January 9, 2008

California Commission on the Fair Administration of Justice
Attn: John Van de Kamp, Chair
900 Lafayette Street, Suite 608
Santa Clara, California 95050

RE: Comparative Proportionality Review in Death Penalty Cases

Dear Mr. Van De Kamp:

We respectfully submit this letter on comparative proportionality review in death penalty cases for the consideration of the California Commission on the Fair Administration of Justice (hereafter “the Commission”). We appreciate the continuing opportunity to contribute to the Commission’s investigation into systemic problems with California’s criminal justice system.

On January 10, experts will present to the Commission evidence of disparities based on race, ethnicity, and geography in death sentences in California. It is time for California, the most diverse state in the country, to implement long overdue reforms to prevent discriminatory and arbitrary death sentences. Accordingly, the Commission should recommend inter-case, comparative proportionality review in death penalty cases as a means of reducing these disparities. Similar recommendations have been made by the Illinois Governor’s Commission on Capital Punishment, the bipartisan Constitution Project, and the American Bar Association’s Death Penalty Moratorium Project. Further, to allow for reliable, evidence based proportionality review, the Commission should also recommend comprehensive data collection in all homicide cases in California. We explain the need for these reforms in detail in this letter.

I. Introduction

In the majority of death penalty states, the highest court in the state conducts inter-case, comparative proportionality review to promote consistency and fairness in death sentences. Comparative proportionality review is intended to ameliorate arbitrariness and disparities in death sentences, particularly racial and geographic disparities. By comparing the facts and circumstances of individual cases, the court may identify those death sentences that appear arbitrary and excessive when considered alongside sentences in similar cases, allowing the court to take corrective action and ensure the fair application of the death penalty across the state.

Sadly, California is among the minority of states that does not require comparative proportionality review of death sentences. Yet, there is a compelling need for such review here: a
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2005 statewide study documented serious racial, ethnic, and geographic disparities in the application of California’s death penalty.\(^1\) Death sentences vary significantly based on the race and ethnicity of victim and on the place where the conviction occurs.\(^2\) The geographic disparities are also linked to racial disparities, as the racial diversity of the community influences the degree to which the death penalty will be pursued.\(^3\) These findings are not surprising given that California’s death penalty statute has been widely criticized as the broadest in the nation, sweeping in nearly all homicides.\(^4\) As Professor David Baldus has observed, “the risk of racial bias is heightened” as the death penalty is extended to less aggravated cases.\(^5\)

In this letter, we review the legal landscape of comparative proportionality review in death penalty cases nationally and in California and we identify useful models in other states that could form the basis for comparative proportionality review here.

II. Overview of Proportionality Review

“Proportionality” has several different meanings in the context of criminal sentences. “Intra-case proportionality” requires that a criminal sentence be proportional to the offense, as reflected in the common sense question, does the punishment fit the crime?\(^6\) A sentence becomes unlawful when it over punishes in relation to the severity of the crime. For example, the California Supreme Court concluded that a life sentence for indecent exposure is excessive.\(^7\) “Inter-case proportionality,” on the other hand, requires that a criminal sentence given to a defendant be similar and proportional to the sentence given to other defendants convicted of the same crime.\(^8\) For example, if one person who commits a petty theft is sentenced to probation with no jail time, while another person who commits the same crime with a similar record is sentenced to 25 years to life, then their sentences are not proportionate. There are two types of “inter-case” proportionality review: one compares a defendant’s sentence only with the sentences given to co-defendants who participated in the exact same crime; the other compares a defendant’s sentence with those of individuals who have committed similar but unrelated offenses. The latter form of proportionality review is also called “comparative” proportionality review. This form of inter-case or comparative proportionality review is used almost exclusively in death penalty cases. It is this form of proportionality review that is the focus of this letter.

The U.S. Supreme Court has held that the Constitution requires some degree of \textit{intra}-case proportionality and has “occasionally struck down punishments as inherently disproportionate,
and therefore cruel and unusual, when imposed for a particular crime or category of crime.\(^9\)

However, the U.S. Supreme Court has not held that the Constitution requires inter-case proportionality. The Court has specifically rejected the argument that the Eighth Amendment requires inter-case, comparative proportionality review in death penalty cases, concluding that disparities in death sentences cannot be labeled as cruel and unusual punishment.\(^{10}\) The Court has also held that death penalty statutes without proportionality review do not violate the Fourteenth Amendment’s guarantee of equal protection.\(^{11}\) Indeed, this decision came in a case challenging California’s death penalty statute for failing to provide proportionality review, *Pulley v. Harris*. In addition, the Ninth Circuit has rejected the argument that failing to conduct comparative proportionality review in a specific case constitutes an equal protection violation.\(^{12}\) Thus federal constitutional law does not currently require comparative proportionality review of death sentences.

Nevertheless, the majority of states do require comparative proportionality review of death sentences,\(^{13}\) as discussed in more detail below. Originally, many of these states included mandatory proportionality review in their post-*Furman* death penalty statutes because, at the time, many considered such review an essential component of a constitutional death penalty statute.\(^{14}\) Once the U.S. Supreme Court held that such review is not mandatory, some states repealed their statutory requirements.\(^{15}\) Still, other states chose to implement comparative proportionality review in death penalty cases even after the U.S. Supreme Court ruling in *Pulley*.\(^{16}\) Indeed, one state that repealed the requirement later reversed that decision.\(^{17}\)

The majority of death penalty states have chosen to provide inter-case, comparative proportionality review of death sentences, recognizing that the procedure creates a critical safeguard for ensuring a fair death penalty system. Comparative proportionality review guards against inconsistencies and excessiveness, ensuring that only the most aggravated crimes result in a death sentence.\(^{18}\) One scholar describes its role as follows:

> First, it is intended to ensure that there is a rationally defensible basis for distinguishing those sentenced to die from those who are not. Second, it is intended to prevent death sentences predicated on constitutionally impermissible


\(^{10}\) Id. at p. 44.


\(^{12}\) *Ceja v. Stewart*, 97 F.3d 1246, 1252 (9th Cir. 1996); *Allen v. Woodford*, 395 F.3d 979, 1018-19 (9th Cir. 2004).

\(^{13}\) Timothy V. Kaufman-Osborn, Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons From Washington State), 79 Wash. L. Rev. 775, 790-792 (2004); see discussion at infra notes 41-56.


\(^{15}\) Kaufman-Osborn, supra note 13 at p. 792; *State v. Loftin*, 724 A.2d at p. 136.

\(^{16}\) Kaufman-Osborn, supra note 13 at p. 792; *State v. Loftin*, 724 A.2d at p. 137.

\(^{17}\) Kaufman-Osborn, supra note 13 at p. 792; *State v. Loftin*, 724 A.2d at p. 136.

factors such as economic status or racial identity, whether of the defendant or the victim.\textsuperscript{19}

The New Jersey Supreme Court has stressed the critical importance of the second goal:

\textit{[P]roportionality review provides a mechanism by which death sentences may be monitored, to prevent any impermissible discrimination in imposing the death penalty. In Marshall II, we spoke of the unique commitment of the people of New Jersey to the elimination of racial discrimination. Today, as then, we believe that to countenance racial discrimination in capital sentencing would mock that tradition and our own constitutional guarantee of equal protection of the laws.}\textsuperscript{20}

Commissions established to review death penalty systems have also recognized the need for comparative proportionality review to prevent arbitrary death sentences and death sentences based on impermissible factors such as race. The Illinois Governor’s Commission on Capital Punishment recommended comparative proportionality review, stating that “the Illinois Supreme Court should consider on direct appeal . . . whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases.”\textsuperscript{21} The Illinois Commission also recommended that data “be collected at the trial level with respect to prosecutions of first-degree murder cases, by trial judges, which would detail information that could prove valuable in assessing whether the death penalty is, in fact, being fairly applied.”\textsuperscript{22} Just this past year, the Illinois Legislature passed a measure providing for comprehensive data collection in homicide cases.\textsuperscript{23}

Likewise, the Constitution Project, a bipartisan, nonprofit organization, recommended:

\begin{quote}
Every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner to make sure that the death penalty is being administered in a rational, non-arbitrary, and even-handed fashion, to provide a check on broad prosecutorial discretion, and to prevent discrimination from playing a role in the capital decision-making process.\textsuperscript{24}
\end{quote}

The Death Penalty Moratorium Project of the American Bar Association Section of Individual Rights and Responsibilities (hereafter “ABA Moratorium Project”) also recommends comparative proportionality review in death penalty cases:

\begin{quote}
[Direct Appeals] Recommendation #1: In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from
\end{quote}

\textsuperscript{19} Kaufman-Osborn, \textit{supra} note 13 at pp. 782-83 [footnotes omitted].

\textsuperscript{20} \textit{State v. Loftin}, 724 A.2d at p. 140 [citations and quotation marks omitted].


\textsuperscript{22} Id. at Recommendation 84.


playing a role in the capital decision making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.  

The ABA Moratorium Project explains the importance of proportionality review as follows:

One important function of appellate review is to ensure that death sentences are not imposed arbitrarily, or result in improper racial or geographic disparities. Meaningful comparative proportionality review, the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate, is the prime method to prevent arbitrariness and bias at sentencing.  

The ABA Moratorium Project recently completed a thorough analysis of the death penalty in eight states. These studies found that none of the states fully complied with this recommendation and only three did so partially. At the same time, the ABA Moratorium Project found that "[e]very state studied appears to have significant racial disparities in imposing the death penalty, particularly associated with the race of the victim, but little has been done to rectify the problem." The ABA Moratorium Project has concluded,

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Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the review, or that do so only superficially, substantially increase the risk that their capital punishment systems will function in an arbitrary and discriminatory manner.\(^{30}\)

Thus, it is appropriate and necessary for the California Commission on the Fair Administration of Justice to consider whether inter-case, comparative proportionality review in death penalty cases should be adopted in California.

### III. Proportionality Review in California

First, it is necessary to briefly review the current status of proportionality review in California. California Penal Code section 190.3 governs the procedure for sentencing a defendant to death or life without parole in this state. That statute does not require comparative proportionality review. The California Supreme Court has concluded that the omission of such a requirement demonstrates the Legislature’s intent that proportionality review is not required.\(^{31}\) Further, the court has repeatedly held that the statute is not unconstitutional for its failure to provide for comparative proportionality review.\(^{32}\) California’s Determinate Sentencing Law does include a “provision for uniformity in the sentences of offenders . . .”\(^{33}\) but that law specifically does not “affect any provision of law that imposes the death penalty . . . or expressly provides for imprisonment in the state prison for life . . .”\(^{34}\)

The California Supreme Court has also held that California constitutional prohibition against cruel or unusual punishment does not require inter-case, comparative proportionality review, reaffirming this holding many times.\(^{35}\) The court has based this decision primarily on the U.S. Supreme Court’s decisions finding that death penalty laws are constitutional even when lacking such a review.\(^{36}\) The California Supreme Court has only recognized a right to *intra*-case proportionality review in death penalty cases, stating “the imposition of a death sentence is subject to such review, because a sentence grossly disproportionate to the offenses for which it is imposed may violate the prohibition against cruel or unusual punishment.”\(^{37}\)

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34. Cal Penal Code § 1170(a)(2).
35. *See People v. Howard*, 44 Cal. 3d at pp. 444-446; *People v. Arias*, 13 Cal. 4th 92, 192 (1993); *People v. Thompson*, 45 Cal. 3d at p. 142. The “cruel or unusual punishment” clause of the state constitution may be found at Cal. Const. Art I §17.
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While inter-case, comparative proportionality review is not constitutionally required in California, it is also not explicitly prohibited. The California Supreme Court has simply “consistently declined to undertake” such review in death penalty cases. As a result, implementing comparative proportionality review in California will require action by the state legislature.

IV. Proportionality Review Across the States

A. Summary

In 2007, thirty-eight states had death penalty statutes in their criminal codes. Of these, a total of twenty-one states, or 55%, conducted comparative proportionality review in death penalty cases. In the past year, both New York and New Jersey have ended use of the death penalty. As a result, the total number of death penalty states has dropped to thirty-six, and the number with proportionality review is now nineteen, or 53%. Chart I identifies all of the states providing proportionality review as of 2007. Appendix 1 provides a state-by-state review of comparative proportionality review in all thirty-eight states, with citations to statutes and controlling cases.

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<td>2 Delaware</td>
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38 See People v. Lang, 49 Cal. 3d 991, 1043 (1989).
39 Ibid.
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As Chart 1 illustrates, the majority of states have adopted comparative proportionality review through state statutes. The Florida Supreme Court has implemented proportionality review based on the state constitution. For all states, the review is conducted during post-conviction challenges, with every state but Alabama requiring review by the state’s highest court. 41 Every state but Nebraska limits comparative proportionality review to death penalty cases.

The majority of states provided for comparative proportionality review when they originally passed their current death penalty statutes in the mid-1970s. 42 Indeed, many states modeled their death penalty statutes on the Georgia statute upheld by the U.S. Supreme Court in Gregg v. Georgia. 43 This statute requires the Georgia Supreme Court to determine whether “the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” 44 Following the U.S. Supreme Court ruling in Gregg finding this statute constitutional, many observers concluded that proportionality review was required for any death penalty statute to be constitutional. 45 Accordingly, ten states adopted identical proportionality review requirements following Gregg. 46 In all, “twenty-six states enacted reformed statutes that included comparative proportionality review provisions . . . .” 47 California was not among them.

The failure to include proportionality review in the California statute led to a challenge that ultimately reached the U.S. Supreme Court in the case of Pulley v. Harris. After the Supreme Court held in Pulley that proportionality review was not constitutionally required, eight states “repealed their statutory comparative proportionality review requirements . . . .” 48 In the years since Pulley, however, other states have adopted comparative proportionality review, including Tennessee which had repealed the requirement immediately following Pulley. 49 Thus, in total, half of current death penalty states provide for proportionality review in death penalty cases by statute. North Carolina is also currently considering an expansion of its proportionality review statute. 50

41 In Tennessee, proportionality review must be conducted by both the supreme court and intermediate appellate court. ABA Tennessee Report, supra note 27 at pp. 165-168.
42 Bienen, supra note 14 at p. 139-140.
43 Ibid.
44 O.C.G.A. § 17-10-35(c)(3).
45 Bienen, supra note 14 at p. 139-140.
47 Kaufman-Osborn, supra note 13 at p. 790; see also Bienen, supra note 14 at p. 140.
48 Kaufman-Osborn, supra note 13, at p. 792. The author identifies nine states that repealed the proportionality review requirements: Alabama, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, South Carolina, South Dakota, Virginia and Washington. However, the Virginia death penalty statute continues to require proportionality review, as recognized by the Virginia Supreme Court. Va. Code Ann. 17-1-313(C)(2) [as amended1998 Va. Acts ch. 872]; Teleguz v. Commonwealth, 643 S.E.2d 708, 731-732.
49 Kaufman-Osborn, supra note 13 at p. 792. These states were: New Hampshire, New York, Tennessee, and Florida. See also Bienen, supra note 14 at p. 152.
50 See North Carolina H.R. 341 (N.C. General Assembly 2007); North Carolina H.R. 788 (N.C. General Assembly 2007) [on file with authors].
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As with the statutory provisions, court decisions requiring proportionality review have ebbed and flowed over the years. Following Gregg, Arizona, Arkansas, and Florida "adopted comparative proportionality review as a result of state court decisions." Other state supreme courts held that such review was required based on both state statute and constitutional law. Following Pulley, the Arizona and Arkansas Supreme Courts abandoned proportionality review, and other state courts ruled the review was not constitutionally required, narrowing the review process.

The Florida Supreme Court continues to apply comparative proportionality review based on state constitutional grounds. Indeed, as the ABA Moratorium Project study explains, "[t]he Florida Supreme Court has interpreted the Florida Constitution to impose 'an absolute obligation' on the Court to determine whether death is a proportionate penalty." The Florida Court has based this holding "on several provisions of its state constitution, including the court's 'mandatory, exclusive jurisdiction . . . over death appeals.'" The court stated,

[t]he obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law by preventing the disagreement over controlling points of law that may arise when the district courts of appeal are the only appellate courts with mandatory appellate jurisdiction. Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law.

The ABA Moratorium Project concluded that the Florida Supreme Court’s "proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties."

In sum, the majority of death penalty states continue to conduct comparative proportionality review despite the lack of a federal constitutional mandate to do so. However, the mechanics of that review vary greatly in each state, as discussed below.

B. Analysis of State Procedures

Most state statutes provide little guidance to the state’s high court on how to conduct proportionality review. As a result, the process has evolved through court and administrative decisions in each state, leading to an array of procedures in practice. While all states with
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proportionality review require that the court compare the case before it to “similar cases,” the critical question is: what makes cases similar? Defining and identifying the realm of cases to use for comparison is a critically important task, one almost always left to the courts to resolve.\(^61\)

Indeed, the ABA Moratorium Project’s review of state death penalty system reveals that questions have been raised about the quality of comparative proportionality review in states that do not maintain concrete and comprehensive data about all death-eligible cases. Of the eight states studied, five require comparative proportionality review in death penalty cases: Alabama, Florida, Georgia, Ohio, and Tennessee.\(^62\) The ABA Moratorium Project criticized each of these states for too narrowly restricting the pool of cases used for comparison to only cases resulting in a death sentence\(^63\) or only to cases tried to a penalty phase,\(^64\) and for failing to use a concrete and comprehensive data set in conducting proportionality review.\(^65\)

Similarly, a recent investigative report by the Atlantic Journal-Constitution found that the Georgia Supreme Court’s comparative proportionality review in death penalty cases is seriously deficient due to the failure to maintain a comprehensive and accurate database on homicide cases within the state.\(^66\) In concluding that a death sentence is proportionate, the Georgia Supreme Court routinely cites “one to two dozen similar sentences”—other cases in which the defendant has been sentenced to death on similar facts.\(^67\) But the review by the Atlantic Journal-Constitution found “about 80 percent of the court’s proportionality reviews since 1982 have cited death sentences that actually had been reversed,” including many cases where the defendant was later sentenced to life without parole and even some cases where murder charges were dropped altogether.\(^68\) Had the state maintained a comprehensive database on homicide cases, this problem would have been avoided.

Until it replaced the death penalty with life without parole, New Jersey stood out as one of the few states in the country to undertake comprehensive and thorough proportionality review based on actual data.\(^69\) As originally enacted, the New Jersey Capital Punishment Act provided that the New Jersey Supreme Court must conduct comparative proportionality review and specifically required the court to compare death sentenced cases with all death eligible homicides, including

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\(^{61}\) Kaufman-Osborn, supra note 13 at p. 795.


\(^{63}\) ABA Florida Report supra note 27, at pp. 208-212; ABA Alabama Report, supra note 27, at pp. 140-141; ABA Ohio Report supra note 27, at pp. 240-246; ABA Georgia Report supra note 27, at pp. 176-177.

\(^{64}\) ABA Tennessee Report supra note 27, at pp. 165-168.

\(^{65}\) ABA Ohio Report supra note 27, at p. 246.


\(^{67}\) Ibid.

\(^{68}\) Ibid.

those that did not end in death sentences. This latter provision was subsequently repealed. Nevertheless, the New Jersey Supreme Court held that properly conducting comparative proportionality review requires the court to consider the entire universe of death-eligible homicides, not just those ending in death sentences. The court stated that this comprehensive review was required to "ensure that the death penalty is being administered in a rational, non-arbitrary, and evenhanded manner, fairly and with reasonable consistency."

In reaching this conclusion, the court noted that some states limited the comparison pool to only cases proceeding to penalty phase, while other states defined the pool even more narrowly, including only death sentenced cases. In rejecting these approaches, the court offered the following hypothetical:

On the assumption that 100 robbery-felony-murder cases are prosecuted as capital crimes, all defendants are convicted and one defendant is sentenced to death, a comparison of the death-sentenced defendant’s punishment with the punishment imposed only on other death-sentenced defendants would exclude from the proportionality-review process the ninety-nine robbery-felony-murder defendants that juries did not sentence to death. Indisputably, the determination whether that single death sentence is disproportionate can be made only by comparing it with the life sentences imposed on the ninety-nine defendants convicted of the same crime . . .

Were we to assume that the remaining ninety-nine defendants were prosecuted and convicted of non-capital murder because of prosecutorial decisions not to seek the death penalty, the disproportionality of the single defendant’s death sentence would arise not because of a disproportionate jury determination but because the prosecutorial decision to seek the death penalty was unique. That type of disproportionate death sentence could not be identified by a proportionality-review process that was limited to [death penalty cases taken to] a penalty phase; it could be identified, however, by a universe that included clearly death-eligible homicides that were not prosecuted as capital cases.

Accordingly, the court concluded that it must continue to compare death penalty cases with similar death-eligible cases, regardless of whether the death penalty was actually sought. In reaching this holding, the New Jersey Supreme Court noted that its authority and duty to conduct proportionality review was not based solely on the statute but also on its "general authority as an appellate tribunal . . . and its specific exclusive jurisdiction over capital causes."

The National Center for State Courts made the same recommendation in 1984, concluding that "the pool of cases for a proportionality review system should contain, as a minimum, all cases in

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71 Baldus, supra note 5 at ft. note 20.
73 Ibid.
75 Id. at p. 134.
which the indictment included a death-eligible charge, and a homicide conviction was obtained.\textsuperscript{76} The Center explained:

In most jurisdictions, this guideline will mean all cases in which the defendant was charged with first degree murder and convicted of first- or second-degree murder or manslaughter. It is to include convictions resulting from a plea of guilty as well as those following a trial, and life sentences resulting from the absence of any aggravating circumstances as well as those stemming from a jury's apparent determination to exercise mercy after finding a defendant legally eligible for capital punishment.\textsuperscript{77}

The ABA Moratorium Project recommendation echoes these views, stating:

direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.\textsuperscript{78}

In addition to New Jersey, other states that have implemented this recommendation include New York and Washington.\textsuperscript{79} The now defunct New York death penalty statute begins with the common and vague language of the Georgia statute, requiring that the state’s highest court review a death sentence to ensure that it is not “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”\textsuperscript{80} But, the “legislation [also] directs the court of appeals to develop a comprehensive database of information for all cases involving indictment for first-degree murder.”\textsuperscript{81} The statute also specifically allowed the defendant to request proportionality review based solely on the race of the defendant or the victim.\textsuperscript{82} As a result, the New York courts developed one of the most comprehensive data collection systems for tracking all homicide cases in the state.

Similarly, Washington State’s proportionality review statute specifically requires the trial judge in all death penalty cases to complete a report with detailed information about the case.\textsuperscript{83} But the statute does not define the universe of cases to be used by the state supreme court in conducting comparative proportionality review, nor does it provide any guidance about what makes cases “similar.”\textsuperscript{84} The Washington State judicial branch, however, has chosen to implement a comprehensive version of proportionality review. A rule of court requires an “extensive

\textsuperscript{77} User Manual, supra note 76.
\textsuperscript{79} State v. Loftin, 724 A.2d at p. 137.
\textsuperscript{80} NY CLS CPL § 470.30(3)(b).
\textsuperscript{81} Baldus, supra note 5 at p. 1597.
\textsuperscript{82} Id. See also Bienen, supra note 14 at p. 215.
\textsuperscript{83} Kaufman-Osborn, supra note 13 at pp. 807-808.
\textsuperscript{84} Id. at p. 808.
questionnaire be completed by the trial judge in every conviction for first degree murder.” The task force which prepared the questionnaire concluded that data must be collected on all first degree murders, not just those tried for death or resulting in death sentences. The task force stated, “this approach was necessary to furnish the Supreme Court with the data it needs” to properly conduct a comparative proportionality review and, specifically concluded that it would not be “appropriate” to limit the review to only death sentenced cases.

The Washington state questionnaire asks trial judges to provide detailed information about the circumstances of the crime, the background of the defendant and the victim, and demographic information about all of the participants in the trial, as well as the demographic composition of the local community. The trial judges file these reports with the Washington Supreme Court, where they are available for public review. Tennessee also requires judge to complete a survey in all first-degree murder cases and Pennsylvania did so until 1997.

Questionnaires like those used by the Washington judicial branch provide a method for identifying all death-eligible homicides, regardless of whether the prosecution charged the case as such. The New Jersey Supreme Court has acknowledged that it can be challenging for judicial branch staff to identify death eligible homicides that have not been charged as possible death penalty cases and have not proceeded to trial. But the court noted that this could be overcome through the use of a detailed questionnaire completed by the trial judges at sentencing in all homicide cases.

There is a second step to identifying cases for the purposes of comparison. After defining whether the comparison pool should include all death eligible cases, only death sentenced cases, or all cases where death was sought at trial, the question remains how to identify which specific cases among that pool are factually similar enough to warrant comparison to the case before the court. In other words, among the many death eligible homicides in California, which specific cases are sufficiently “similar” to provide a meaningful comparison to the case before the court? The court cannot realistically compare a death sentence in a robbery-felony murder case to all other robbery-felony murder cases. How, then, does the court decide which robbery-felony murder cases it should use for the comparison?

In considering this question, the New Jersey Supreme Court noted that “there is considerable variation among the states in respect of the methods used both to select cases for comparison purposes and to make factual comparisons among the selected cases.” The court noted that the Tennessee Supreme Court once used seventeen factors to select and compare cases (including method of killing, motive, and remorse), while the Washington Supreme Court used only four (nature of crime, aggravating circumstances, defendant’s criminal history, and defendant’s

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83 Kaufman-Osborn, supra note 13 at p. 810.
84 Id. at p. 810.
85 Ibid.
86 Id. at pp. 810-811; see also Id. at appendix, containing a complete copy of the questionnaire.
87 Id. at p. 815.
89 State v. Loftin, 724 A.2d at pp. 147-148.
90 Ibid.
91 Id. at p. 137.
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personal history). The New Jersey Supreme Court also observed that some state courts purport to conduct proportionality review without ever defining the factors used to identify the comparison cases.

In order to answer this question of how to identify the similar cases for comparison, New Jersey Supreme Court appointed Professor David Baldus as Special Master for Proportionality Review in 1988. After three years of work, Professor Baldus,

provided the court with a database comprising 246 cases and more than 400 factors that detailed the social and criminal backgrounds of the offenders and their victims, the contexts of their crimes, and the procedural and legal issues that Baldus deemed relevant to capital cases.

Using this data, Professor Baldus created three statistical models for assessing the defendant’s culpability. These models provided a means of analyzing all of the detailed information in each case and then grouping the cases into relevant categories for comparison. Using three models allowed the court to compare results from the different methods. Together, the statistical models were intended to provide the court with a reliable, evidence-based method of conducting comparative proportionality review.

At the end of Professor Baldus’ term as Special Master, the state Administrative Office of the Courts took over the data collection and analysis for proportionality review. The New Jersey Supreme Court subsequently appointed two other special masters to assist with proportionality review, most recently Judge David Baime. At the court’s request, Judge Baime assessed whether the court should continue to use the methods of statistical analysis created by Professor Baldus. Judge Baime ultimately recommended abandoning the models designed by Professor Baldus because there were too few qualifying homicides in New Jersey to make the models reliable. Judge Baime worked with consultants to provide the court with a revised model for statistical analysis to be used particularly for identifying disparities based on race or ethnicity. This model included both statutory and non-statutory factors that are most likely to influence whether a case ends in a death sentence.

Overall, the New Jersey Supreme Court has invested significant effort into developing a comprehensive and reliable method for conducting comparative proportionality review in death penalty cases. Although the statistical models initially adopted proved unworkable because of the small sample size, those models should be considered for California, a state with many times

94 Id. at p. 138.
95 Ibid. [citing cases from Georgia, Mississippi, and Pennsylvania].
96 Lesman, supra note 69 at p. 393; Bienen, supra note 14 at pp. 161-162; State v. Loftin, 724 A.2d at p. 140.
97 Lesman, supra note 69 at p. 395.
98 Lesman, supra note 69 at pp. 394-95; for more detailed explanation of the statistical models, see State v. Loftin, 724 A.2d at p. 140.
99 Lesman, supra note 69 at p. 401.
100 Lesman, supra note 69 at pp. 402-403.
101 Lesman, supra note 69 at pp. 403-404.
102 Lesman, supra note 69 at pp. 404-405.
103 Lesman, supra note 69 at p. 405.
104 Bienen, supra note 14 at pp. 161-162, 185-186.
as many homicides and a significantly larger death row. Moreover, the expertise developed in New Jersey could provide substantial assistance to the California Commission on the Fair Administration of Justice in shaping recommendations, and ultimately to California’s judicial branch in developing and implementing effective proportionality review in this state. In addition, the data collection survey used by the Washington judicial branch should be considered as a means of identifying and collecting information on all death-eligible homicides in California. Finally, the state courts of New York, New Jersey and Washington can all provide technical assistance in creating and maintaining electronic databases on homicide cases in the state.

V. Conclusion: California Should Adopt Uniform Comparative Proportionality Review

The judicial branches of New Jersey, New York and Washington have been national leaders in attempting to eliminate racial, ethnic and geographic disparities in death sentencing. These states have invested significant resources in developing tools for combating arbitrariness and bias in death sentencing. Sadly, California stands alongside Texas among the minority of states that have failed to take any action to prevent or rectify these problems. It is time for California, the most diverse state in the country and one with a true commitment to eliminating barriers to equal justice, to implement long overdue reforms to prevent discriminatory and arbitrary death sentences.

The majority of death penalty states require inter-case, comparative proportionality review in death penalty cases to reduce disparities and arbitrariness in death sentences. After 30 years without any proportionality review, California’s death penalty is marred by racial, ethnic and geographic disparities.\textsuperscript{105} Because California’s death penalty statute is the broadest in the nation and nearly every homicide is eligible for the death penalty, the risk of disparate and arbitrary application of death sentences is even greater, making comparative proportionality review all the more important.

The California Commission on the Fair Administration of Justice should follow the lead of the Illinois Commission, the Constitution Project, and the ABA Moratorium Project, and should recommend that California implement mandatory inter-case, comparative proportionality review in death penalty cases. This review should specifically include comparison with similar death-eligible cases, and should not be limited to only death sentenced or even life without parole cases. “Similar cases” for comparison should be further defined with the assistance of experts such as Professor Baldus, but at a minimum should include such factors as the special circumstances present, the aggravators and mitigators present, the defendant’s criminal history, and the defendant’s personal history. The statistical models developed by the New Jersey Supreme Court should specifically be considered for use in California.

Further, in order to facilitate comprehensive proportionality review, the Commission should recommend that the Judicial Council and/or the California Department of Corrections be required to conduct systemic data collection in all homicide cases. The ABA Moratorium Project

\textsuperscript{105} Pierce and Radelet, supra note 1 at pp. 37-40.
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recommends implementing a statewide data collection clearinghouse in any state that does not currently do so.\textsuperscript{106} As Professor Baldus has stated,

\begin{quote}
[t]he most important role for state courts is to develop a database that provides an overview of the system and reliable information on the universe of cases that are used as comparison cases in individual reviews. This task should be assumed by the court and not left to the meager resources of capital defendants and their attorneys.\textsuperscript{107}
\end{quote}

This data collection should include basic demographic information about the defendants and victims, including sufficient information to identify socio-economic status. The data collection questionnaire used by the Washington judicial branch may be used as a model. In addition, to allow proportionality review in all cases currently under sentence of death, the Commission should recommend that this data collection process include a review of all homicide cases over the past 30 years.

The New Jersey Supreme Court stated that comparative proportionality review was required in death penalty cases because of the state’s “principled commitment to fairness.”\textsuperscript{108} California, the state with the greatest diversity and the largest death row, should be no less committed. With more than 660 people on death row and more than 3,000 serving life without parole, it is imperative that individual cases be reviewed to ensure that those who were sentenced to death are the more culpable. If we cannot ensure that the death penalty is applied in a fair and just manner, then we should not have a death penalty in this state.

Again, we greatly appreciate this opportunity to share information with the Commission. Thank you for your careful consideration of these issues.

Sincerely,

Natasha L. Minsker
Death Penalty Policy Director


\textsuperscript{107} Baldus, \textit{supra} note 5 at p. 1598.

\textsuperscript{108} Lesman, \textit{supra} note 69 at p. 413.
## Mandatory Review via Statute

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