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Washington's Comparative Proportionality Review: Toward Effective Appellate Review of Death Penalty Cases under the Washington State Constitution

W. Ward Morrison Jr.

WASHINGTON'S COMPARATIVE PROPORTIONALITY REVIEW: TOWARD EFFECTIVE APPELLATE REVIEW OF DEATH PENALTY CASES UNDER THE WASHINGTON STATE CONSTITUTION

Abstract: In conducting mandatory comparative proportionality review of all cases in which the death penalty is imposed, the Washington Supreme Court compares the defendant's case with similar cases to ensure that the penalty is being applied consistently. In theory, the review promotes rational and non-arbitrary capital sentencing. In practice, the review has not been effectively applied. Continued use of ineffective appellate review for death sentences violates the Washington Constitution. This Comment explores the various problems associated with the review process, and proposes possible solutions.

Comparative proportionality review by appellate courts seeks to achieve uniformity among capital sentences by comparing the case being reviewed with similar cases, considering qualities of both the crime and the defendant. The court assembles a pool of similar cases, and determines whether imposition of a death sentence is excessive or disproportionate to the penalties imposed in those similar cases.

The United States Supreme Court requires that states afford "super due process"[1] before imposing the death penalty. Although the Court has stated that comparative proportionality review can be a valuable tool in limiting the arbitrary infliction of the death penalty, it has held that comparative proportionality review of death penalty cases is not constitutionally required. The Court has consistently refrained from mandating any specific procedure by which a state can provide meaningful appellate review of death sentences. Two factors explain the Court's reticence. First, the nature of death penalty adjudication does not easily lend itself to specific and particularized procedure. Second, the Court is unwilling to impose any procedures upon the states. Although the Court assumes that comparative proportionality review operates to ensure evenhandedness among capital sentences, it has not examined substantive results to determine whether the process lives up to its promise.

Since 1981, the State of Washington has required the Washington Supreme Court to conduct a comparative proportionality review of every death sentence imposed by a jury to ensure that the sentence comports with federal and state protections against cruel and unusual

1. *See* Furman v. Georgia, 408 U.S. 238 (1972) ("super due process" requires heightened attention to procedural fairness); *see infra* Section I.A.

punishments.[2] The Washington Constitution's prohibition against cruel punishment may require that the comparative proportionality review provide more than a *theoretically* effective procedure.[3] To comply with the state constitution, the statute must be effective *as applied* to eliminate arbitrary imposition of the death penalty. The current use of the comparative proportionality review does not meet this standard. As applied, the statute violates Washington's constitutional prohibition against cruel punishment.[4]

I. UNITED STATES SUPREME COURT DECISIONS: DOES "SUPER DUE PROCESS" REQUIRE THAT PROCEDURES BE EFFECTIVE?

The United States Supreme Court's decisions on capital punishment procedure reflect a strong emphasis on heightened procedural fairness.[5] States may not impose the death penalty arbitrarily.[6] The Supreme Court death penalty decisions, however, have not coalesced to form coherent rules that states must follow to comport with federal constitutional law. Thus, while the Supreme Court has required procedural safeguards, it has sent the states unclear signals as to what safeguards to impose.

A. "Super Due Process" in Death Penalty Cases Requires Appellate Review

1. Furman v. Georgia

The Supreme Court's decision in *Furman v. Georgia*[7] introduced the concept of "super due process."[8] In *Furman,* the death penalty was imposed under a system that left the choice of sentence to the unfet-

2. Act of May 14, 1981, ch. 138, 1981 Wash. Laws 535 (codified at WASH. REV. CODE ch. 10.95 (1987)); *see infra* notes 52–53 and accompanying text.

3. *See infra* notes 29–34 and accompanying text.

4. WASH. CONST. art. I, § 14; *see infra* Section III (examining application of comparative proportionality review).

5. For a Washington court's discussion of the United States Supreme Court death penalty decisions, see State v. Bartholomew, 98 Wash. 2d 173, 180–92, 654 P.2d 1170, 1175–82 (1982) (*Bartholomew* I), *vacated sub nom.* Washington v. Bartholomew, 463 U.S. 1203 (1983).

6. *See infra* notes 7–13 and accompanying text.

7. 408 U.S. 238 (1972). In *Furman* and its companion cases, the state court imposed the death sentence on a black defendant convicted of murder and on two black defendants convicted of rape. For an insightful analysis of the Supreme Court's death penalty jurisprudence, see Brennan, *Constitutional Adjudication and the Death Penalty: A View From the Court,* 100 HARV. L. REV. 313 (1986).

8. *See Furman,* 408 U.S. at 253 (Douglas, J., concurring). *See generally* Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death,* 53 S. CAL. L. REV. 1143 (1980) (discussing the philosophical and legal implications of "super due process").

tered discretion of the judge or jury.[9] The Supreme Court held that arbitrary and discriminatory imposition of the death penalty violated the eighth amendment of the federal Constitution.[10]

In *Furman,* the Court demonstrated its increasing awareness of procedural fairness and equity,[11] and indicated that, despite divisions among the Justices on other issues, a majority of the Justices were concerned with the seemingly random imposition of the death penalty.[12] Because death as a punishment is unique, the death penalty necessitates unique treatment in its adjudication.[13] This unique treatment—"super due process"—requires that the death penalty be imposed in a non-arbitrary way.

2. *The Effect of* Furman *On the States*

Furman set the standard for procedural due process in death penalty cases.[14] To comply with this higher standard, states were forced to alter their individual statutes.[15] The post-*Furman* death penalty statutes reflect this growing attention to procedural protection. Although individual states have adopted different procedures, all are designed to limit the possibility of continued arbitrary infliction of the death penalty. However, the Court has yet to go beyond the facial validity of the statutes to determine whether, in their application, they

9. *Furman,* 408 U.S. at 253 (Douglas, J., concurring). Each Justice filed a separate opinion in *Furman.* The crucial opinions are those of Justices Douglas, Stewart, and White. *See* State v. Bartholomew, 98 Wash. 2d 173, 180–92, 654 P.2d 1170, 1175–82 (1982) (*Bartholomew* I) (finding that the opinions of these Justices overturned the death penalties before them in *Furman* without going so far as finding capital punishment absolutely prohibited by the eighth amendment), *vacated sub nom.* Washington v. Bartholomew, 463 U.S. 1203 (1983).

10. *Furman,* 408 U.S. at 256–57 (Douglas, J., concurring); *see also Bartholomew* I, 98 Wash. 2d at 182, 654 P.2d at 1176.

11. *Furman* represented a sharp departure from a case decided the previous year. In McGautha v. California, 402 U.S. 183 (1971), the Court held that juries were free to impose the death penalty without standards or guidelines for imposition, and that in doing so, no provision of the Constitution was breached. *Furman* reached the opposite conclusion. *Furman,* 408 U.S. at 245–48 (Douglas, J., concurring).

12. *See, e.g., Furman,* 428 U.S. at 309 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

13. *Id.* at 289 (Brennan, J., concurring) ("The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself.").

14. *Furman* represented more than an enlightened approach to capital sentencing. The *Furman* ruling also spared the lives of the more than 600 convicted felons who were then facing death sentences. These sentences were subsequently changed to life imprisonment. *See* S. DIKE, CAPITAL PUNISHMENT IN THE UNITED STATES 23 (1982).

15. *Furman* struck down the capital punishment laws in 39 states, as well as in the District of Columbia. *Furman,* 408 U.S. at 411 (Blackmun, J., dissenting). Washington's statute was struck down in Smith v. Washington, 408 U.S. 934 (1972). For a listing of the additional states, see B. NAKELL & K. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 26 n.61 (1987).

yield less arbitrary results than those reached under pre-*Furman* statutes.[16]

Washington's capital punishment statute was adopted as a response to the United States Supreme Court decisions in *Furman* and its progeny.[17] Thus far, the Washington Supreme Court has upheld the statute as meeting minimum federal constitutional standards.[18] The court has, however, focused its attention on trial level procedures,[19] and has not yet addressed the effectiveness of its comparative proportionality review procedure.

B. Facial Validity and "Super Due Process": Pulley v. Harris

In *Pulley v. Harris,*[20] the Supreme Court held that comparative proportionality review is not an indispensable element in a state's capital sentencing statute under the United States Constitution.[21] The Court held that the eighth amendment does not require a particular type of

16. In 1976, the Court reviewed three post-*Furman* statutes. In each of them, the Court limited its review to the facial validity of the statutes. The Court failed to analyze whether the statutes were effective in curbing arbitrary death penalty sentencing. For general analysis of the post-*Furman* statutes, see Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth,* 9 GONZ. L. REV. 651 (1974).

The Court upheld Georgia's statute, revised in light of *Furman,* in Gregg v. Georgia, 428 U.S. 153 (1976). While the Court focused most of its attention on the trial procedure, it also approved of Georgia's inclusion of mandatory comparative proportionality appellate review. *Id.* at 204–06. Also, the Court was careful to note that Georgia's scheme was only one of a myriad of possibilities, and that it was still possible for a state to adopt seemingly acceptable standards which would later be found to be inadequate. *Id.* at 195 n.46. Georgia's new statute provided the model for Washington's death penalty statute.

Florida's revised statute was upheld in Proffitt v. Florida, 428 U.S. 242 (1976). The requirement that the trial judge validate the death sentence in a written statement met the Court's requirement of meaningful appellate review. *Id.* at 250–52.

Texas's revised statute was reviewed in Jurek v. Texas, 428 U.S. 262 (1976). The Court validated the Texas plan even though its discretionary sentencing and appellate review were less standardized than those in Georgia and Florida. *Id.* at 276.

17. Washington's capital punishment statute, adopted in 1981, is designed to limit the arbitrary use of the death sentence, both at the trial and appellate levels. Act of May 14, 1981, ch. 138, 1981 Wash. Laws 535 (codified at WASH. REV. CODE ch. 10.95 (1987)).

18. *See, e.g.,* State v. Mak, 105 Wash. 2d 692, 724–26, 718 P.2d 407, 427–28, *cert. denied,* 479 U.S. 995 (1986); State v. Jeffries, 105 Wash. 2d 398, 423–26, 717 P.2d 722, 737–38, *cert. denied,* 479 U.S. 922 (1986).

19. *See, e.g.,* State v. Bartholomew, 101 Wash. 2d 631, 683 P.2d 1079 (1984) (*Bartholomew* II) (limiting the admission of evidence of aggravating circumstances offered at the special sentencing proceeding).

20. 465 U.S. 37 (1984).

21. *Id.* at 44–45. In *Pulley,* the defendant had been convicted and sentenced to death in California for first degree murder, kidnapping, and robbery. *Id.* at 39 n.1. The defendant asserted that California must conduct a comparative proportionality review, but the Supreme Court disagreed. *Id.* at 53.

appellate review.[22] In refusing to validate a particular means of appellate review, the Court expressed a willingness to allow states to choose any method which appears valid on its face.[23]

The California statute examined in *Pulley* provided minimal appellate review and no comparative proportionality review.[24] The Court asserted that other elements of the statute, such as the procedures designed to guide the jury's discretion, resulted in a constitutionally valid scheme.[25] What was crucial was that California's statute provided a mechanism which would achieve the desired result of an objectively applied penalty.[26]

C. *"Super Due Process" Does Not Yet Require That Review Be Effective*

By relying on a facial analysis of the death penalty statute, and refusing to scrutinize the practical application of the process, the *Pulley* ruling leaves open the possibility of a further challenge to the appellate review process.[27] As with its decision in *Furman,* the Supreme Court in *Pulley* did not address the difficult issue of whether appellate review must be actually effective before the death penalty may be constitutionally imposed.[28] Thus, it remains to be seen how

22. *Id.* at 44–45. The eighth amendment prohibits, among other things, the imposition of "cruel and unusual" punishment. U.S. CONST. amend. VIII. In reaching the conclusion that no particular type of appellate review is required in death penalty cases under the eighth amendment, the Court in *Pulley* substantially relied on its 1976 cases upholding various states' post-*Furman* death penalty statutes. *See supra* note 16 (examining three post-*Furman* capital sentencing statutes).

23. *Pulley,* 465 U.S. at 54–59 (Stevens, J., concurring). Justice Stevens, in his concurring opinion, highlighted the dispute over exactly what sort of appellate review, if any, the Court had mandated in its earlier decisions. Justice Stevens pointed out that while the Court had refrained from insisting on a particular type of review, it had held consistently that "some form of meaningful appellate review is constitutionally required." *Id.* at 54.

24. CAL. PENAL CODE ANN. § 190.4(e) (West Supp. 1978) (providing for automatic appeal and review of evidence where the jury returns a sentence of death and the trial judge affirms the sentence), *as cited in Pulley,* 465 U.S. at 52–53.

25. California law charges the jury to find special aggravating and mitigating circumstances in the defendant's case, whereby the defendant becomes subject to a penalty of death, or life without parole. *Id.* § 190.2, *as cited in Pulley,* 465 U.S. at 51 n.13. These circumstances must be proven beyond a reasonable doubt, and are reviewable during the appeal stage. *Id.* § 190.4(a), (e), *as cited in Pulley,* 465 U.S. at 51–53.

26. *Pulley,* 465 U.S. at 44–51 (finding that *Gregg, Proffitt,* and *Jurek* did not establish comparative proportionality review as a constitutional necessity).

27. Justice Brennan, joined by Justice Marshall, dissented in *Pulley.* He claimed that the Court's cursory analysis of the California procedure created a situation where the death penalty could continue to operate in an arbitrary fashion, but would do so under the guise of rationality. *Id.* at 60 (Brennan, J., dissenting).

28. Justice Brennan argued that upholding the statutes on their faces was not sufficient to comply with *Furman.* Without determining whether the results reached under the statutes were

the Court will rule when a state which has imposed upon itself an affirmative duty to conduct certain procedures, such as comparative proportionality review, fails to apply those procedures in a meaningful manner.

II. WASHINGTON LAW: THE THEORETICAL IDEAL

A. *Death Penalty Sentence Review Under the Washington Constitution*

While the United States Supreme Court has been deferential in its examination of death penalty statutes, the Washington Supreme Court need not follow the same trend. The Washington Supreme Court is the ultimate arbiter of the Washington Constitution.[29] The United States Supreme Court will not disturb state court decisions which rest solely on state law.[30] State constitutions often provide greater protections than the federal Constitution.[31] As long as the state constitution grants the minimum amount of protection guaranteed by the federal constitutional provision, the state is not barred from providing additional protection.[32]

Article I, section 14 of the Washington Constitution prohibits the imposition of cruel punishment.[33] The Washington Supreme Court

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devoid of *Furman* inconsistencies, Justice Brennan argued that the majority had little basis for its conclusion that the statutes were constitutional. *Id.* at 67.

29. The Supreme Court's interpretation of the federal Constitution does not control the Washington Supreme Court's interpretation of the Washington Constitution. *See* Olympic Forest Prods., Inc. v. Chaussee Corp., 82 Wash. 2d 418, 421–22, 511 P.2d 1002, 1005 (1973) (Supreme Court rulings on the fourteenth amendment do not control the state supreme court's interpretation of its own due process clause).

30. *See* Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (decisions which are based on separate, adequate, and independent state grounds are unreviewable by the Supreme Court); *see also* State v. Bartholomew, 101 Wash. 2d 631, 644, 683 P.2d 1079, 1087 (1984) (*Bartholomew* II) (applying *Long* in an interpretation of article I, § 14 of the Washington Constitution). For a general treatment of the independent and adequate state grounds issue, see Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds,* 63 TEX. L. REV. 1025 (1985).

31. The expansion of individual rights under state constitutional interpretations has been well documented. *See generally Symposium: The Emergence of State Constitutional Law,* 63 TEX. L. REV. 959 (1985).

32. State v. Fitzsimmons, 94 Wash. 2d 858, 859, 620 P.2d 999, 1000–01 (1980) (allowing for an expanded right to counsel under state rules); State v. Fain, 94 Wash. 2d 387, 392–93, 617 P.2d 720, 723 (1980) (allowing a claim based upon article I, § 14 of the Washington Constitution, even where the claim could not be based upon the eighth amendment); Federated Publications, Inc. v. Kurtz, 94 Wash. 2d 51, 56, 615 P.2d 440, 443 (1980) (expanding the defendant's right to a fair trial).

33. WASH. CONST. art. I, § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."). The Washington provision differs from the eighth amendment to the federal Constitution which states "[e]xcessive bail shall not be required, nor excessive fines

has held that where a trial lacks fundamental fairness and results in the death penalty, the punishment violates article I, section 14.[34] The Washington Supreme Court, in applying the state constitution, could require the appellate review procedures to be effective as applied, even though the United States Supreme Court has not required such a determination to be made under the federal Constitution. If Washington's comparative proportionality review has not been effective as applied, to provide a meaningful safeguard against arbitrary or discriminatory imposition of the death penalty, the court could refuse to sustain the constitutionality of the procedure notwithstanding its theoretical effectiveness.

B. Washington's Death Penalty Statute

Adopted in 1981, Washington's current capital punishment statute is a product of the United States Supreme Court death penalty decisions.[35] Under Chapter 10.95 of the Revised Code of Washington,[36] aggravated first degree murder is the only crime punishable by death.[37] Aggravated first degree murder is defined according to a list of aggravating circumstances.[38] Imposition of the death penalty is not mandatory when a defendant is convicted of aggravated first degree murder.[39] The prosecutor must first seek the death penalty.[40] If the defendant is convicted of aggravated first degree murder and the prosecutor has sought the death penalty, the jury then must determine whether mitigating circumstances warrant a lesser sentence.[41] The

imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The eighth amendment applies to the individual states through the due process clause of the fourteenth amendment. Gideon v. Wainwright, 372 U.S. 335, 342 (1963); Robinson v. California, 370 U.S. 660, 666–68 (1962).

34. State v. Bartholomew, 101 Wash. 2d 631, 640, 683 P.2d 1079, 1085 (1984) (*Bartholomew* II) (holding that state constitutional provisions regarding both due process and cruel punishment were violated by WASH. REV. CODE § 10.95.060 (1987), which regulates admissibility of evidence in capital cases).

35. *See supra* note 17.

36. Act of May 14, 1981, ch. 138, 1981 Wash. Laws 535 (codified at WASH. REV. CODE ch. 10.95 (1987)).

37. WASH. REV. CODE § 10.95.030(2) (1987).

38. *Id.* § 10.95.020 (listing aggravating factors, which include murder of a judge, murder pursuant to a contract, and murder committed to conceal commission of a crime).

39. *Id.* § 10.95.030.

40. *Id.* § 10.95.040.

41. *Id.* § 10.95.060. The sentence is imposed as the result of a special sentencing hearing. *Id.* §§ 10.95.050–.060. At this hearing, the jury is asked: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" *Id.* § 10.95.060(4). Thus, the jury considers the relative weights of the aggravating and mitigating circumstances. If the jury finds

statute provides specific examples of mitigating circumstances which the jury may consider in assessing the culpability of the defendant.[42]

The Washington statute provides for automatic appeal of all death penalty sentences to the Washington Supreme Court.[43] On appeal, the Washington Supreme Court is required to review three issues: First, whether sufficient evidence existed to justify the jury's determination of insufficient mitigating circumstances;[44] second, whether the sentence was a product of passion or prejudice;[45] and third, whether the sentence is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and defendant.[46]

C. The Comparative Proportionality Review Process

1. Traditional Versus Comparative Proportionality

In reviewing the appropriateness of a capital sentence, a court may use two types of proportionality review: Traditional or comparative.[47] Traditional proportionality review is used by courts to decide whether, in the abstract, the severity of the punishment is justified by the severity of the crime.[48] No attempt is made to compare the punishment given in the case under review to the punishment awarded in similar cases. It has long been settled that death is not traditionally disproportionate when imposed for the most serious crimes.[49] Traditional proportionality review provides no protection against arbitrary or discriminatory imposition of the death penalty.

Comparative proportionality review is used by courts to prevent arbitrary or discriminatory imposition of the death penalty by determining whether the penalty has been applied consistently among similar cases.[50] The reviewing court examines the penalty in the context of penalties similar defendants have received for similar offenses. Penalties which are traditionally proportionate may be applied in a compar-

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beyond a reasonable doubt that the evidence of mitigation does not allow for leniency, the defendant is automatically sentenced to death. *Id.* § 10.95.080(1).

42. *Id.* § 10.95.070 (listing mitigating factors, which include prior criminal record, evidence of extreme mental disturbance, and age of the defendant).

43. *Id.* § 10.95.100.

44. *Id.* § 10.95.130(2)(a).

45. *Id.* § 10.95.130(2)(c).

46. *Id.* § 10.95.130(2)(b).

47. Pulley v. Harris, 465 U.S. 37, 42–44 (1984).

48. *Id.* at 42–43.

49. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (capital punishment "is an extreme sanction, suitable to the most extreme of crimes").

50. *Pulley*, 465 U.S. at 43.

atively disproportionate fashion. In Washington, comparative proportionality review of capital sentences is required by statute.[51]

2. *Washington's Proportionality Choice*

In 1981, the Washington Legislature included a mandatory appellate review provision in its capital punishment statute.[52] By mandating capital punishment under certain conditions, the legislature implicitly found the death penalty to be traditionally proportionate for first degree aggravated murder.[53] Thus, the legislature restricted the court's analysis of death penalties to a comparative proportionality review.[54] Presumably, comparative proportionality review was required to ensure the rational and objective review of each death sentence, and provide an element of procedural fairness that had been lacking previously in death penalty adjudication.[55]

The mandatory comparative proportionality review of a death sentence compels the Washington Supreme Court to determine whether the death penalty is proportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[56] In conducting this review, the court must limit its universe of similar cases to those reported in the Washington Reports or the Washington Appellate Reports since January 1, 1965 that carried the possibility of a death penalty.[57] This category includes all cases where first degree aggravated murder was charged, even those cases in which the prosecutor did not seek the death penalty.[58] Thus, as long as the criminal charge carried the threat of capital punishment, the court may use the case in

51. WASH. REV. CODE § 10.95.130(2)(b) (1987). Washington is not alone in its statutory mandate of comparative proportionality review. *See, e.g.*, GA. CODE ANN. § 17-10-35(c)(3) (1982).

52. Act of May 14, 1981, ch. 138, 1981 Wash. Laws 535 (codified at WASH. REV. CODE § 10.95.100 (1987)).

53. Washington voters expressed their desire for a mandatory death penalty in a 1975 statewide initiative. 1975–76 Wash. Laws 2d Ex. Sess. 17 (codified at WASH. REV. CODE §§ 9A.32.045–.047 (1977)) (repealed 1981). In 1981, this statute was changed by the legislature to allow for the death penalty in first degree aggravated murders. Act of May 14, 1981, ch. 138, 1981 Wash. Laws 535 (codified at WASH. REV. CODE ch. 10.95 (1987)).

54. WASH. REV. CODE § 10.95.130(2)(b) (1987).

55. *See supra* notes 7–13 and accompanying text. For a thorough discussion of the history of Washington's death penalty legislation, see Comment, *The Death Penalty in Washington: An Historical Perspective*, 57 WASH. L. REV. 525 (1982).

56. WASH. REV. CODE § 10.95.130(2)(b) (1987).

57. *Id.* § 10.95.130(2)(b).

58. *Id.* § 10.95.130(2)(b) (requiring the universe of possible similar cases to include cases in which trial court reports are required to be filed); *id.* § 10.95.120 (mandating the submission of trial court reports in all cases where the defendant is convicted of aggravated first degree murder).

its comparative pool. By requiring that a pool of similar cases serve as the comparative group, the statute attempts to guide the discretion of the Washington Supreme Court.

Although the statute defines the universe of cases available for the review, it does not guide the court in choosing the pool of similar cases for use in carrying out a particular comparative proportionality review. The Washington Supreme Court has used at least two methods to define "similar cases" for use in applying the comparative proportionality review. First, the court has looked to the number of aggravating factors and has chosen cases for the comparative pool with the same number of aggravating circumstances.[59] Second, the court has gathered its similar cases according to types of aggravating circumstances.[60] The court has not adopted a specific methodology for choosing similar cases to be used in all death penalty reviews.

III. WASHINGTON SUPREME COURT'S APPLICATION OF COMPARATIVE PROPORTIONALITY REVIEW: A LACK OF STANDARDS

A review of cases that have undergone comparative proportionality review[61] reveals that Washington's death penalty statute does not ensure effective appellate review. The primary flaw is that the statute does not provide adequate standards or guidance as to its use. The review procedure has proven problematic for two major reasons. First, the statute does not adequately define a "similar case."[62] The statute's vagueness also makes it difficult to determine which cases should be included in the comparative pool. The result of the review can be skewed by including only cases where the death penalty was upheld. Moreover, the statute does not address how a comparative proportionality review should be carried out when no similar cases can

59. *See, e.g.*, State v. Campbell, 103 Wash. 2d 1, 30, 691 P.2d 929, 945–46 (1984) (finding that no other cases in Washington had the same number of aggravating factors), *cert. denied*, 471 U.S. 1094 (1985).

60. *See, e.g.*, State v. Rupe, 108 Wash. 2d 734, 768–69, 743 P.2d 210, 229–30 (1987) (*Rupe* II) (finding that only one case contained the same combination of aggravating circumstances, the court compiled an additional list with cases containing two of the four aggravating factors at issue), *cert. denied*, 108 S. Ct. 2834 (1988).

61. Few cases exist with which to analyze the actual effectiveness of Washington's comparative proportionality system. The limited number of cases, however, does not lessen the seriousness of the problem. Not only does each case represent the fate of an individual, but errors occurring at the review stage increase the chances for further error; the system cannot work if erroneous decisions are used as the benchmark for further comparison.

62. *See infra* notes 64–98 and accompanying text.

be found. This problem confronts the court when reviewing cases of unprecedented aggravating and mitigating circumstances.

Second, the statute does not sufficiently define standards for performing the comparative review.[63] Once the comparative pool is drawn, the statute lacks sufficient standards with which to conduct the comparison. Cases can be similar or dissimilar in a variety of ways. It is not clear which criteria the court must examine and how it should weigh them in its comparison.

A. What Is a "Similar Case"?

The major flaw in Washington's comparative proportionality review system is the lack of a definition of a similar case.[64] Washington's statute[65] is vague in that it does not define the word "similar," it does not state how many cases should be included in the review, and it does not offer a methodology for choosing which cases are to be used in the comparison. This lack of a practical working definition manifests itself in each review the court conducts.

1. Lack of Similar Cases: Comparing Incomparables

The first significant problem in deciding on a pool of similar cases is that no similar cases may exist with which to conduct the comparative proportionality review. When this occurs, the reviewing court is tempted to slip into a traditional proportionality review.[66] This phenomenon represents the paradox of comparative proportionality review: the review process often requires the comparison of incomparables.

Aggravated first degree murder cases often present the judge and jury with grotesque and macabre fact patterns. These cases can be unique in at least two ways. First, some murders are qualitatively unique.[67] Cases that stand apart, based upon their qualitative unique-

63. *See infra* notes 99–122 and accompanying text.

64. *See supra* notes 59–60 and accompanying text.

65. WASH. REV. CODE § 10.95.130(2)(b) (1987).

66. *See supra* notes 47–51 and accompanying text.

67. Heinous murders make the comparison difficult; such cases simply seem worse than others. The court's proportionality review in State v. Rice, 110 Wash. 2d 577, 625–28, 757 P.2d 889, 915–17 (1988), presents the dilemma of qualitative uniqueness. Rice, in a highly publicized trial, was convicted of the brutal murders of a prominent Seattle attorney and his family. In its comparison of Rice's crime with other similar crimes, the court exhibited the shortcomings of the comparative proportionality procedure. First, only one case, State v. Rupe, 108 Wash. 2d 734, 743 P.2d 210 (1987) (*Rupe* II), *cert. denied,* 108 S. Ct. 2834 (1988), was found to contain the same number and type of aggravating circumstances. The other two cases chosen, State v. Jeffries, 105 Wash. 2d 398, 717 P.2d 722, *cert. denied,* 479 U.S. 922 (1986), and State v. Campbell, 103 Wash. 2d 1, 691 P.2d 929 (1984), *cert. denied,* 471 U.S. 1094 (1985), both resulted

ness, make the compilation of a pool of similar cases difficult. Second, some murders are quantitatively unique. These cases present to a reviewing court unprecedented numbers of aggravating factors.[68] Where a reviewing court chooses to define a similar case based on its number of aggravating factors, the court may be unable to find such cases.[69]

The question then becomes, how can the court conduct its comparative proportionality review with no similar cases? In *State v. Campbell,*[70] the court conducted its review without a pool of similar cases. Lacking any cases for its comparison, the court justified its review on a traditional proportionality theory, finding death to be a fitting punishment for a triple murder.[71]

Campbell was one of the first cases to be reviewed by the Washington Supreme Court under the revised statute. Charles Campbell, while an inmate at the Everett Work Release Facility, murdered three persons.[72] The state's evidence in the case was quite strong, as was the evidence of aggravating factors.[73] In November 1982, Campbell was

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in the imposition of the death penalty. Given the heinous nature of Rice's crime, the court probably felt constrained to affirm his death penalty on the basis of traditional proportionality.

68. *See, e.g.,* State v. Campbell, 103 Wash. 2d 1, 30, 691 P.2d 929, 945 (1984) (finding no other case with four aggravating factors), *cert. denied,* 471 U.S. 1094 (1985).

69. The compilation of similar cases and the resultant comparative review usually is based upon the number of aggravating factors. *See supra* note 59 and accompanying text. This simplifies the calculation, and eases the compilation of the pool of similar cases. Consideration of the crime, however, is just one element of the court's comparative review. The court also must take account of facts relating to the defendant. Cases like *Campbell* and *Rice* appear to be comparatively proportionate, especially when cases with fewer aggravating circumstances have resulted in the death penalty. However, differences between defendants may make such cases more difficult to compare.

In addition, comparative proportionality review mandates a comparison with similar cases. For example, the court in *Rice* found that *Jeffries* was a similar case. However, the court failed to include cases similar to *Jeffries* that did not result in the death penalty. Inclusion of these cases would have changed the comparative proportionality calculus. *See infra* notes 89–98 and accompanying text.

70. 103 Wash. 2d 1, 691 P.2d 929 (1984).

71. *Id.* at 30, 691 P.2d at 945–46.

72. The first victim had been a previous victim of Campbell's. In 1976, Campbell had been convicted of the 1974 first degree assault and sodomy of this woman. The second murder victim had been a witness in that prior trial. The third victim was the daughter of the woman who had been sodomized and assaulted in 1974. The three were found dead in the same home, all victims of massive hemorrhage. Apparently, the defendant had used a knife to sever the carotid arteries of each victim; all three bled to death. *Id.* at 5–6, 691 P.2d at 933.

73. *Id.* at 7, 13, 691 P.2d at 933, 937. There were four statutory aggravating factors noted in this case. The defendant was serving a term of imprisonment at the time of an act resulting in death (WASH. REV. CODE § 10.95.020(2) (1987)); the murder was related to the victim's exercise of official duties (*id.* at § 10.95.020(6)(b)); the murder was committed to protect the defendant's identity (*id.* at § 10.95.020(7)); and the murder was committed in the course of burglary in the first degree (*id.* at § 10.95.020(9)(c)).

convicted on three counts of aggravated first degree murder. Following the jury's finding of insufficient mitigating circumstances to warrant leniency, the judge imposed the death penalty against Campbell.[74]

The Washington Supreme Court affirmed both the conviction and the sentence.[75] The majority opinion stated that *Campbell* presented a novel issue for the court because it concerned facts which had never been before the court in a death penalty review.[76] The court held that the penalty imposed was not disproportionate.[77] Because Campbell's crime was particularly heinous, the court concluded that most juries faced with a similar fact pattern would have imposed the death penalty.[78]

The court failed to carry out the comparative proportionality review as required by the death penalty statute and the Washington Constitution. In analyzing the issue whether the death penalty imposed against Campbell was proportionate, the court applied only a traditional proportionality analysis. Nevertheless, the majority believed it had carried out its statutory duty.[79]

Traditional proportionality review is not an adequate substitute for comparative proportionality review. Traditional proportionality review easily lends itself to the discretionary and ad hoc rationalization that comparative proportionality review attempts to prevent.[80] If the Washington Supreme Court applies only a traditional proportionality review whenever it is faced with unique and extraordinary crimes, the statutory mandate for a comparative proportionality review will cease to have meaning.[81]

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74. *Campbell,* 103 Wash. 2d at 13, 691 P.2d at 937.

75. *Id.* at 35, 691 P.2d at 948.

76. *Id.* at 30, 691 P.2d at 945.

77. *Id.* at 30, 691 P.2d at 946.

78. *Id.* at 30, 691 P.2d at 945.

79. *Id.* at 34, 691 P.2d at 947.

80. Justice Utter, in his dissenting opinion on the imposition of the death penalty in *Campbell,* pointed to a number of factors which make the comparative proportionality review difficult to administer in less than an arbitrary or meaningless fashion. He pointed out that while the supreme court is required to consider the weight of mitigating circumstances, the statute lacks a meaningful definition of the term "mitigating circumstance." *Id.* at 43, 691 P.2d at 953 (Utter, J., concurring in part, dissenting in part). Also, even assuming the court was certain what constituted a mitigating circumstance, the statute provides no rational method of weighing mitigation against aggravation. *Id.* at 41–44, 691 P.2d at 953–54.

81. *See* State v. Harris, 106 Wash. 2d 784, 725 P.2d 975 (1986), *cert. denied,* 107 S. Ct. 1592 (1987). In *Harris,* the court affirmed the conviction and death sentence against a defendant charged with a contract killing. In its comparative proportionality review, however, the court noted that no case had ever been reported in either the Washington Reports or the Washington Appellate Reports in which the death penalty had been considered for a contract killing. *Id.* at 798, 725 P.2d at 982. In the three Washington cases involving contract killings, which were

When the court is faced with quantitatively or qualitatively unique cases, it faces the possibility of having no similar cases for its comparison.[82] This situation causes the court to lapse into a traditional proportionality review. Because Washington law requires a comparative proportionality review in every case, and not a traditional proportionality review, the Washington death penalty statute is not being applied effectively in these unique cases.

2. *Choosing the Comparative Pool from the Universe of Similar Cases*

The death penalty statute limits the universe of cases from which to choose;[83] it does not, however, guide the court in choosing its comparative pool from the universe of similar cases. Thus, the court may select and exclude cases as it sees fit. The risk exists that justices will compile a group of similar cases according to a predetermined outcome. When the only cases used in the comparison are cases where the death penalty was imposed, it is not surprising that death becomes a proportionate sentence for the case on review.

In *State v. Jeffries,*[84] Patrick Jeffries was charged with and convicted of the first degree aggravated murder of a Clallam County couple.[85] The jury found two aggravating factors: First, the murders were committed to conceal the commission of a crime, and second, the killings involved more than one victim and were part of a common scheme or plan.[86] The death penalty was imposed.

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described in reports filed with the Clerk of the Supreme Court pursuant to WASH. REV. CODE § 10.95.120 (1987), the prosecutor had failed to seek the death penalty. *Id.* at 799, 725 P.2d at 983. Even though the pool of similar cases did not contain a single case where the death penalty had been imposed for a contract killing, the court found the death penalty to be comparatively proportionate. *Harris,* 106 Wash. 2d at 798–99, 725 P.2d at 983. This result can be explained only on the basis of a traditional proportionality review.

82. With no cases against which to compare the appealed case, the court arguably is precluded from carrying out its statutory duty. *See, e.g., Harris,* 106 Wash. 2d at 798, 725 P.2d at 982–83.

83. WASH. REV. CODE § 10.95.130(2)(b) (1987); *see supra* notes 57–58 and accompanying text.

84. 105 Wash. 2d 398, 717 P.2d 722, *cert. denied,* 479 U.S. 922 (1986).

85. The couple had met Jeffries while he was serving prison time in Canada. After his release, the couple gave Jeffries a place to stay and a workshop in which to practice his woodcarving. The relationship was amicable at first, but became less so as time progressed. At some point on March 19, 1983, Jeffries murdered the couple and buried them in shallow graves near their home. The facts revealed that the husband was shot first, which alerted the wife that her life was in danger. She attempted to hide from Jeffries, but he eventually found her. Both were victims of multiple gunshot wounds. *Id.* at 401–08, 717 P.2d at 725–29.

86. *Id.* at 406–07, 717 P.2d at 728.

The Washington Supreme Court carried out its comparative proportionality review of Jeffries's sentence in summary fashion. The review of similar cases fills less than one page. In its analysis, the court selected four cases, all of which affirmed imposition of the death penalty, to compare with Jeffries's sentence.[87] The death penalty was found to be comparatively proportionate.[88]

The court did not consider *State v. Carothers*[89] in its comparative proportionality review of Jeffries's sentence. Like Jeffries, Carothers was charged with the aggravated first degree murder of a husband and wife. *Jeffries* and *Carothers* contained identical aggravating factors. Both cases involved killing more than one victim as part of a common scheme or plan, and both were committed to conceal the commission of a crime.[90] In both cases, the prosecutor sought the death penalty.[91] In *Jeffries,* the jury found insufficient mitigating factors to warrant leniency, and the court imposed a sentence of death. In *Carothers,* the prosecutor sought the death penalty; nevertheless, the jury found sufficient mitigating circumstances to warrant a sentence less than death.[92]

Other aggravated first degree murder cases with facts similar to those in *Jeffries* were not used in the court's comparative proportionality review.[93] In these similar cases, the state declined to seek the

87. *Id.* at 430, 717 P.2d at 740. The four cases used in the comparison were as follows: State v. Rupe, 101 Wash. 2d 664, 683 P.2d 571 (1984) (*Rupe* I) (shooting death of two bank tellers during bank robbery); State v. Bartholomew, 101 Wash. 2d 631, 683 P.2d 1079 (1984) (*Bartholomew* II) (victim was killed to hide defendant's identity); State v. Quinlivan, 81 Wash. 2d 124, 499 P.2d 1268 (1972) (defendant murdered his friend and lover's mother), *superseded by statute as noted in* State v. Crenshaw, 98 Wash. 2d 789, 659 P.2d 488 (1983); State v. Hawkins, 70 Wash. 2d 697, 425 P.2d 390 (1967) (defendant murdered his lover's son and daughter), *cert. denied,* 390 U.S. 912 (1968).

88. *Jeffries,* 105 Wash. 2d at 430, 717 P.2d at 740.

89. 84 Wash. 2d 256, 525 P.2d 731 (1974). Carothers had an accomplice who had befriended him while the two served criminal sentences in New York. Upon Carothers's release from prison, he married and moved to the Seattle area. The other man, Joseph Lalak, later joined him there. According to Lalak, who was granted immunity in the trial, the two men were driving on the Olympic Peninsula on September 3, 1971, searching for a place to rob. They came upon the victims' home. Carothers shot both the husband and wife and stole the man's wallet. *Id.* at 257–59, 525 P.2d at 732–33.

90. *Id.; Jeffries,* 105 Wash. 2d at 406–07, 717 P.2d at 728.

91. *Jeffries,* 105 Wash. 2d at 440, 717 P.2d at 746 (Utter, J., dissenting).

92. State v. Carothers, 9 Wash. App. 691, 695, 514 P.2d 170, 173 (1973), *aff'd,* 84 Wash. 2d 256, 525 P.2d 731 (1974).

93. Justice Utter discussed several double murder cases in his dissent in *Jeffries,* including the following: State v. Carey, 42 Wash. App. 840, 714 P.2d 708 (1986) (prosecutor did not seek the death penalty for the double murder of defendant's wife and son, who were killed in an intentionally set fire); State v. Guloy, 104 Wash. 2d 412, 705 P.2d 1182 (1985), *cert. denied,* 475 U.S. 1020 (1986); State v. Dictado, 102 Wash. 2d 277, 687 P.2d 172 (1984) (prosecutor did not seek the death penalty for two defendants charged with the murders of two union reformers); and State v. Kincaid, 103 Wash. 2d 304, 692 P.2d 823 (1985) (prosecutor did not seek the death

death penalty. The majority, however, did not include them in the review.

In *Jeffries,* the majority misinterpreted the meaning of Washington's death penalty statute by failing to include cases in its comparative proportionality review in which defendants were convicted of aggravated first degree murder, but were not sentenced to death.[94] The majority apparently believed that it was not bound to include such cases. However, the statute requires comparison with those cases where trial reports have been filed with the supreme court.[95] Because these reports include all first degree aggravated murder convictions, even those where the death penalty was not sought by the prosecutor, all of those cases should have been included in the group of potentially similar cases.[96] The majority assumed that such reports are filed only in cases in which the death penalty was sought.[97] This error may have had a dramatic impact on the comparative proportionality review. Had non-death penalty cases been included in the comparative pool, it is possible that the majority would have been unable to affirm the sentence so easily because the court gave no reason why Jeffries should be sentenced when other defendants charged with similar crimes were not. The omission of these similar cases from the comparison illustrates the lack of standards in composing the comparative pool.

By excluding comparable cases where the death penalty was not sought, the Washington Supreme Court has failed to comply with the Washington death penalty statute in its selection of the pool of similar cases.[98] Yet even complying with the statute would not eliminate the potential for arbitrary application because the statute gives little guidance as to which cases must be chosen from the larger pool. The court may easily exclude cases which should be included in the comparison. This error predetermines that the death sentence will be found comparatively proportionate.

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penalty for the murder of defendant's wife and her sister). *Jeffries,* 105 Wash. 2d at 438–39, 717 P.2d at 745 (Utter, J., dissenting).

94. *See Jeffries,* 105 Wash. 2d at 431–32, 717 P.2d at 742 (Utter, J., dissenting).

95. WASH. REV. CODE § 10.95.130(2)(b) (1987) (similar cases include those in which reports have been filed with the supreme court under WASH. REV. CODE § 10.95.120 (1987)).

96. *Id.* § 10.95.120.

97. *Jeffries,* 105 Wash. 2d at 429–30, 717 P.2d at 740. *But see* WASH. REV. CODE § 10.95.120 (1987) (requiring that reports be submitted from the trial court to the supreme court "[i]n all cases in which a person is convicted of aggravated first degree murder").

98. *See supra* notes 56–58 and accompanying text.

B. Making the Comparison: Lack of a Comparative Method

After it has selected a comparative pool, the court must formulate a model by which cases can be standardized for comparison. The court's comparative proportionality review might take account of the facts of the case which relate to both the crime and the defendant, as well as the number and type of aggravating and mitigating factors.[99] The statute is unclear as to what evidence the court should consider in its review. Also, it is uncertain how similar cases which result in different sentencing decisions should be compared and reconciled in the comparative proportionality review. Without a means to standardize the differences between cases, the court's comparative review is not applied effectively.[100]

1. State v. Mak

The difference in treatment of two similarly situated defendants in a recent Washington murder case illustrates the lack of standards in Washington's comparative proportionality review procedure. In 1983, Kwan Fai Mak and Benjamin Ng, along with a third accomplice, perpetrated an execution-style robbery at the Wah Mee Club in Seattle's International District.[101] Both Mak and Ng were charged with thirteen counts of first degree aggravated murder and one count of first degree assault.[102] The prosecutor never proved who fired the shots, and argued in both cases that the matter was actually irrelevant.[103] Mak was convicted and sentenced to death.[104] Benjamin Ng, his accomplice, was convicted of the same crime but escaped the death sentence.[105] Thus, only Mak's case was brought to the court on automatic appeal.

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99. *See supra* notes 59–60 and accompanying text.

100. The lack of a comparative model is related to the inability to define "similar cases." *See supra* text accompanying notes 64–65. It is only after the similar cases are gathered that the actual comparison between those cases and the case on review can commence.

101. State v. Mak, 105 Wash. 2d 692, 697, 718 P.2d 407, 413, *cert. denied,* 479 U.S. 995 (1986). Thirteen people died as a result of the crime. The victims were held up at gunpoint, hog-tied, and then shot dead. *Id.*

102. State v. Ng, 104 Wash. 2d 763, 765, 713 P.2d 63, 64 (1985); *Mak,* 105 Wash. 2d at 697, 718 P.2d at 413.

103. Report of Proceedings, State v. Mak, cause 49966-7, at 3102, *as cited in Ng,* 104 Wash. 2d at 769, 713 P.2d at 66.

104. *Mak,* 105 Wash. 2d at 697, 718 P.2d at 413.

105. *Ng,* 104 Wash. 2d at 770, 713 P.2d at 67. The jury in Ng's case, under the procedure described at WASH. REV. CODE § 10.95.060 (1987), was unable to answer unanimously the question posed by WASH. REV. CODE § 10.95.060(4) (1987). *See supra* note 41.

On mandatory review, the Washington Supreme Court affirmed Mak's sentence, and found it comparatively proportionate.[106] The court offered two reasons for the discrepancy between Mak's and Ng's sentences. First, the evidence of mitigation was not the same for each of the two defendants.[107] Presumably, confronted with the mitigating evidence that Ng suffered from dementia as a result of a childhood injury, the jury was unable to reach the unanimous conclusion that this factor did not warrant leniency.[108]

Second, the two defendants performed substantially different roles in the crime.[109] The majority asserted that evidence presented at trial tended to prove that Mak was the mastermind behind the killings.[110] These two factors, according to the court, contributed to the difference in outcomes, and therefore the difference was not considered "aberrational."[111]

2. Problems With the Comparative Review Process

a. Weighing Aggravating and Mitigating Circumstances in the Court's Consideration of the Crime and Defendant

Under Washington law, the court must consider both the defendant and the crime in its comparative proportionality review.[112] An essential component of this analysis is the examination of aggravating and mitigating circumstances. Some aggravating and mitigating factors will relate to the crime, and others will relate to the defendant. The court has not stated which aggravating and mitigating circumstances it considers most important. In addition, the court has not made clear which prong of its comparative proportionality review, the crime or the defendant, should command the greatest attention.

The court's analysis in *State v. Mak* illustrates the difficulty in determining whether consideration of the crime or defendant is most important in its comparative proportionality review. In *Mak,* the court recognized that the Mak and Ng crimes were not only similar, but identical.[113] Therefore, in compiling the pool of cases for Mak's

106. *Mak,* 105 Wash. 2d at 698, 725–26, 718 P.2d at 413, 428.

107. *Id.* at 724–25, 718 P.2d at 428.

108. The mitigating factor relied on in Ng's case was "[w]hether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect" WASH. REV. CODE § 10.95.070(6) (1987).

109. *Mak,* 105 Wash. 2d at 724–25, 718 P.2d at 428.

110. *Id.* at 697, 718 P.2d at 413.

111. *Id.* at 724, 718 P.2d at 428.

112. WASH. REV. CODE § 10.95.130(2)(b) (1987).

113. *Mak,* 105 Wash. 2d at 724, 718 P.2d at 428.

comparative proportionality review, *State v. Ng* was the definitive similar case in terms of the crime committed. Because the court was unable to distinguish the two cases on the basis of the crime, the court shifted its emphasis to the two defendants.[114] No explanation was given by the court to justify its focus on the differences between the defendants rather than on the similarities of the crimes.

The court's analysis in *Mak* also illustrates the difficulty in weighing aggravating and mitigating circumstances. The court found that evidence of Ng's mental illness[115] contributed to the discrepancy in sentencing.[116] This evidence created a relevant and important distinction between the two defendants. Nevertheless, the court did not indicate how it weighed the mitigating circumstances. Thus, insofar as the court considered the defendant, the court did not create a principled means to compare cases which may contain different mitigating circumstances.

b. Evidence Which the Court Considers

The result of the comparative proportionality review depends, at least in part, upon what evidence the court considers in its review. The death penalty statute does not state which evidence is to be considered. When the court conducts the comparative proportionality review of a death sentence, it should consider all available relevant evidence. At a minimum, the court should promulgate standards to determine what evidence should be considered in its comparative proportionality review.

In *Mak,* the court emphasized the state's claim that the "respective roles" of the defendants were different, contributing to the imposition of different sentences.[117] However, evidence excluded at Mak's trial might have convinced the jury that Mak did not assume the lead role in the crime.[118] The evidence might have made Mak less culpable, and

114. In previous cases, the nature of the crime had been paramount in the court's comparative review. *See generally* State v. Rice, 110 Wash. 2d 577, 757 P.2d 889 (1988); State v. Campbell, 103 Wash. 2d 1, 691 P.2d 929 (1984), *cert. denied,* 471 U.S. 1094 (1985).

115. *Mak,* 105 Wash. 2d at 725, 718 P.2d at 428.

116. *Id.* at 724–25, 718 P.2d at 428.

117. *Id.* at 725, 718 P.2d at 428.

118. This evidence concerned allegations of a further accomplice, who had approached Ng and offered to sell him a bulletproof vest. *Id.* at 716, 718 P.2d at 424. In addition, Mak claimed that the evidence would prove that this third party was a "banker" for a local gambling club, and had a plan to control the gambling in the International District. Supposedly, Ng had been contacted by this third party on the day of the crime, and had been with him for an hour before the murders. *Id.* at 716, 718 P.2d at 423.

thus a less likely candidate for the death penalty.[119] Although the Washington Supreme Court was aware that this evidence existed,[120] the court did not state whether it considered the evidence in carrying out the comparative proportionality review. After *Mak,* it is unclear what evidence the court will consider in its comparative proportionality review.

c. *Determining When the Death Penalty Is Comparatively Proportionate*

The Washington Supreme Court must decide whether the sentence imposed is comparatively proportionate to other similar cases. It is unclear whether the penalty must have been imposed in a majority of the cases in the comparative pool, or whether a lesser percentage will suffice. For example, if the comparative pool contains three cases in which the death penalty was imposed and three cases in which it was not imposed, is the imposition of the death penalty in the case being reviewed comparatively proportionate?[121]

The result of the *Mak* comparative proportionality review makes it difficult to predict whether the death sentence will be comparatively proportionate for a future similar case.[122] The future case will have facts relating to the crime and the defendant which will differ in some respects from the facts in *Mak* and *Ng.* Reconciling *Mak, Ng,* and the future case will be difficult without standards to make the comparison.

IV. TOWARDS AN EFFECTIVE COMPARATIVE PROPORTIONALITY REVIEW

A comparative proportionality review necessitates a review of the facts relating to the crime, the defendant, the aggravating circumstances, and the mitigating circumstances. Neither the Washington Supreme Court nor the death penalty statute, however, provides a model for making the comparison. The court has not determined

119. "Neither we, nor Mak, will ever know. Mak, however, has less time to speculate about the possibility." *Id.* at 769, 718 P.2d at 451 (Utter, J., dissenting).

120. *Id.* at 715, 718 P.2d at 423.

121. The problem would be even more complicated than it first appears. In addition to distinguishing the death and non-death halves of the comparative pool, the court would also need to distinguish the cases within each half upon their individual combinations of aggravating and mitigating circumstances.

122. There would seem to be little that could be said that might convince a jury that one who participated in the killing of 13 people should have his life spared. And yet, under the bizarre facts of this case, two of the three participants in this crime have been spared the death penalty. . . . Only one actor in this most brutal of all killings committed within this state received the death penalty.

Mak, 105 Wash. 2d at 763, 718 P.2d at 448 (Utter, J., dissenting).

which factors are most important, or how the relevant factors are to be compared with one another. Because the court has failed to adopt standards for its comparative proportionality review, the statute is not being effectively applied to eliminate the arbitrary imposition of the death penalty. Thus, continued use of the comparative proportionality review violates the Washington Constitution's prohibition of cruel punishment.[123]

Comparative proportionality review is a promising concept, but the method by which it is imposed in Washington needs improvement. Because the death penalty statute does not provide sufficient direction for its use, the court should formulate its own guidelines. The following suggestions would result in a more effectively applied comparative proportionality review procedure.

The statute presently requires the court to conduct a *comparative* proportionality review in all cases where a defendant has been sentenced to death. Some cases are exceedingly difficult to compare, but this cannot excuse the court from its lawful duty. A traditional proportionality review is insufficient under the Washington statute. The statute requires that the court choose a comparative pool, and then carry out a meaningful comparative proportionality review.

The court should articulate a standard for weighing the relative importance of the characteristics of the crime and of the defendant in choosing and comparing similar cases. In addition, the court should announce which aggravating and mitigating circumstances are more important than others, and explain how it weighs different aggravating and mitigating circumstances against one another. These proposals remedy the statutory deficiencies, which presently act to undermine the statute's effectiveness in preventing arbitrary punishments.

The court should determine the number of similar cases necessary to conduct an effective review. Comparative proportionality reviews which use only a small number of cases lack an appearance of fairness. A large pool provides the court with a better indication of the comparative proportionality of a death sentence imposed for a particular crime and defendant. The comparative pool always should include similar non-death penalty cases. Failure to do so predetermines that death will be found comparatively proportionate. The court also should explain how it will carry out its comparison when some similar cases involved imposition of the death penalty and some did not.

Finally, the court should determine what evidence it will consider in its comparative proportionality review. Where a defendant faces the

123. *See supra* note 33.

imposition of the death penalty, the court should examine all available relevant evidence in conducting its review, even evidence which was properly excluded from the jury at trial. The seriousness of the penalty mandates such a thorough analysis.

V. CONCLUSION

Washington's comparative proportionality review procedure has failed to provide a principled and effective means for the appellate review of death sentences. Although the goals of the review process are laudable, its use has not provided a meaningful safeguard against the arbitrary imposition of the death penalty. Instead, the review represents a procedural smoke screen that obscures the flaws in the capital punishment scheme.

The primary problem with Washington's comparative proportionality review procedure is that Washington's capital punishment statute lacks a sufficiently clear definition of a similar case and the court so far has failed to provide one. Related problems include the comparison of quantitative or qualitatively unique cases, the composition of the comparative pool, and the comparison process itself.

The Washington Supreme Court has not examined its comparative proportionality review for actual effectiveness. The Washington Constitution's prohibition against cruel punishment requires that it do so. Until the Washington Supreme Court examines the review process for actual effectiveness as applied, the death penalty should be struck down as violative of the Washington Constitution.

W. Ward Morrison, Jr.