proportionality review for the thirty-two reversed cases. This approach is identical to the method used in analyzing the group of twenty-six affirmed death sentences reported in Table 5.[152]

TABLE 8

PROPORTION OF DEFENDANTS RECEIVING A DEATH SENTENCE WITHIN SUBGROUPS OF COMPARABLE CASES DEFINED BY FACT-SPECIFIC APPROACH: REVERSED AND REMANDED ON FIRST DIRECT APPEAL.

A. *Case Analysis*	Number of Specific Facts Matched in Comparison Group:			
Case	One	Two	Three	Four
State v. Gill	15/105	11/56	9/40	3/29
	(.143)	(.195)	(.225)	(.103)
State v. Tyner	15/105	13/77	7/22	7/18
	(.143)	(.169)	(.318)	(.389)
State v. Gilbert	15/105	13/77	9/40	7/29
& Gleaton (I)	(.143)	(.169)	(.225)	(.241)
State v. Goolsby	1/2			
	(.500)			
State v. Woomer (LA)	8/22	5/7	5/7	
	(.364)	(.714)	(.714)	
State v. Linder	3/4			
	(.750)			
State v. Adams (I)	10/17	8/13	5/7	
	(.588)	(.615)	(.714)	
State v. Plath	8/22	7/11	5/7	
	(.364)	(.635)	(.714)	
State v. Woomer (IB)	15/105	11/56	9/40	1/16
	(.143)	(.195)	(.225)	(.063)
State v. J.A. Butler	15/105	11/56	2/16	
	(.143)	(.195)	(.125)	

149. *See Comparative Review of Death Sentences, supra* note 38, at 713-16.
150. *Id.* at 715.
151. *See* Appendix B, *infra* p. 530.
152. *See Comparative Review of Death Sentences, supra* note 38, at 681-89.

A. *Case Analysis*	Number of Specific Facts Matched in Comparison Group:			
Case	One	Two	Three	Four
State v. Patterson (I)	15/105	13/77	6/55	5/45
	(.143)	(.169)	(.109)	(.111)
State v. Truesdale (I)	8/22	5/7	3/4	
	(.364)	(.714)	(.750)	
State v. Smart	8/32	5/11	4/6	
	(.250)	(.455)	(.667)	
State v. Sloan	8/22	6/17	3/10	
	(.364)	(.353)	(.300)	
State v. Koon	10/17	8/13	1/5	
	(.588)	(.635)	(.200)	
State v. Elmore (I)	8/22	7/11	5/7	
	(.364)	(.635)	(.714)	
State v. Woods	15/105	2/28	2/23	
	(.143)	(.071)	(.087)	
State v. Stewart (I)	15/105	14/39	4/14	
	(.143)	(.359)	(.286)	
State v. Norris	8/22	3/11	3/10	
	(.364)	(.273)	(.300)	
State v. Peterson	15/105	13/77	7/18	
& Stubbs	(.143)	(.169)	(.389)	
State v. Drayton (I)	15/105	2/28	2/28	
	(.143)	(.071)	(.071)	
State v. Middleton (I)	15/105	14/39	2/4	
	(.143)	(.359)	(.500)	
State v. Stewart (III)	15/105	14/39	4/14	
	(.143)	(.359)	(.286)	
State v. Patrick	15/105	13/77	6/55	3/26
	(.143)	(.169)	(.109)	(.115)
State v. Brown (I)	15/105	11/56	3/10	
	(.143)	(.195)	(.300)	
State v. Pierce	8/22	5/7	4/5	
	(.364).	(.714)	(.800)	
State v. Arthur (I)	15/105	3/35	1/11	
	(.143)	(.086)	(.091)	
State v. Cooper	15/105	2/28	1/7	
	(.143)	(.071)	(.143)	
State v. Matthews (I)	15/103	2/28	1/7	
	(.143)	(.071)	(.143)	
State v. Patterson	15/105	13/77	2/15	
	(.143)	(.169)	(.133)	
State v. Riddle (I)	15/105	13/77	1/10	
	(.143)	(.169)	(.100)	
State v. Hawkins	2/18	1/10	1/8	
	(.111)	(.100)	(.125)	

B: *Summary of Death Sentences Within Groups of Comparable Cases by Specific Facts: Reversed and Remanded Cases Only*

Probability of Death Sentence for Comparable Cases	Number of Affirmed Death Cases in This Category	Percent of Affirmed Death Cases
Less than .35	20/32	63%
.36 - .50	3/32	9%
.51 - .75	8/32	25%
.76 - 1.00	1/31	3%

C: Summary: *Proportion of Death Sentence Within Groups of Comparable Cases by Specific Facts: All Reviewed Cases and Affirmed Cases Only*

Probabilty of Death Sentence for Comparable Cases	All Reviewed Cases	Affirmed Cases Only
Less than .35	50% (29/58)	35% (9/26)
.36 - .50	17% (10/58)	27% (7/26)
.51 - .75	26% (15/58)	27% (7/26)
.76 - 1.00	7% (4/58)	11% (3/26)

Table 8B indicates that 63% of the death sentences in the reversed cases would be described as comparatively excessive. In the cases where the death sentences were affirmed, comparatively excessive sentences were approximately half as frequent. Table 8C illustrates the effect of the court's procedural reversals on the proportion of comparatively excessive death sentences. Including both reversed and affirmed cases, fifty-eight death sentences were reviewed between 1979 and 1987. Of these fifty-eight sentences, one-half (twenty-nine of fifty-eight) would be considered excessive by our fact-specific method. After the reversals of thirty-two of these cases on procedural grounds are taken into account, the proportion of comparatively excessive death sentences declines to 35%. As Baldus and his colleagues found in their study of death sentencing in Georgia, there is evidence to support the claim that the South Carolina court has eliminated some disproportionate death sentences by reversing either the defendant's conviction or sentence on procedural grounds. But despite reversals on procedural grounds, over one-third of the death sentences imposed in the state and affirmed by the court during this period were comparatively excessive.

C. Differences Between an Empirical and Non-Empirical Approach to Proportionality Review: Affirming Comparatively Excessive Death Sentences

The three empirical methods of proportionality review consistently identified nine cases as examples of comparatively excessive death sentences, even though the South Carolina Supreme Court affirmed the sentence in each case:

State v. Hyman,[153] *State v. Gilbert (II)*,[154] *State v. Thompson*,[155] *State v. Yates*,[156] *State v. Koon (II)*,[157] *State v. Patterson (II)*,[158] *State v. Gaskins*,[159] *State v. Lucas*,[160] and *State v. Plemmons*.[161] Focusing on the seven cases in which the aggravating circumstance was armed robbery,[162] the empirical analysis indicated that South Carolina juries only infrequently impose a death sentence for the non-egregious killing of an armed robbery victim.[163]

Nonetheless the South Carolina court affirmed the death sentences in these seven armed robbery-murder cases as proportionate to those imposed "in similar cases, considering both the crime and the defendant."[164] The court reached these results based on a *pro forma* proportionality review in which it determined whether or not a death sentence was deserved based on its own standard of reasonableness. To the extent the court considered comparable cases, because it included only previously affirmed death sentences in its pool of comparable cases, when faced with another death sentence to review it simply determined if it had affirmed a death sentence for a comparable offense. If the case under review was comparable to an earlier case in which a death sentence was affirmed, either because it was similar in specific facts or overall aggravation, the court ceased its "review" and affirmed the sentence.

This theory and method operated in the court's opinions affirming the seven armed robbery-murder cases that were found to be comparatively excessive. In affirming the death sentence in *State v. Hyman*, the court's only discussion was that "[t]he record clearly reflects appellant planned, prepared and

153. 276 S.C. 559, 281 S.E.2d 209 (1981).
154. 277 S.C. 53, 283 S.E.2d 179 (1981).
155. 278 S.C. 1, 292 S.E.2d 581 (1982).
156. 280 S.C. 29, 310 S.E.2d 805 (1982).
157. 285 S.C. 1, 328 S.E.2d 625 (1985).
158. 285 S.C. 5, 327 S.E.2d 650 (1984).
159. 284 S.C. 105, 326 S.E.2d 132 (1985).
160. 285 S.C. 37, 328 S.E.2d 63 (1985).
161. 286 S.C. 78, 332 S.E.2d 765 (1985).
162. In State v. Koon, 285 S.C. 1, 328 S.E.2d 629 (1985), the only aggravating circumstance was kidnapping, while in State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985), the defendant, considered one of the state's most notorious killers, committed a contract-murder of a death row inmate while serving several life sentences. Of the remaining seven cases all but one, State v. Lucas, 285 S.C. 37, 328 S.E.2d 63 (1985), involved the killing of a single victim with armed robbery as the only aggravating circumstance. In *Lucas*, the defendant was convicted of two murders in conjunction with burglary, armed robbery, and grand larceny. 285 S.C. at 38, 328 S.E.2d at 64.
163. It is not as though death sentences are infrequently imposed for all armed robbery-murders, however. In State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979), for example, the two defendants kidnapped and murdered two teenaged victims, also robbing one of them and raping and mutilating the other post-mortem. In State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), the two defendants in two separate incidents robbed, kidnapped, and murdered three victims "execution style." State v. Woomer (II), 278 S.C. 468, 299 S.E.2d 317 (1982), also involved a robbery and "execution style" murder, although only one victim was slain. In these three cases, armed robbery was only one of several contemporaneous felonies and in each case the slayings were performed with what appeared to be gratuitous violence. For these armed robbery-murders the death penalty was imposed with substantially more consistency.
164. S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. 1985).

committed a brutal crime for the purpose of obtaining money."[165] The court did not indicate why the crime was a brutal one. The slaying involved no excessive violence, nor was the murder "execution style." In fact, police reports of the crime which were obtained for this Article[166] suggest that both parties to the offense were quite drunk at the time. It seems the court was chiefly concerned with the fact that the defendant in *Hyman* had "planned and prepared" for the robbery. In *Hyman*, the court had no knowledge of the proportion of planned armed robbery-murders that resulted in a life sentence. Nonetheless, the court felt it sufficient to note that in past cases a planned robbery and slaying had been considered deserving of a death sentence.

The element of planning was also an important factor in the court's affirmance of the armed robbery-murder death sentences in *State v. Gilbert (II)*,[167] *State v. Thompson*,[168] and *State v. Yates*.[169] All three cases, *Hyman, Thompson,* and *Gilbert (II)*, are discussed in *Yates*. In affirming the death sentence imposed on defendant Yates, the South Carolina court cited the previously affirmed death sentences imposed in *Gilbert (II)* and *Thompson*. As with *Hyman* what made these cases comparable was the apparent planning of the armed robbery (but apparently not the murder). In citing *Gilbert (II)*, the *Yates* court noted that the defendants Gilbert and Gleaton "spent a morning cruising in search of a target to rob," and that the "same prelude to crime also appears in the record of *State v. Thompson*."[170] In describing the murder in *Yates*, the court referred to the planning of the robbery as the reason for categorizing it as a *Hyman* or *Gilbert (II)* type homicide. The court noted that Yates and his accomplice "contemplated robbery for over a day, making a diligent search" for an appropriate robbery target, and in affirming Yates' sentence concluded that "it is sufficient for our purposes that the Appellant displayed the same intent and followed the same pattern of preparation as Gilbert, Gleaton, and Thompson before him."[171] The court concluded that "[g]iven that we have upheld a comparable sentence in the comparable case of *State v. Gilbert,* we are confident that the finding of *this jury* represents consistent application of the ultimate sanction in this category of capital crime."[172]

The court could have taken a different approach in *Yates* by examining the relevant mitigating circumstances. The victim in this murder was not killed by Yates, but by his accomplice (although Yates participated in the robbery and wounded another person on the scene). The South Carolina court could have used this fact to distinguish Yates from defendants Hyman, Thompson, Gilbert, and Gleaton, each of whom was the "triggerman" for his

165. 276 S.C. at 571, 281 S.E.2d at 215.
166. *See supra* note 50 and accompanying text.
167. 277 S.C. 53, 283 S.E.2d 179 (1981).
168. 278 S.C. 1, 292 S.E.2d 581 (1982).
169. 280 S.C. 29, 310 S.E.2d 805 (1982).
170. *Id.* at 43-44, 310 S.E.2d at 813.
171. *Id.* at 44, 310 S.E.2d at 814.
172. *Id.* at 45, 310 S.E.2d at 814 (emphasis added).

respective crime. Instead, the court concluded that this mitigating factor was "less impressive" than that found in *Gilbert (II)*, in which the defendants were using drugs. It is apparent that the court gave little weight to Yates' diminished culpability in the murder when comparing his case with the other armed robbery-murder cases and focused instead on his participation in the planning of the crime: "Although this outcome sets the instant case apart from previous capital sentences we have affirmed, it is sufficient for our purposes that the Appellant displayed the same intent and followed the same pattern of preparation as Gilbert, Gleaton and Thompson before him."[173]

The court did not, however, confine its attention solely to the level of preparation for the crime in affirming death sentences for armed robbery-murders. For example, in *State v. Patterson (II)*, although there was no clear evidence of prolonged deliberation, the defendant's death sentence was affirmed.[174] The court's brief proportionality review focused on the number of entry wounds in the victim: "[t]he victim's autopsy revealed 30 to 40 pellet wounds to the head . . . ."[175] Apparently, even though Patterson's armed robbery did not involve prolonged deliberation or preparation, the grisly nature of the crime scene justified the death sentence in the eyes of the court.

An even more striking example of the South Carolina court's lack of interest in conducting a comprehensive and independent proportionality review can be seen in *State v. Plemmons*.[176] The armed robbery-murder in *Plemmons* did not fit into either the *Hyman-Gilbert (II)* "deliberation/preparation" category nor the *Patterson (II)* "gruesome" category. The defendant in *Plemmons* killed his seventy-two-year-old grandmother while both were drunk and engaged in a heated argument. Unable easily to place this slaying in a previously constructed category, the court nonetheless affirmed Plemmons' death sentence, in part, on the basis of his personal traits: "We conclude that the defendant's character and the crimes for which he was convicted justify the jury's recommendation of death."[177] The court conducted no analysis independent of the jury's consideration of relevant aggravating factors or those mitigating factors that might have "justified" a life sentence. As to Plemmons' character, the proportionality discussion does not tell us what weight or consideration the court gave to the fact that Plemmons was born to a mentally retarded mother in a state institution where he spent most of his early years; that he suffered considerable physical and sexual abuse as a child; that he possessed dull-normal intelligence; and that he was described by a psychiatrist as child-like and immature.[178]

In the seven armed robbery-murder cases the court proceeded by attempting to categorize each case into a type of homicide for which at least one

173. *Id.* at 44, 310 S.E.2d at 814.
174. 285 S.C. 5, 327 S.E.2d 650 (1984).
175. *Id.* at 12, 327 S.E.2d at 654.
176. 286 S.C. 78, 332 S.E.2d 765 (1985).
177. *Id.* at 84-85, 332 S.E.2d at 769.
178. *Id.* at 83-84, 332 S.E.2d at 769.

previous jury had imposed a sentence of death. If this was impossible to accomplish the court merely invented a new category of "deserved homicides" based on idiosyncratic case characteristics. Importantly, in these and most other death sentences it reviewed for proportionality, the South Carolina court did not appear to be interested in conducting an independent, empirical review of the juries' decisions. Quite the contrary, the South Carolina Supreme Court's proportionality review amounts to only a *pro forma* compliance with the requirements of the state statute. The result is that the decision as to whether a capital defendant should live or die virtually rests in the hands of the jury alone.

CONCLUSION

To ensure that capital sentences are both uniform and individualized they should be subjected to a comparative proportionality review by a court with statewide jurisdiction. The theory and practice of proportionality review in South Carolina, however, offers inadequate protection against either relatively or absolutely disproportionate death sentences. By excluding life sentences from the universe of comparable cases, the South Carolina court is unable to determine whether a death sentence is regularly imposed in cases comparable to the case under review. Nor can the court determine whether a death sentence in a given case is an accurate reflection of prevailing moral standards on the appropriateness of the penalty for a given class of homicides, or instead is the product of an aberrant jury. As a result, a jury's imposition of a death penalty, however aberrant, is virtually immune to challenge. Only through an empirical comparative review can the South Carolina Supreme Court ensure that the penalty of death is proportionately applied.

APPENDIX A:
CASE CHARACTERISTICS FOR SOUTH CAROLINA AFFIRMED DEATH SENTENCES: 1979 TO 1987

Case	*Date Affirmed*	*Case Description*
State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979), *cert. denied*, 444 U.S. 957 (1979), and 444 U.S. 1026 (1980).	5/28/79	Three defendants kidnapped and robbed two teenaged victims at gunpoint. Male victim was immediately shot; the female victim was raped and then shot to death. One defendant later returned to mutilate her body. Defendants were using drugs and alcohol at the time of the offense.
State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981), *cert. denied*, 458 U.S. 1122 (1982), *habeas corpus denied sub nom.*, Hyman v. Aiken, 606 F. Supp. 1046 (D.S.C.), *vacated and remanded*, 777 F.2d 938 (4th Cir. 1985), *vacated and remanded*, 478 U.S. 1016 (1986), *habeas corpus granted*, 824 F.2d 1405 (4th Cir. 1987).	7/22/81	Defendant and four co-defendants robbed two elderly men in their home. A gun was taken. During course of the robbery, one of the victims was beaten and the other one was killed with a shotgun. Defendant was alleged to be the triggerman. Defendants and victims had been drinking heavily.
State v. Gilbert (II), 277 S.C. 53, 283 S.E.2d 179, *cert. denied*, 456 U.S. 984 (1982).	9/14/81	After riding around in their car during the morning, drinking, and using drugs, defendants robbed a service station owner. During the course of the robbery the victim was shot and stabbed to death.
State v. Thompson, 278 S.C. 1, 292 S.E.2d 581, *cert. denied*, 456 U.S. 938 (1982).	1/07/82	Defendant and two co-defendants robbed and killed the owner of a small store. After first wounding the victim, defendant fired second, fatal shot.
State v. Butler, 277 S.C. 452, 290 S.E.2d 1, *cert. denied*, 459 U.S. 932 (1982).	2/22/82	Defendant picked a young woman up on a road at night, took her to a remote spot, beat, and raped her. The victim was shot and dumped into a nearby pond.
State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), *cert. denied*, 460 U.S. 1103 and 463 U.S. 1214 (1983).	11/10/82	Defendants abducted two victims from a service station, robbed them, took them to a secluded area, and killed them "execution style." They then went to a service station, robbed and abducted another victim, who was also taken to a remote area and killed. A third defendant was involved and was granted immunity from prosecution for his testimony.
State v. Woomer (II), 278 S.C. 468, 299 S.E.2d 317 (1982), *cert. denied*, 463 U.S. 1229 (1983).	12/20/82	Defendant and an accomplice drove to a small grocery store which they robbed. Store patrons were made to lie down on the floor. The two offenders then took two female hostages to a secluded road where they were raped, shot with a shot gun, and left for dead. One of the women survived, but was badly disfigured. The accomplice killed himself before being captured by police.

Case	*Date Affirmed*	*Case Description*
State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied*, 462 U.S. 1124 (1983), *denial of habeas corpus vacated sub nom.*, Yates v. Aiken, 474 U.S. 896 (1985).	12/22/82	Defendant and an accomplice were robbing the victim at his store when the victim tried to get a gun. Defendant Yates then shot and wounded this victim and fled the scene. Upon hearing the shots, the victim's mother entered the store and struggled with Yates' accomplice, who stabbed the woman to death. The wounded first victim then shot accomplice to death.
State v. Adams (II), 279 S.C. 228, 306 S.E.2d 208, *cert. denied*, 464 U.S. 1023 (1983).	6/29/83	Defendant broke into victim's house with the intent to kidnap and hold him for ransom. During the course of the crime, the victim, a mildly retarded 16-year-old boy, resisted, was cut with a knife, and eventually strangled to death.
State v. Spann, 279 S.C. 399, 308 S.E.2d 518 (1983), *cert. denied*, 466 U.S. 947 (1984).	10/13/83	Defendant broke into the house of an 82-year-old woman who lived alone. The victim was robbed, raped, and then beaten to death.
State v. Plath (II), 281 S.C. 1, 313 S.E.2d 619, *cert. denied*, 467 U.S. 1265 (1984).	1/17/84	Two defendants and their two teenaged, female accomplices picked up a lone female hitchhiker. They took her to a remote dump in the woods, beat, stabbed, and repeatedly raped her.
State v. Koon (II), 285 S.C. 1, 328 S.E.2d 625, *cert. denied*, 471 U.S. 1036 (1985).	4/03/85	Defendant abducted a 30-year-old woman from a shopping mall. They went to a remote area where defendant killed her and buried her in a shallow grave. Defendant remembered nothing about the offense, and led police to the grave 39 days after the offense.
State v. Patterson (II), 285 S.C. 5, 327 S.E.2d 650 (1984), *cert. denied*, 471 U.S. 1036 (1985).	10/10/84	Defendant and several accomplices robbed a convenience store and shot the 19-year-old clerk in the back of the head with a shotgun. Robbery was completed and victim was apparently shot because he was the only witness to the robbery.
State v. Truesdale (II), 285 S.C. 13, 328 S.E.2d 53 (1984), *cert. denied*, 471 U.S. 1009 (1985).	10/31/84	Defendant kidnapped 18-year-old woman from a shopping mall. While driving he shot the victim four times, and drove to a vacant field where he raped and left her.
State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984), *cert. denied*, 471 U.S. 1009 (1985).	11/13/84	Defendants broke into the home of an 81-year-old woman. The victim was beaten, brutally raped, and strangled to death.
State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132, *cert. denied*, 471 U.S. 1120 (1985).	1/22/85	Defendant, serving several life sentences for prior murder convictions, was hired to kill another inmate residing on death row. Defendant was hired by the surviving stepson of the deceased's own crime victims. Defendant killed the victim with a homemade bomb.

Case	*Date Affirmed*	*Case Description*
State v. Lucas, 285 S.C. 37, 328 S.E.2d 63, *cert. denied*, 472 U.S. 1012 (1985).	1/29/85	Defendant and two accomplices broke into an elderly couple's home during the night. Both victims were killed; their house was ransacked and robbed. Defendant was paroled from prison two days before the slayings.
State v. Singleton, 284 S.C. 388, 326 S.E.2d 153, *cert. denied*, 471 U.S. 1111 (1985).	1/31/85	Defendant was a prisoner working outside the institution when the offense occurred. Defendant broke into the home of a 74-year-old widow, who caught the defendant breaking into her bathroom. He then climbed in the window, hit the victim, raped her, and strangled her to death. Before leaving the home, the defendant took money and jewelry.
State v. Skipper, 285 S.C. 42, 328 S.E.2d 58 (1985), *rev'd*, 476 U.S. 1 (1986).	2/12/85	Defendant left a bar with a 23-year-old woman who was later found under a house raped and strangled. Defendant had prior rape convictions.
State v. Damon, 285 S.C. 125, 328 S.E.2d 628, *cert. denied*, 474 U.S. 865 (1985).	4/04/85	During the course of robbing their home, defendant killed an elderly man and woman. Both were struck repeatedly over the head with a hammer, causing their deaths.
State v. Elmore (II), 286 S.C. 70, 332 S.E.2d 762 (1985), *vacated and remanded*, 476 U.S. 1101 (1986).	5/16/85	Defendant broke into the home of a 76-year-old widow. He robbed, raped her and beat her severely, causing her death. Before leaving, defendant stuffed the victim's body into a closet.
State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985), *vacated and remanded*, 476 U.S. 1102 (1986).	6/03/85	During the course of an argument defendant shot his 73-year-old grandmother and robbed her of several thousand dollars. He then placed the victim in a plastic bag, buried her in a shallow grave, and left the state.
State v. South, 285 S.C. 29, 331 S.E.2d 775, *cert. denied*, 474 U.S. 888 (1985).	6/04/85	Defendant killed a rookie policeman with a rifle while the officer was parked at the side of the road writing a traffic citation. There was no provocation or apparent motive.
State v. Jones, 288 S.C. 1, 340 S.E.2d 782 (1985), *vacated and remanded*, 476 U.S. 1102 (1986).	7/02/85	The defendant hid outside the victim's house and waited for him to return from work. When the victim and his wife returned home, defendant shot victim with a shotgun and forced the victim's wife into their house. After tying her up, defendant ransacked the house and stole money.
State v. Smith, 286 S.C. 406, 334 S.E.2d 277 (1985), *cert. denied*, 475 U.S. 1031 (1986).	8/06/85	After arguing with an elderly couple over his request to borrow their car, defendant repeatedly stabbed both to death. He then stole money from their wallets and took their car.
State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986), *cert. denied*, 480 U.S. 940 (1987).	10/13/86	Defendant killed his former wife, her father, and 10-year-old stepson. All three were repeatedly stabbed to death and buried in a shallow grave in the nearby woods. Defendant was also convicted of kidnapping and burglary in the same incident.

APPENDIX B:
CASE CHARACTERISTICS FOR SOUTH CAROLINA REVERSED AND REMANDED DEATH SENTENCES: 1979 TO 1987

Case	*Date Reversed*	*Reversal of:*	*Case Description*	*Case Disposition*
State v. Gill 273 S.C. 190, 255 S.E.2d 455	5/24/79	Conviction and Sentence	Two defendants were involved in an argument over money with a third man. The defendants shot and killed the third man, and wounded two women.	Resentenced: Life
State v. Tyner 273 S.C. 646, 258 S.E.2d 559	8/23/79	Sentence	Two defendants robbed a convenience store. During the course of the robbery the man who owned the store was shot in the chest with a shotgun. The victim's wife was also shot when she screamed. Both victims died.	Resentenced: Death, then murdered on death row
State v. Gilbert (I) 273 S.C. 690, 258 S.E.2d 890	10/02/79	Sentence	The defendants attempted to rob a filling station. The owner/operator was shot and stabbed. Both defendants were under the influence of drugs and alcohol at the time of the offense.	Resentenced: Death
State v. Goolsby 275 S.C. 110, 268 S.E.2d 31	6/24/80	Sentence	Defendant killed his female companion during an argument by pressing a blunt object against her throat, causing death by asphyxiation. He then drove to an isolated area in Arizona where he dumped the body in the brush.	Resentenced: Life
State v. Woomer (IA) 276 S.C. 258, 277 S.E.2d 696	4/28/81	Sentence	Defendant and a second man robbed a convenience store. They took two women as hostages to aid in their escape. The women were taken to a deserted road, raped and then shot in the head. One victim died.	Resentenced: Death
State v. Linder 276 S.C. 304, 278 S.E.2d 335	5/14/81	Conviction and Sentence	Defendant was observed by the victim, a police officer, to be speeding. The officer gave chase. Upon overtaking the vehicle, the officer began his investigation. The defendant suddenly shot him with a revolver that he had concealed in a leg holster.	Acquitted
State v. Adams (I) 277 S.C. 115, 283 S.E.2d 582	10/06/81	Conviction and Sentence	The defendant kidnapped the victim in order to obtain a ransom. When the victim resisted, he was strangled.	Resentenced: Death

Case	*Date Reversed*	*Reversal of:*	*Case Description*	*Case Disposition*
State v. Plath (I) 277 S.C. 126, 284 S.E.2d 221	10/07/81	Sentence	Defendants and their girlfriends picked up a female hitchhiker. They left her at one location and then went back to kill her. They drove the victim to a wooded area, and forced her to perform sexual acts. They then beat, strangled, and stabbed her to death.	Resentenced: Death
State v. Woomer (IB) 277 S.C. 170, 284 S.E.2d 357	11/10/81	Conviction and Sentence	Defendant and a second man robbed the victim, then marched him into a back room, and killed him with a single pistol shot in the head.	Not reprosecuted
State v. J.A. Butler 277 S.C. 543, 290 S.E.2d 420	4/12/82	Conviction and Sentence	Defendant robbed a motel. He forced the owner and his pregnant wife to lie on the floor and then shot them in the head. The woman survived.	Resentenced: Life
State v. W. Patterson (I) 278 S.C. 319, 295 S.E.2d 264	9/13/82	Conviction and Sentence	Defendant and two women robbed a convenience store. He shot the clerk in the head with a shotgun.	Resentenced: Death
State v. Truesdale (I) 278 S.C. 368, 296 S.E.2d 528	10/19/82	Conviction and Sentence	Defendant kidnapped the victim from a shopping center parking lot. He shot her four times as he drove her to a field where he raped her and left her to die.	Resentenced: Death
State v. Smart 278 S.C. 515, 299 S.E.2d 686	11/23/82	Sentence	Defendant shot and stabbed the two men he was visiting after being paroled.	Resentenced: Life
State v. Sloan 278 S.C. 435, 298 S.E.2d 92	12/06/82	Conviction and Sentence	Defendant raped victim in her apartment. He stabbed her in the back repeatedly, then beat her about the head with a steam iron.	Resentenced: Life
State v. Koon (I) 278 S.C. 528, 298 S.E.2d 769	12/20/82	Sentence	Defendant abducted a woman from a shopping center parking lot. She was sexually molested, stabbed, and partially buried in a shallow grave.	Resentenced: Death
State v. Elmore (I) 279 S.C. 417, 308 S.E.2d 781	11/01/83	Conviction and Sentence	Defendant robbed an elderly woman. He raped her, shot her, and hid the body in a closet.	Resentenced: Death
State v. Woods 282 S.C. 18, 316 S.E.2d 763	6/05/84	Conviction and Sentence	Defendant robbed a gas station, then shot victim twice with a sawed-off shotgun.	Resentenced: Life

Case	*Date Reversed*	*Reversal of:*	*Case Description*	*Case Disposition*
State v. Stewart (I) 283 S.C. 104, 320 S.E.2d 447	9/05/84	Sentence	Defendant broke into the victim's home, robbed her, stabbed her several times, and stomped on her head as she lay on the floor.	Resentenced: Death (reversed)
State v. Norris 285 S.C. 6, 328 S.E.2d 339	3/25/85	Sentence	Defendant raped the victim, severly beat her, and stomped on her face about a dozen times. The victim died of asphxiation.	Resentenced: Life
State v. Peterson 287 S.C. 244, 335 S.E.2d 800	10/14/85	Conviction and Sentence	Defendants robbed a car rental agency. The victim was found lying face down with his hands tied behind his back. He had been shot four times in the head.	Resentenced: Life
State v. Drayton (I) 287 S.C. 226, 337 S.E.2d 216	11/19/85	Conviction and Sentence	Defendant and the victim stole money from the gas station where she was employed. They then drove to a railroad trestle. The defendant shot the victim between the eyes.	Resentenced: Death
State v. Middleton (I) 288 S.C. 21, 339 S.E.2d 692	1/29/86	Conviction and Sentence	Defendant raped and asphyxiated one woman. The next day he repeated the offense on another victim. Both bodies were mutilated. The second victim was also burned.	Resentenced: Death
State v. Stewart (II) 288 S.C. 232, 341 S.E.2d 789	3/14/86	Sentence	Defendant kicked in the victim's door and asked her where she kept her money. He then hit her and stabbed her with a kitchen knife that she had picked up.	Resentenced: Death
State v. Patrick 289 S.C. 301, 345 S.E.2d 481	6/09/86	Sentence	Two defendants were riding around and drinking. They picked the victim up at a bar. The three men argued, and the victim was shot in the head while in the back seat. The defendant then stole the victim's watch. Drugs and alcohol were involved.	Resentenced: Life
State v. Brown (I) 289 S.C. 581, 347 S.E.2d 882	7/21/86	Conviction and Sentence	Defendant was robbing the victim's home, when he returned home. The victim was shot five times. Evidence indicated he had tried to ward off the bullets with his hands.	Resentenced: Death

Case	*Date Reversed*	*Reversal of:*	*Case Description*	*Case Disposition*
State v. Pierce 289 S.C. 430, 346 S.E.2d 707	7/21/86	Conviction and Sentence	Defendant and two co-defendants abducted the victim from a parking lot and took her to an isolated area. There she was raped, robbed and shot to death.	Resentenced: Life
State v. Arther (I) 290 S.C. 291, 350 S.E.2d 187	10/20/86	Sentence	The victim was robbed of money obtained from his government check. He was killed by a blow to the head with an ax.	Resentenced: Death
State v. Cooper 291 S.C. 352, 353 S.E.2d 441	11/17/86	Conviction and Sentence	Defendant robbed and stabbed landlord, then beat him with a chair leg.	Awaiting Retrial
State v. Matthews (I) 291 S.C. 339, 353 S.E.2d 444	12/15/86	Sentence	The victim and her boyfriend were eating at a drive-thru restaurant. Defendant approached them with a gun and demanded money. After taking the victim's purse from the boyfriend, he suggested that they take a ride. He then shot the victim in the head and her boyfriend in the chest.	Resentenced: Death
State v. R. Patterson 290 S.C. 523, 351 S.E.2d 853	12/29/86	Sentence	Defendant approached a couple in a parking lot and demanded the woman's purse. A struggle ensued during which the woman was knocked to the ground. When her husband intervened, he was shot at close range.	Awaiting Resentencing
State v. Riddle (I) 291 S.C. 232, 353 S.E.2d 138	2/02/87	Sentence	Defendant and his brother broke into a home in order to rob it. On their way out, they were discovered by the victim who screamed. The defendant cut the victim's throat.	Resentenced: Death
State v. Hawkins 292 S.C. 418, 357 S.E.2d 10	5/26/87	Conviction and Sentence	Two defendants broke into the victim's home in order to commit burglary. They knocked the victim, an elderly man, to the ground. While he was disabled, kerosene was poured around him, and intentionally ignited.	Resentenced: Life