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Proportionality Review: Still Inadequate, But Still Necessary

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I. Introduction

Proportionality review is the General Assembly of Virginia's attempt to insure that the death penalty is administered as fairly as possible. All cases in which a defendant has been sentenced to death must automatically undergo a review by the Supreme Court of Virginia to determine that the sentence is neither excessive nor disproportionate to the sentences imposed in similar cases.[2] In order to conduct the proportionality review, the Supreme Court of Virginia may accumulate records of capital felony cases tried within a time that is determined by the court.[3] The court shall consider available records and those records must be made available to circuit courts.[4]

This article will focus on the failure of the Supreme Court of Virginia accurately to compare both crimes and defendants when conducting the proportionality review and to take into account the changes that have occurred in capital case law. Proportionality reviews, as they are currently conducted, fail to include a variety of life cases. This necessarily skews the comparison. The court also fails adequately to compare similar defendants. In fact, it is often the case that the only comparison of defendants is on prior criminal records. This completely ignores other relevant personal similarities or dissimilarities. In addition, the court also fails to take into account the changes that have occurred in capital law.

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* J.D. Candidate, May 2003, Washington & Lee University School of Law; B.A., Auburn University. Thank you to Professor Roger D. Groot and all the members of the Virginia Capital Case Clearinghouse for your patience and guidance. This article is dedicated to the loving memory of my father who will always be my inspiration. To my mother and Richard, thank you for your constant love and support. And, to my brother, David, and sister-in-law, Terri, thank you for believing in me and for helping me to believe in myself.

2. VA. CODE ANN. § 17.1-313 (Michie 1999). Section 17.1-313 states in pertinent part:

> In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine: . . . Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Id.

3. *Id.*

4. *Id.*

Changes in procedural issues such as mitigation, the process of voir dire, and parole eligibility, have all had an impact on the comparison. Cases that occurred after these changes should not be compared to those that occurred before these changes because the latter cases are substantially different from the former. This article will show that if there is ever to be meaningful proportionality review, the way in which it is conducted must be changed.

II. The Proportionality Review Statute

Proportionality review has been mandated by the General Assembly in Section 17.1-313 of the Virginia Code.[5] The statute requires that any sentence of death be reviewed on the record by the Supreme Court of Virginia.[6] The statute further provides, in relevant part, that:

> In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine: . . . Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[7]

It is important to note that this part of the statute requires comparison of two separate elements–the crime and the defendant. An adequate proportionality review demands that both be compared in order fully to determine that the sentence imposed is proportional to sentences imposed in cases involving similar situations.

The statute requires the court to review available records. It does not, however, require the court to collect case records from either the Court of Appeals of Virginia or the Virginia circuit courts.[8] Rather, Section 17.1-313(E) states that "[t]he Supreme Court *may* accumulate the records of all capital felony cases *tried* within such period of time as the court may determine."[9] The statute's use of "may" could have been a way to prevent defendants from claiming that the proportionality review requirement was not fulfilled if all available cases were not used in the comparison, or perhaps to relieve the court of the burden of collecting and comparing all available capital cases.[10] Whatever the reason for the statute's use of "may," leaving the determination of the cases to be accumulated at the discretion of the court leads to a great number of relevant cases being left out of the proportionality review. The statute's use of "tried" implicates that the review is meant to include more than just those capital cases which are appealed. It appears that the supreme court does not collect cases from the Court of

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5. *See id.*
6. § 17.1-313(A).
7. § 17.1-313(C).
8. *See* Kelly E.P. Bennett, *Proportionality Review: The Historical Application and Deficiencies*, 12 CAP. DEF. J. 103, 108 (1999) (discussing Virginia's proportionality review).
9. § 17.1-313(E) (emphasis added); *see* Bennett, *supra* note 8, at 108.
10. § 17.1-313(E); *see* Bennett, *supra* note 8, at 108.

Appeals of Virginia or the Virginia circuit courts.[11] The result of the Supreme Court's failure to collect and compare cases from the lower courts precludes consideration of a disproportionate number of cases in which a life sentence was imposed. Life cases are rarely appealed to the Supreme Court and therefore the chances of these cases being included in the proportionality review is severely reduced.[12]

This failure to use life cases in the proportionality review is one of the most significant problems with the proportionality review as it is currently conducted. Section 17.1-313 of the Virginia Code requires the Supreme Court of Virginia, when conducting a proportionality review, to review available records to determine whether the sentence imposed is excessive.[13] The relevant portion of the statute reads, "[t]he court *shall* consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive."[14] In order to avoid a finding of an excessive sentence it is necessary for the court to compare each case in which the defendant was sentenced to death with other cases in which a similar crime was committed to determine if the death penalty has generally been imposed for that particular type of crime.[15]

Under Virginia Code Section 17.1-313, the Virginia Supreme Court is also given discretion to determine whether capital cases will be accumulated as well as the period of time within which records of cases will be accumulated for purposes of a proportionality review.[16] In *Bailey v. Commonwealth*,[17] Justice Koontz explained that the Court has a standing order that directs the clerk of the court to "segregate and accumulate" the printed records and opinions in Class 1 felony cases, to maintain an index of cases and to make that index available for examination upon the request of any court of record in the Commonwealth or in the federal jurisdiction.[18] Justice Koontz then stated that the archive contains the records of all appeals of convictions whether the sentence imposed was life or death.[19] These records are also cross-indexed according to the offense, the sentence imposed and whether that sentence was imposed by a judge or jury.[20]

It is not clear that life cases actually are reviewed or that any meaningful re-examination is done. The Supreme Court appears to include in the review records only those cases which are appealed to the Supreme Court or those in

11. *See* Bennett, *supra* note 8, at 108.
12. *Id.* at 109.
13. § 17.1-313(E).
14. *Id.* (emphasis added).
15. *Id.*
16. § 17.1-313.
17. 529 S.E.2d 570 (Va. 2000).
18. Bailey v. Commonwealth, 529 S.E.2d 570, 580 (Va. 2000) (specifying the procedure for conducting a proportionality review).
19. *Id.*
20. *Id.*

which a death sentence has been imposed and the review is therefore mandatory. There appears to be no effort on the part of the Supreme Court to seek out capital cases that appear at either the circuit court or court of appeals level. If the statute and the scheme set out above were followed, it stands to reason that there would have been sentences that would have been reversed on proportionality grounds. As it stands, the notion of a review seems to be an illusion, and the statute requiring it seems to serve no real purpose.

III. Inherent Problems in the Proportionality Review Statute

There are instances in which life sentence cases are appealed to the Supreme Court of Virginia.[21] When this occurs, these cases are available for use in the proportionality review. However, it is often the case that these life cases are of no real help in determining proportionality of sentencing because they often lack information regarding both facts about the sentencing process, and the crime itself.[22] There are only two available sentences for a defendant convicted of capital murder, a sentence of life or a sentence of death.[23] A defendant given a life sentence can receive no lesser sentence, therefore, when life sentence cases are appealed, they are never appealed on sentencing issues. As a result, when life sentence cases are appealed they are appealed for trial error only. The few life sentence cases that finally reach the Supreme Court of Virginia do so on discretionary review from the Court of Appeals. Due to the fact that the Supreme Court of Virginia sees so few of these cases, a significant number of relevant life cases are neglected in the proportionality review process.[24] As a result of life cases only being appealed for issues of trial error, those few life cases that are heard by the Supreme Court of Virginia are often not factually developed on the issue of sentencing.[25] This is a problem because the lack of factual information makes these cases deficient as tools when determining whether similar circumstances exist. Because there are so few life cases appealed to the Supreme Court of Virginia and the few that are appealed provide minimal assistance, the proportionality review tends to be neither proportional nor an actual review.

For all these reasons, it is easy for the court to allow the review to become no more than an exercise in finding similar cases in which the death penalty has been imposed, thereby making the sentence in the instant case proportional, rather than actually determining whether juries and judges have generally imposed death sentences in similar circumstances. For proportionality review to

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21. *See, e.g.*, Burlile v. Commonwealth, 544 S.E.2d 360 (Va. 2001). In *Burlile*, the defendant was sentenced to life for two capital murder charges and appealed to the Supreme Court of Virginia on the issue of whether a jury must find that the defendant was a principal in the first degree, or "triggerman," in each killing in order to convict a defendant of capital murder. *Id.* at 362-63.

22. *See* Bennett, *supra* note 8, at 110.

23. VA. CODE ANN. § 19.2-264.4(A) (Michie 2000).

24. *See* Bennett, *supra* note 8, at 110.

25. *Id.*

actually serve any purpose it is necessary for the court to include a much broader collection of cases in its records. Only then can it determine accurately and fairly how juries and judges tend to sentence capital defendants.

A. Failure to Consider Life Sentence Cases

In order for the Supreme Court of Virginia to conduct a serious proportionality review there are several classes of cases that need to be accumulated. Classes of cases that need to be included in the proportionality review that are not currently included are: (1) bench trials resulting in life sentences; (2) guilty pleas resulting in a life sentence not pursuant to a plea bargain on charge or sentence; (3) cases in which the judge sentences to life over the jury's death verdict; (4) jury trials in which a life sentence was imposed and not appealed; and (5) jury trials in which a life sentence was imposed and later appealed on trial error.

1. Bench Trials

Bench trials in which a life sentence has been imposed are not included in proportionality reviews because these cases are not generally appealed.[26] Bench trials in which a defendant was given a life sentence cannot be appealed on either trial error or sentencing issues. The cases cannot be appealed for sentencing issues because a life sentence was imposed and no lesser sentence was available. In a bench trial the judge rather than the jury is the factfinder. When the judge is the factfinder no error can be shown because it is accepted that as the factfinder, the judge would generally follow his own instructions.[27] Judges are aware of the rules of evidence and procedure and it is presumed that they routinely hear inadmissible evidence which they disregard when making decisions. These cases could be accumulated by the Supreme Court of Virginia and included in the review but the proportionality review statute does not require that these cases be accumulated. This failure to accumulate results in a number of relevant cases being left out of the review.

2. Guilty Pleas

In cases in which a guilty plea was entered and a life sentence imposed, the only recourse is habeas corpus alleging ineffective assistance of counsel.[28] A

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26. Gregory v. Commonwealth, No. 1671-99-2, 2001 WL 242227, at *1 (Va. Ct. App. Mar. 13, 2001). This is an unpublished opinion in a capital case in which the defendant received a life sentence at a bench trial. *Id.*

27. *See generally* Harris v. Rivera, 454 U.S. 339, 346 (1981) (holding that an apparent inconsistency in the trial judge's verdict was insufficient to overcome the well-established presumption that the judge adhered to the basic rules of procedure).

28. *See* Robinson v. Deeds, Nos. 92493, 92494, 92601, 2000 WL 274154, at *1 (Va. Cir. Ct. Jan. 10, 2000) (denying defendant, after his plea of guilty, his petition for a writ of habeas corpus

defendant cannot appeal the verdict upon a plea of guilty, and there is obviously no claim of trial error when there has been no trial. For example, in *Commonwealth v Hefelfinger*,[29] the defendant, who did not have a charge or sentence bargain, pleaded guilty to capital murder. Hefelfinger was sentenced to life imprisonment.[30] This case is particularly interesting because it was a life sentence for a case that involved rather heinous facts: the defendant abducted a twelve-year-old girl after smothering her in her bedroom, he drove for a while before stopping and having sex with the corpse, he then dismembered the body. While the head and limbs were found, the torso is still missing. The facts of the case are heinous and yet the defendant was given a life sentence. This case could be very useful in a proportionality review but it will never be included because cases in which the defendant pleads guilty are not accumulated by the Supreme Court of Virginia to be included in the records for proportionality review.

3. Judge Gives Life Over Jury Verdict of Death

In *Winckler v Commonwealth*,[31] the jury found Winckler guilty of robbery, abduction, and capital murder; the jury then sentenced her to death for the capital murder conviction.[32] Winckler, along with three other defendants, was convicted for the murder of Stacey Hanna.[33] Winckler was the only defendant for whom the jury recommended the death penalty.[34] The judge in the case set aside the jury's death sentence and imposed a sentence of life imprisonment on the capital murder conviction.[35] Virginia Code Section 19.2-264.5 gives a judge the authority to set aside a sentence of death.[36] Cases in which the judge sets aside a death penalty can only be appealed on issues of trial error. *Winckler* would be an excellent case to include in the proportionality review because the opinion is replete with factual information regarding the circumstances of the crime.

4. Jury Gives Life-No Appeal

The most obvious cases which are ignored in the proportionality review are those cases in which a jury sentences a defendant to life upon the conviction of

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for ineffective assistance of counsel).

29. No. CR 00000109 (City of Norfolk Cir. Ct. Sept. 11, 2000).

30. Commonwealth v. Hefelfinger, No. CR 00000109 (City of Norfolk Cir. Ct. Sept. 11, 2000). This case is unreported because the defendant pleaded guilty.

31. 531 S.E.2d 45 (Va. 2000).

32. Winckler v. Commonwealth, 531 S.E.2d 45, 48 (Va. 2000). Winckler was sentenced to death by the jury but the trial judge set the sentence aside and issued a life sentence. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*; *see also* VA. CODE ANN. § 19.2-264.5 (Michie 2000) (allowing judge to set aside death sentence after consideration of post-sentence report and for good cause).

capital murder and the defendant does not appeal. In *Commonwealth v. Fleming*,[37] the defendant was sentenced to life and did not appeal on trial error.[38] In *Fleming*, the defendant stabbed the victim, a drug dealer, multiple times during a fight over drugs. The jury sentenced Fleming to life imprisonment plus twenty-five years. This case and others like it will not be included in the review because while the statute says the records may include all cases *tried*, the Supreme Court of Virginia does not accumulate cases in which there was no appeal.

5. Jury Gives Life-Appealed for Trial Error

The fifth category of cases that are neglected in the proportionality review are those cases in which a jury sentenced a defendant to life, and the defendant appeals on trial error. These cases could potentially reach the Supreme Court of Virginia and be included among cases considered in a proportionality review. However, these cases may only be appealed on trial error and therefore will often not be helpful in the review because they lack information regarding the sentencing process. In *Layne v. Commonwealth*,[39] William Ray Layne, who had been convicted of capital murder of a child under twelve in the commission of an abduction with intent to defile and sentenced to life by the jury, appealed his conviction based on trial error.[40] Layne claimed that the trial court had erroneously admitted hearsay testimony.[41] The Court of Appeals of Virginia affirmed the conviction.[42] The opinion from the Court of Appeals contained almost no information about the nature of the crime.[43] Thus, even if this case were to be included in the review it would not provide necessary factual information that would be useful in determining whether similar crimes and defendants were treated similarly. Its very existence, however, does demonstrate that at least one jury refused to sentence to death a defendant who sexually abused, abducted and murdered a young girl.

B. Failure to Compare Defendants

Virginia's proportionality review again proves to be inadequate and incomplete due to the court's failure to compare the instant defendant to other capital

37. No. CR 98010595 (City of Lynchburg Cir. Ct. Feb. 22, 1999).

38. Commonwealth v. Fleming, No. CR 98010595 (City of Lynchburg Cir. Ct. Feb. 22, 1999).

39. No. 0682-94-3, 1996 WL 12682, at *1 (Va. Ct. App. Jan. 16, 1996).

40. Layne v. Commonwealth, No. 0682-94-3, 1996 WL 12682, at *1 (Va. Ct. App. Jan. 16, 1996) (holding that the trial court had not erred in admitting hearsay testimony); *see* VA. CODE ANN. § 18.2-31(8) (Michie Supp. 1995) (repealed 1996) (stating that "[t]he willful, deliberate, and premeditated killing of a child under the age of twelve years in the commission of abduction . . . when such abduction was committed . . . with the intent to defile the victim" is an offense that shall constitute capital murder).

41. *Layne*, 1996 WL 12682, at *1.

42. *Id.*, at *2.

43. *Id.*, at *2.

defendants.[44] Section 17.1-313 of the Virginia Code requires the Supreme Court of Virginia to conduct proportionality review to 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*."[45] This portion of the statute obviously requires the court not only to determine that the crime in the instant case is similar to other crimes for which juries have generally imposed death, but also to determine that the defendant in the instant case is, in comparison to similarly situated defendants, a good candidate for death.[46] The comparison must involve similar crimes and similar defendants.[47] The review of the defendant is mandatory.[48] When comparing defendants the court should, at a minimum, look at age, psychological status, personal history, and past criminal records. In short, comparison of defendants should include comparison of mitigation evidence with aggravation evidence. Making these comparisons are the only way the court can determine whether similar defendants are similarly sentenced. Despite the statutory requirement, the Supreme Court of Virginia almost always fails to compare defendants when determining the proportionality of a sentence.[49]

The defendants used in the comparison are almost exclusively those that have been given death sentences. Consequently, most reviews become determinations of whether the conduct of the defendant under review is similar to that of other defendants who have been sentenced to death, rather than an analysis of whether juries have generally given a sentence of death to similar defendants.[50] Again, this results in an incomplete and inaccurate proportionality review.

In *Jackson v Commonwealth*,[51] the trial court convicted the defendant, a juvenile, of capital murder and sentenced him to death on the "future dangerousness" predicate.[52] Jackson was sixteen-years-old when he committed the crime.[53] The Supreme Court of Virginia conducted the mandated proportionality review,

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44. *See* Bennett, *supra* note 8, at 118.

45. VA. CODE ANN. § 17.1-313(C)(2) (Michie 1999) (emphasis added); *see* Bennett, *supra* note 8, at 118.

46. *See* VA. CODE ANN. § 17.1-313(C)(2) (Michie 1999); *see also* Bennett, *supra* note 8, at 118.

47. VA. CODE ANN. § 17.1-313(C)(2) (Michie 1999).

48. *Id.*

49. *See* Bennett, *supra* note 8, at 121; *see, e.g.*, Ramdass v. Commonwealth, 437 S.E.2d 566, 574 (Va. 1993). In conducting the proportionality review, the court looked at the defendant's criminal history, previous probation violations, previous prison sentences, length of time between release from prison and commission of another crime, malice of his previous crimes, and the crime currently under review. *Id.* This review did nothing but look at the bad history and failed to compare the defendant to other defendants. *Id.*; *see also* Dubois v. Commonwealth, 435 S.E.2d 636, 640 (Va. 1993) (reviewing only the defendant's prior criminal record, the fact that current crime was committed while on mandatory parole and the malice evidenced in the current offense).

50. Bennet, *supra* note 8, at 120.

51. 499 S.E.2d 538 (Va. 1998).

52. Jackson v. Commonwealth, 499 S.E.2d 538, 542-43 (Va. 1998).

53. *Id.* at 542.

in which it compared Jackson's crime to crimes in other capital cases, particularly those in which robbery or attempted robbery was the underlying felony and the death penalty was based on the "future dangerousness" predicate.[54] While the Supreme Court made a comparison of similar crimes, it failed to compare similar defendants. Justice Hassell's dissent in *Jackson* commented that the failure of the court to compare similar defendants produced an inaccurate proportionality review.[55] Justice Hassell noted that of the ten sixteen-year-olds who had been convicted of capital murders to that date, Jackson was the only one who had been sentenced to death.[56] This is a perfect example of why it is important, when conducting proportionality review, to compare defendants as well as crimes. The inadequate review failed to reveal the disproportionality of Jackson's sentence.

IV. The Process of Proportionality Review Fails to Recognize the Changing Times

A. Evolving Standards of Decency Under the Eighth Amendment of the United States Constitution

Current proportionality review fails to account for the evolving standards of decency under the Eighth Amendment of the United States Constitution which have led to procedural changes in capital law.[57] At a minimum, the Eighth Amendment prohibits punishment that would have been considered cruel and unusual at the time the Bill of Rights was adopted.[58] However, the protections of the Eighth Amendment not only apply to those punishments considered cruel and unusual under the common law in 1789, but also to those punishments considered cruel and unusual by contemporary standards.[59]

The Supreme Court of the United States has had few occasions to give precise meaning to "cruel and unusual punishment." However, the Court recognized that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[60] The Eighth Amendment exists to ensure that while the State has the power to punish, "this power [must] be exercised within the limits of civilized standards."[61] In determining evolving standards, the Court must look to objective evidence of

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54. *Id.* at 554-55.

55. *Id.* at 557 (Hassell, J., dissenting).

56. *Id.* at 555-57.

57. *See* U.S. CONST. amend. VIII (prohibiting the infliction of cruel and unusual punishments).

58. Ford v. Wainwright, 477 U.S. 399, 405 (1986) (holding that executing the insane is unconstitutional because there is no basis to accept execution of the insane in either English common law or within modern community standards).

59. *Id.* at 406.

60. Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding that the Eighth Amendment did not permit Congress to take away petitioner's citizenship as punishment for a crime).

61. *Id.* at 100.

society's views of a particular punishment.[62] "The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the [various] legislatures" as well as "data concerning the actions of sentencing juries."[63] There are a few situations in which the Court has categorically determined that the death penalty is excessive and therefore prohibited by the Eighth Amendment. The substantively protected Eighth Amendment categories include: (1) those defendants fifteen or younger;[64] (2) the insane;[65] (3) those convicted of raping an adult woman;[66] and (4) certain accomplices to murder.[67] This list is not exhaustive and evolving standards may require that other crimes and/or defendants be removed from the list of death eligibility.[68] The fact that society's views as well as capital jurisprudence in general have changed cannot be ignored when determining the proportionality of the sentence in a particular situation.

Society's views on the death penalty have changed over the last few years. Many more potential life jurors exist today than existed almost ten years ago. A *Gallup* poll conducted in 2000 shows that sixty-six percent of Americans are in favor of the death penalty, while twenty-eight percent oppose the death penalty.[69] While this shows that a majority of Americans are still in favor of the death penalty, it is important to note that at sixty-six percent, support for the death penalty is at its lowest support level since 1981.[70] The death penalty had its highest level of support in 1994 when eighty percent of Americans favored the death penalty.[71] These numbers show that support for the death penalty has dropped fourteen percent in the last eight years.

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62. Coker v. Georgia, 433 U.S. 584, 593-97 (1977) (holding that a sentence of death for the rape of an adult woman was prohibited by the Eighth Amendment); Enmund v. Florida, 458 U.S. 782, 788-96 (1982) (holding that a sentence of death for an accomplice to a murder was excessive and therefore prohibited by the Eighth Amendment).

63. Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (holding that executing mentally retarded defendants convicted of capital offenses is not categorically prohibited by the Eighth Amendment).

64. *See* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

65. *See* Ford v. Wainwright, 477 U.S. 399, 410 (1986).

66. *See* Coker v. Georgia, 433 U.S. 584, 600 (1977).

67. *See* Tison v. Arizona, 481 U.S. 137 (1987). For a discussion of these decisions, see generally Kimberly A. Orem, *Evolution of an Eighth Amendment Dichotomy: Substantive and Procedural Protections within the Cruel and Unusual Punishment Clause in Capital Cases*, 12 CAP. DEF. J. 345, 351-54 (2000).

68. Atkins v. Virginia, 534 S.E.2d 312, 319-20 (2000) (holding that while the death sentence was proportional in the instant case, mental retardation can be used as a mitigating factor), *cert. granted*, 122 S. Ct. 24 (U.S. Va. Sept. 25, 2001) (No. 00-8452) (arg. Feb. 20, 2002).

69. Frank Newport, *Support for Death Penalty Drops to Lowest Level in 19 Years, Although Still High, at 66%*, (Feb. 24, 2000) *at* http://www.gallup.com/poll/releases/pr000224.asp.

70. *Id.* The results of the poll are based on telephone interviews conducted with a randomly selected national sample of 1,050 adults, 18 years and older, conducted on February 14-15, 2000. *Id.* One can say with 95% confidence that the maximum error attributable to sampling and other random effects is plus or minus three percentage points. *Id.*

71. *Id.*

In 1972, the United States Supreme Court in *Furman v Georgia*,[72] ruled that the death penalty as it was practiced constituted cruel and unusual punishment which was prohibited by the Eighth Amendment to the United States Constitution.[73] The Court stated that the death penalty was unconstitutional as it was applied in the state statutory schemes because the sentencing mechanisms were standardless, and provided no rational basis for who should live and who should die.[74] However, four years later, in *Gregg v Georgia*,[75] the Court determined that the death penalty could in fact be applied in a constitutional manner if certain safeguards were inserted into the capital trial and sentencing process.[76] One way in which states have accomplished this task is to narrow the class of death eligible persons.[77] The states have used various methods to narrow the class: making only certain crimes punishable by death, requiring the presence of at least one aggravating factor, and allowing the admission of mitigation evidence.[78] By narrowing the class of death eligible persons, the states are attempting to provide the "procedural" protections required by the Eighth Amendment. The "substantive" protections come in the prohibition of punishing specific crimes with a sentence of death.[79] Requiring proportionality review is yet another way in which states have implemented protections to ensure that the death penalty remains constitutional.

B. Changes in Capital Law Since Furman

The notion of evolving standards has had a direct impact on capital punishment law. Procedural changes have been made to accommodate changing notions of fairness. *Gregg* required safeguards in order to make the death penalty

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72. 408 U.S. 238 (1972).

73. Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam) (holding that the death penalty as applied in state statutes before the Court violated the Eighth Amendment to the Constitution).

74. *Id.* at 293-94 (Brennan, J., concurring); *see also* Kimberly A. Orem, *Evolution of an Eighth Amendment Dichotomy: Substantive and Procedural Protections within the Cruel and Unusual Punishment Clause in Capital Cases*, 12 CAP. DEF. J. 345, 351-54 (2000).

75. 428 U.S. 153 (1976).

76. *See* Gregg v. Georgia, 428 U.S. 153, 195 (1976) (holding that the death penalty does not violate the Eighth Amendment, thereby rejecting *Furman*).

77. *See, e.g.*, McClesky v. Kemp, 481 U.S. 279, 305-08 (1987) (identifying specific crimes for which death penalty can be imposed, requiring sentencer to find at least one aggravating factor and requiring that mitigation evidence be accessible to the sentencing body).

78. *See, e.g.*, Blystone v. Pennsylvania, 494 U.S. 299, 305 (1990) (holding constitutional the mandatory imposition of a death sentence if jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or where the aggravating circumstances outweigh the mitigating circumstances, so long as jury is not denied any mitigating evidence).

79. *See* Kimberly A. Orem, *Evolution of an Eighth Amendment Dichotomy: Substantive and Procedural Protections within the Cruel and Unusual Punishment Clause in Capital Cases*, 12 CAP. DEF. J. 345, 351-54 (2000).

constitutional. Examples of safeguards that have been implemented into capital law include: requiring the presentation of mitigation evidence;[80] requiring instructions about the ineligibility of parole for those defendants convicted of capital crimes;[81] and changes in voir dire that insure that jurors can consider both life and death before they are allowed to sit on a jury.[82] The aforementioned procedural changes are intended to increase the fairness of the process. These safeguards occur at different times within the process. Presentation of mitigation evidence and instruction on the ineligibility of parole occur in the sentencing phase of the trial. The direct application of different procedures at different times should effect proportionality review because the variance in process can yield disparate outcomes. The requirement that it be determined during voir dire that a juror could consider both life and death occurs during the initial guilt phase of the trial, but because it has a direct effect on what the make-up of the sentencing body will be, this safeguard plays a major role in proportionality review. Due to the direct role that each of these procedural safeguards plays in the process of determining the sentence imposed in a capital trial, it is necessary to consider how they effect the overall composition of the records used for comparison in proportionality review. The effect that the implementation of these safeguards has had on sentencing makes it inappropriate to compare current cases to those which were decided before these safeguards existed.

1. Mitigation

Mitigation evidence is presented during the penalty phase of the trial. It is used to provide background information on the defendant for consideration by the sentencing body when determining the sentence. In *Stewart v Commonwealth*, the court said that "mitigating factors are those circumstances which do not justify or excuse the offense, but which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability and punishment."[83] Mitigation evidence may include information on the mental health of the defendant, the defendant's childhood and background, and testimony in support of the

80. *See* Stewart v. Commonwealth, 427 S.E.2d 394, 408-09 (Va. 1993) (holding that the presentation of mitigation evidence is required).

81. *See* Simmons v. South Carolina, 512 U.S. 154, 162 (1994) (holding that a "life means life" instruction must be given where future dangerousness is used as the aggravating factor and sentence options are only a life or death sentence); Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (1999) (holding that "life means life" instructions should be given in cases where vileness is used as the aggravating factor).

82. *See* Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (holding that the state is not entitled to exclusion for cause, even if the juror expressed scruples, unless both "unmistakably clear" and "automatically" were present in voir dire); Wainwright v. Witt, 469 U.S. 412 (1985) (holding that the state is allowed to exclude any juror whose views prevent him from performing his duties as a juror in accordance with his instructions and his oath); Morgan v. Illinois, 504 U.S. 719 (1992) (holding that, to meet due process demands, a defendant must be allowed to exclude a juror that would automatically vote for the death penalty).

83. *Stewart*, 427 S.E.2d at 408-09 (quoting the trial court's jury instruction).

defendant from friends or family.[84] It is necessary for the court to provide the sentencing body with all of the relevant mitigating information so that the sentencing body can make an individualized assessment as to the need for the death penalty in each specific case.[85] In *Lockett v. Ohio*,[86] the Court stated that due to the unique and final nature of the death penalty there is great importance placed on the notion of individualization of sentences.[87] The Court emphasized that "where sentencing discretion is granted, it generally has been agreed that the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant-*if not essential*-[to the] selection of an appropriate sentence.'"[88] The Court again addressed the importance of mitigation evidence in *Eddings v. Oklahoma*[89] when it held that just as a state may not constitutionally bar the sentencing body's access to mitigation material, the sentencer cannot refuse to consider relevant mitigation evidence.[90] Following *Eddings* and *Lockett*, presentation of mitigation evidence is now required. In Virginia, *Williams v. Taylor*[91] essentially made the presentation of mitigation evidence mandatory.[92] On remand from the United States Supreme Court, the United States District Court for the Eastern District of Virginia agreed with the circuit court that the trial counsel left out a great deal of mitigation evidence including: (1) evidence that Williams was abused by his father; (2) testimony of correctional officers who would testify that Williams was not a danger while incarcerated; (3) commendations while in prison for helping to break up a drug ring and returning the warden's wallet; (4) character witnesses; (5) evidence that Williams was borderline mentally retarded; and (6) juvenile records of growing up in a home under reprehensible conditions with intoxicated parents.[93] The United States Supreme Court reversed the United States Court of

84. *Id.* at 407-09 (holding that testimony of expert appointed upon motion of Commonwealth to evaluate defendant concerning existence or absence of mitigation circumstances relating to mental condition was not limited to matters of mitigation and could evaluate future dangerousness).

85. Orem, *supra* note 79, at 350.

86. 438 U.S. 586 (1978).

87. Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (holding that limits imposed on mitigation material available to the sentencer violated defendant's constitutional rights).

88. *Id.* at 602-03 (alteration in original) (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

89. 455 U.S. 104 (1982).

90. Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (holding that a sentencer must consider relevant mitigating evidence).

91. 529 U.S. 362 (2000).

92. Williams v. Taylor, 529 U.S. 362 (2000) (holding that Williams's constitutional right to effective assistance of counsel was violated and the judgment of the Supreme Court of Virginia in refusing to set aside his death sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").

93. *Id.* at 372 n.4; *see generally* Jeremy P. White, Case Note, 13 CAP. DEF. J. 123 (2000)

Appeals for the Fourth Circuit, holding that it had misapplied the *Strickland* standard. The Supreme Court remanded the case to the trial court ruling that under *Strickland v Washington*,[94] the lack of mitigation evidence prejudiced the defendant.[95] Mitigation evidence should be used when comparing defendants in proportionality review because it is often the only true evidence about the defendant outside of the defendant's criminal record. Mitigation evidence can have an enormous impact on a case and therefore should always be included in any proportionality review.

Eddings (1982) made consideration of mitigation evidence, if presented, mandatory. *Williams* (2000) effectively made presentation of mitigating evidence mandatory. A pre-*Eddings* case in which the defendant was sentenced to death might well have been a life case if the sentencer had considered whatever mitigation evidence was presented. A post-*Eddings*, pre-*Williams* case in which the defendant was sentenced to death might well have been a life case if mitigation had been presented. Using those "old" death cases to determine what sentencers "generally do" is improper. At best those "old" death cases can instruct what sentencers did within the system in effect at the time the sentences were imposed.

2. *Ineligibility of Parole for Those Convicted of Capital Crimes*

Another change in capital law that has had a substantial impact on capital cases is the requirement of an instruction that informs the jury that a defendant convicted of a capital crime is ineligible for parole. In Virginia, after January 1, 1995, all convicted defendants are parole ineligible. In *Simmons v South Carolina*,[96] the United States Supreme Court held that in cases in which life or death are the only sentencing options, the defendant is parole ineligible, and when the aggravating factor is future dangerousness, the jury must be instructed that "life means life."[97] In *Yarbrough v Commonwealth*,[98] the Supreme Court of Virginia expanded the application of the *Simmons* rule to cases in which the Commonwealth relies solely on the vileness aggravating factor.[99] *Yarbrough* held that the "life means

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(analyzing Williams v. Taylor, 120 S. Ct. 1495 (2000)).

94. 466 U.S. 668 (1984); *see also Williams*, 529 U.S. at 372 n.4.

95. *Williams*, 529 U.S. at 372; *see* Strickland v. Washington, 466 U.S. 668, 694 (1984) (holding that a defendant is prejudiced if there is a reasonable probability that the counsel's unprofessional errors led to a different result in the proceeding).

96. 512 U.S. 154 (1994).

97. Simmons v. South Carolina, 512 U.S. 154, 156 (1984) (holding that a "life means life" instruction must be given when future dangerousness is used as the aggravating factor and sentence options are only a life or death sentence).

98. 519 S.E.2d 602 (Va. 1999).

99. Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999) (holding that "life means life" instructions should be given in cases where vileness is used as the aggravating factor); VA. CODE ANN. § 19.2-264.4(A) (Michie 2000) (stating that "life means life" instruction is given at the request of the defendant).

life" instruction is required in all capital cases in which a defendant is ineligible for parole.[100] By instructing the jury that a life sentence means just that, a life sentence, some jurors are more likely to impose a sentence of life than if they believed a life sentence included a chance of parole. Cases in which defendants were not allowed to give this instruction to the jury almost certainly produced a higher percentage of death sentences.

Comparing current cases in which the instruction is required to older cases in which the instruction was not required would be an inaccurate comparison. There is no way to determine if the defendant in the previous case would have been given a death sentence had the jury in that case been given the instruction. After all, support for the death penalty drops to fifty-two percent when "life imprisonment with absolutely no possibility of parole" is given as an alternative.[101] This is a fourteen percent drop from the number of people who generally support the death penalty. The circumstances during sentencing have completely changed and this should be reflected in the proportionality review.

Pre-*Simmons* (1994) and pre-abolition (1995) cases in which the death sentence was based on future dangerousness only, should not be compared with current death cases based only on that aggravator. Similarly pre-*Yarbrough* (1999) cases in which the death sentence was based on vileness only, should not be compared with current cases based only on that aggravator.

3. Changes in Voir Dire

Requirements that must be met in order to sit on a capital jury have changed over the years. Specifically, jurors must now be willing to consider both punishments of life in prison and death in order to sit on a capital jury. *Witherspoon* and later *Wainwright v. Witt*,[102] which watered down *Witherspoon*, are phrased in terms of the state's right to have jurors who are impartial on the death penalty.[103] *Morgan* on the other hand is phrased in terms of the same right on behalf of the defendant.[104] To be more specific, *Witherspoon* was generally understood to mean that the state was not entitled to exclusion for cause, even if the juror expressed scruples, unless both "unmistakably clear" and "automati-

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100. Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999).

101. *See* Newport, *supra* note 69.

102. 469 U.S. 412 (1985).

103. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968) (holding that the state is not entitled to exclusion for cause, even if the juror expressed scruples, unless both "unmistakably clear" and "automatically" were present in voir dire); Wainwright v. Witt, 469 U.S. 412 (1985) (holding that the state is allowed to exclude any juror whose views prevent him from performing his duties as a juror in accordance his instructions and his oath).

104. Morgan v. Illinois, 504 U.S. 719, 726 (1992).

cally" were present.[105] That is, only a juror who made it "unmistakably clear" that he/she would "automatically" vote against the death penalty was excludable.[106]

Witt lowered the standard by allowing the state to exclude a juror whose views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[107] The United States Supreme Court dispensed with *Witherspoon's* reference to "automatic" decisionmaking, and the standard no longer requires that a juror's bias be proven with "unmistakable clarity."[108] The Court once again reversed a death sentence based on juror bias in *Morgan* when it held that the defense is entitled to reverse-*Witherspoon* the jurors, that is, the question is now whether the juror would automatically vote for death.[109] In *Morgan*, the Court held that in order to meet due process demands, a defendant must be allowed to challenge for cause any prospective juror who will automatically vote for the death penalty.[110] If the state may strike jurors who are absolutely opposed to the death penalty, then the defendant must be able to strike those who are absolutely in favor of the death penalty to meet due process requirements.[111]

Verdicts rendered before these cases, especially *Morgan*, could have very well been decided by predominantly pro death jurors. This affects the proportionality review because it might provide for a greater number of defendants being sentenced to death than would have been had the *Witherspoon/Witt/Morgan* standards been in operation. Of course, it is only fair to note that there also could have been a jury that was predominantly pro life. It is far less likely, however, that these cases would be included in the review.

C. *Changes in the Federal Requirements of Proportionality Review*

Instead of making the proportionality review more fair and accurate, the current trend in most states is to repeal the statute requiring the review. States started to repeal their statutes following the ruling in *Pulley v. Harris*.[112] In *Pulley*, the Supreme Court of the United States retreated from its solid commitment to the principle of proportionality.[113] The issue in *Pulley* was whether a state system that did not include a comparative proportionality review was constitutional.[114]

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105. Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968).

106. *Id.*

107. Wainwright v. Witt, 469 U.S. 412, 420 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

108. *Id.* at 419.

109. *Morgan*, 504 U.S. at 726.

110. *Id.* at 728.

111. *Id.* at 729.

112. Pulley v. Harris, 465 U.S. 37, 53 (1984) (holding that a comparative proportionality review is not a constitutional requirement).

113. *Id.*

114. *Id.* at 42.

The Court, in finding that comparative proportionality review was not a constitutional requirement, upheld the California system.[115] Following this decision, meaningful proportionality review has become rare.[116] It seems strange that the Supreme Court would rule this way considering that the very language of the Eighth Amendment seems to require proportionality in sentencing.[117] By definition, the terms "excessive" and "unusual" include a proportionality component. In fact, neither word seems to have any meaning absent comparison with something else.[118] The Eighth Amendment supports the basic notion that in a fair system of criminal justice, the punishment should reflect the circumstances of the offense, the character of the offender, and the nature of the crime.[119] In *Furman v Georgia*,[120] Justice Brennan analyzed the Eighth Amendment's use of the word "unusual," and concluded that the only way not to violate the Eighth Amendment, the only way to ensure that the punishment was not excessive was to make the punishment proportionate.[121] He proposed that four principles govern proportionality: (1) the severity of the punishment; (2) the probability of arbitrary application; (3) the level of acceptance by contemporary society; and (4) the accomplishment of legitimate penal purposes.[122] Justice Brennan went on to determine that because the death penalty was inconsistent with all four principles, its imposition violated the Eighth Amendment.[123] While each member of the five member majority in *Furman* had a different basis for his conclusion, each consistently focused on the theme of arbitrariness.[124] In *Pulley*, the Court distinguished traditional proportionality review from comparative proportionality review.[125] "Traditional" proportionality review asks whether the sentence is disproportionate to the offense.[126] "Comparative" proportionality review is a review in which the sentence imposed is compared to sentences of others convicted of the same crime.[127] After *Pulley* traditional proportionality

115. *Id.* at 53.

116. Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After Pulley v Harris*, 70 U. COLO. L. REV. 813, 816-17 (1999) (surveying whether the Supreme Court's ruling in *Pulley*, which held that proportionality review is not constitutionally mandated, will lead to the return of an arbitrary system of capital punishment).

117. *Id.* at 819; *see* U.S. CONST. amend. VIII (prohibiting the infliction of cruel and unusual punishments).

118. White, *supra* note 116, at 819 n.27.

119. *Id.* at 819.

120. 408 U.S. 238 (1972).

121. Furman v. Georgia, 408 U.S. 238, 279-80 (1972) (Brennan, J., concurring).

122. *Id.* at 281-82.

123. *Id.* at 305.

124. White, *supra* note 116, at 821; *see generally Furman*, 408 U.S. 238 (1972).

125. White, *supra* note 116, at 833; *see* Pulley v. Harris, 465 U.S. 37, 42-43 (1984).

126. White, *supra* note 116, at 833.

127. *Id.* at 833-34; *see Pulley*, 465 U.S. at 43.

review is still mandated, although its application is narrow. Comparative proportionality review is, however, no longer constitutionally required.[128]

There is some difference between the way courts in California and Virginia review for proportionality. California's proportionality review standard was mandated by the state constitution, whereas Virginia's proportionality review is statutorily mandated.[129] However, seven states which had statutorily mandated proportionality review systems have repealed their provisions since *Pulley*.[130] Many of the other states which have retained their provisions have nonetheless recognized that proportionality review would no longer provide a basis for federal review of capital sentences.[131]

V. Conclusion

Proportionality review was created to insure fairness in capital sentencing. Without conducting the review in the manner in which it was intended to be conducted, fairness will never be achieved. An adequate review necessarily requires that cases in which a life sentence has been imposed must be included in the comparison. Also, it is necessary in the comparison of defendants that more than just prior criminal records need to be examined. Failure to consider changes in capital law and the effect that those changes might have on the legitimate similarities of some of these cases is unacceptable. Comparing cases that were ruled on in a decidedly different time is not a fair comparison. The way in which proportionality review is conducted must be changed, otherwise, the review is inaccurate, misleading and essentially serves no legitimate purpose. Nonetheless, the proportionality review statute should be retained because it reflects the fundamental fairness that the Eighth Amendment was intended to protect.

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128. White, *supra* note 116, at 837-38.

129. VA. CODE ANN. § 17.1-313 (Michie 1999).

130. Connecticut repealed proportionality review in 1995. *See* CONN. GEN. STAT. § 53a-46(b) (Supp. 1998). Idaho repealed proportionality review in 1994. *See* IDAHO CODE § 19-2827(c) (1997). Maryland repealed proportionality review in 1992. *See* MD. ANN. CODE art. 27, § 414(e) (1996). Nevada eliminated proportionality review in 1985. *See* NEV. REV. STAT. § 177.055(2)(d) (1997). Oklahoma repealed proportionality review in 1985. *See* OKLA. STAT. tit. 21, § 701.13(c) (Supp. 1999). Pennsylvania repealed proportionality review in 1997. *See* PA. STAT. ANN. tit. 42, § 9711(h)(3)(iii) (West 1998). Wyoming repealed proportionality review in 1989. *See* WYO. STAT. ANN. § 6-2-103(d)(iii) (Michie 1997). *See generally* White, *supra* note 116, at 848.

131. White, *supra* note 116, at 848.