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The Meaning of "Meaningful Appellate Review" in Capital Cases: Lessons from California

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**THE MEANING OF “MEANINGFUL APPELLATE
REVIEW” IN CAPITAL CASES: LESSONS FROM
CALIFORNIA**

Steven F. Shatz*

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INTRODUCTION

In 1972, in *Furman v. Georgia*,¹ the Supreme Court's seminal death penalty case, the Court held that the death penalty, as then administered, violated the Eighth Amendment because the penalty decision was so unguided, and the imposition of the death penalty was so infrequent² as to create an unconstitutional risk of arbitrariness.³ In 1976, in *Gregg v. Georgia*,⁴ and its companion cases, *Proffitt v. Florida*⁵ and *Jurek v. Texas*,⁶ the Court approved the post-

1. *Furman v. Georgia*, 408 U.S. 238 (1972).

2. The justices assumed that about 15–20% of those who were death-eligible were sentenced to death. Chief Justice Burger, writing for the four dissenters, adopted that statistic. *Furman*, 408 U.S. at 386 n.11 (Burger, C.J., dissenting), as did Justice Powell, also writing for the four dissenters. *See id.* at 435 n.19 (Powell, J., dissenting). Justice Stewart, in turn, cited to the Chief Justice's statement as support for his conclusion that the imposition of death was "unusual." *Id.* at 309 n.10. Post-*Furman* research confirmed that the pre-*Furman* death sentence rate in Georgia was 15%. *See* David C. Baldus, et al., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 80 (1990).

3. Although *Furman* had no majority opinion, and each of the five justices in the majority wrote separately, the "holding" came to be seen as embodied in the opinions of Justices Stewart and White. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion). Both justices emphasized that the relatively infrequent use of the death penalty created the risk that it would be applied arbitrarily, Justice Stewart stating that it was cruel and unusual because it was inflicted on "a capriciously selected random handful" of defendants and that it was like "being struck by lightning." *Furman*, 408 U.S. at 309–10, and Justice White stating that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313.

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

5. *Proffitt v. Florida*, 428 U.S. 242 (1976).

6. *Jurek v. Texas*, 428 U.S. 262 (1976).

Furman death penalty schemes of Georgia, Florida and Texas, respectively. In those cases, the Court identified several aspects of the schemes that limited the risk of arbitrariness, but, in subsequent cases, the Court held that *Furman* was satisfied if the state's scheme met two requirements: (1) the state, by statute, had to "genuinely narrow the class of persons eligible for the death penalty";⁷ and (2) the state scheme had to provide for "meaningful appellate review" of death sentences.⁸ These two requirements were intended to implement *Furman's* bedrock principle, that the death penalty must be imposed "with reasonable consistency, or not at all."⁹ As Justice Stevens explained:

A constant theme of our cases . . . has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner. As stated in *Zant v. Stephens*, we have stressed the necessity of "generally narrow[ing] the class of persons eligible for the death penalty," and of assuring consistently applied appellate review.¹⁰

The Court assumed that the former, "statutory narrowing," requirement would lead to more consistency in the administration of the death penalty because the sentencer would be exercising discretion within a reduced class of murderers who were more deserving of death than the "average" murderer.¹¹

As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate . . . it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it

7. *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

8. *Parker v. Dugger*, 498 U.S. 308, 321 (1991); *See infra* Part I.

9. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

10. *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring) (quoting *Zant*, 462 U.S. at 876–77).

11. *See Roper v. Simmons*, 543 U.S. 551, 571 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) "culpability of the average murderer is insufficient to justify the most extreme sanction").

loses its usefulness as a sentencing device.¹²

This requirement has been the subject of litigation in the lower courts,¹³ including the California Supreme Court,¹⁴ and has drawn significant attention from death penalty scholars.¹⁵ This attention may be due to the fact that the requirement is quantifiable—the death-eligibility rate (the percentage of murderers made death-eligible) and death sentence rate (the percentage of death-eligible murderers¹⁶ sentenced to death) are determinable—and therefore subject to empirical study. In fact, the Court’s statement that the required statutory narrowing should result in the imposition of the death penalty “in a *substantial portion* of the cases so defined” constituted an invitation to determine whether, under various state death penalty schemes, the death penalty was in fact being imposed in a substantial portion of death-eligible cases: i.e., to determine the state’s death-sentence

12. *Penry v. Lynaugh*, 492 U.S. 302, 327 (1989) (quoting *Gregg*, 428 U.S. at 222 (White, J. concurring)).

13. *See, e.g.*, *McKenzie v. Risley*, 842 F.2d 1525, 1539, 1541(9th Cir. 1988) (en banc)(upholding Montana death penalty scheme on basis that only six types of deliberate homicide made defendant death-eligible and that aggravated kidnapping led to death-eligibility only where victim died as result of kidnapping); *Andrews v. Shulsen*, 802 F.2d 1256, 1261 (10th Cir. 1986)(upholding Utah death penalty scheme because at time capital homicide was restricted “to intentional or knowing murders committed under eight aggravating circumstances”); *State v. Middlebrooks*, 840 S.W.2d 317, 346–47 (Tenn. 1992), cert. granted, 507 U.S. 1028, cert. dismissed as improvidently granted, 510 U.S. 124 (1993) (upholding failure-to-narrow challenge because of broad definition of felony-murder and felony-murder aggravating factor); *State v. Wagner*, 752 P.2d 1136, 1158 (Or. 1988), vacated and remanded, 492 U.S. 914 (1989) (rejecting failure-to-narrow challenge because limited number of aggravated murders).

14. The court has rejected “failure to narrow” challenges in scores of cases, all without consideration of empirical evidence on the issue. *See, e.g.*, *People v. Cook*, 139 P.3d 492, 529 (Cal. 2006); *People v. Boyette*, 58 P.3d 391, 428–29 (2002).

15. The most recent and thorough discussion of the narrowing requirement appears in Sam Kamin & Justin Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981 (2015). *See also* James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment 1963–2006*, 107 COLUM. L. REV. 1 (2007); Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* 72 N.Y.U. L. REV. 1283 (1997).

16. I refer to defendants committing murders falling within the statutorily narrowed class as “death-eligible.” This is the sense in which the Supreme Court has used the term in distinguishing between the “eligibility” decision (whether the defendant committed a murder with an aggravating factor, as defined by statute) and the “selection” decision. *See Tuilaepa v. California*, 512 U.S. 967, 971–73 (1994).

rate. A number of researchers have accepted the invitation and published their findings on state death-sentence rates.¹⁷

By contrast, there has been little litigation in the lower courts about the requirement of meaningful appellate review, and most of the literature on the issue discusses the need for comparative intercase proportionality review and/or the methodology of such review.¹⁸ The present Article examines the Supreme Court's understanding of the meaningful appellate review requirement and tests that requirement against the California death penalty scheme. Part I reviews the Supreme Court law on meaningful appellate review, using as a framework the Court's distinction in *Pulley v. Harris*¹⁹ between two types of proportionality review, referred to here as: (1) "comparative proportionality review," where a state court reviews the proportionality of a death sentence by comparing the sentence with the sentences in other similar cases²⁰; and (2) "individual proportionality review," where a state court reviews a death sentence for disproportionality, excessiveness or inappropriateness without considering sentences in other cases. Part II describes the California death penalty scheme and the California Supreme Court's review of death sentences. Part III examines whether the California death penalty scheme is "so lacking in other checks on arbitrariness" that comparative proportionality review is

17. See, e.g., Justin Marceau, Sam Kamin & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069 (2013) (Colorado: database of 539 death-eligible homicides, death sentence rate of 0.56%); Steven F. Shatz & Naomi R. Shatz, *Chivalry is not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. OF GEN., LAW & JUSTICE 64 (2012) (California: database of 1299 convicted first degree murderers, death sentence rate of 5.5%); John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?* 11 J. EMPIRICAL LEGAL STUDIES 637, 638 (2014) (Connecticut: 205 death-eligible homicides, death sentence rate 4.4%).

18. See, e.g., William W. Berry, III, *Practicing Proportionality*, 64 FLA. L. REV. 687 (2012); Bidish J. Sarma, Robert J. Smith & Ben G. Cohen, *Struck by Lightning: Walker v. Georgia and Louisiana's Proportionality Review of Death Sentences*, 37 S.U.L. L. REV. 65 (2009); Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts after Pulley v. Harris*, 70 COLO. L. REV. 813 (1999).

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

20. This *intercase* comparative proportionality review should be distinguished from what might be termed "*intracase* comparative proportionality review," the comparison of a defendant's sentence with the sentences received by co-participants in the crime.

required under *Pulley*.²¹ Part IV addresses how a state court might develop standards for individual proportionality review and contrasts that approach with the actual performance of the California Supreme Court. The Conclusion argues that, in the last twenty-five years, the Supreme Court has paid insufficient attention to its foundational death penalty jurisprudence, with the result that, as demonstrated by California, the states have been free to ignore *Furman* and to administer death penalty schemes no less arbitrary than the Georgia scheme that was held unconstitutional more than forty years ago.²²

I. THE SUPREME COURT AND “MEANINGFUL APPELLATE REVIEW”

Unlike the narrowing requirement, which was explained in *Zant v. Stephens*,²³ the requirement of “meaningful appellate review” emerged over time and in a series of cases. Part A describes the development of the requirement and its rationale. Part B examines the three cases in which the Supreme Court has addressed challenges to death sentences based on the requirement.

A. *The Requirement of Meaningful Appellate Review of Death Sentences*

In all three of the 1976 cases where the Supreme Court upheld the state’s death penalty scheme, the plurality cited with approval the scheme’s provisions for review. In *Gregg v. Georgia*,²⁴ the plurality referred to “meaningful appellate review” as a “further safeguard” against arbitrary death sentences.²⁵ In *Proffitt v. Florida*,²⁶ the plurality said of the Florida Supreme Court’s comparative proportionality review:

21. See *Pulley*, 465 U.S. at 51.

22. Throughout this Article, to avoid the awkwardness of the “he/she” formulation, I refer to death-sentenced defendants with male pronouns. Nationally, more than 98% of death-sentenced defendants are men, and the defendants in every case cited in this Article were men.

23. See *Zant*, 462 U.S. at 877.

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

25. *Id.* at 195; *Id.* at 206 (Georgia’s comparative proportionality review “substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury”).

26. *Proffitt v. Florida*, 428 U.S. 242 (1976).

[T]he Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases. . . . [I]t is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency.²⁷

In *Jurek v. Texas*,²⁸ concerning the Texas scheme, which did not provide for comparative review, the plurality said:

By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law.²⁹

Though in these cases the plurality did not specify which elements of the three death penalty schemes were constitutionally required, its emphasis on the importance of meaningful appellate review suggested that the justices might come to see such review as essential.³⁰

In subsequent cases, the Court either assumed or stated that meaningful appellate review was required in capital cases. In *Barclay v. Florida*,³¹ Justice Stevens, in a concurring opinion reflecting the “holding” of the Court,³² addressed (and rejected on the merits) the defendant's contention that the Florida Supreme Court had failed to

27. *Id.* at 258–59.

28. *Jurek v. Texas*, 428 U.S. 262 (1976).

29. *Id.* at 276.

30. By contrast, in the other two companion cases, *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976), the Court struck down the state schemes and observed that they did not provide for “meaningful appellate review of the jury's decision.” *Id.* at 335–36. In his dissenting opinion in *Woodson*, Justice Rehnquist responded criticizing the plurality's “praise of appellate review as a cure for the constitutional infirmities” and asserting that “surely” such review was not constitutionally required. *Woodson*, 428 U.S. at 318–19.

31. *Barclay v. Florida*, 463 U.S. 939 (1983), discussed *infra* at note 33.

32. See *United States v. Marks*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”) quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (plurality opinion).

provide meaningful appellate review.³³ In *Pulley v. Harris*,³⁴ the majority, while rejecting the defendant's claim that California Supreme Court was required to engage in comparative proportionality review of death sentences, seemed to assume that "some form of meaningful appellate review is required."³⁵ In his concurring opinion, Justice Stevens made this assumption explicit:

While we did not hold [in *Zant v. Stephens*³⁶] that comparative proportionality review is a mandated component of a constitutionally acceptable capital sentencing system, our decision certainly recognized what was plain from *Gregg*, *Proffitt*, and *Jurek*: that some form of meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges.³⁷

Finally, in *Parker v. Dugger*,³⁸ the Court granted relief to a defendant because the state supreme court had failed to conduct meaningful appellate review of his death sentence. The state courts have understood these cases to hold that the Eighth Amendment requires "meaningful appellate review" of death sentences,³⁹ as have the commentators.⁴⁰

33. *Barclay*, 463 U.S. at 972–74.

34. *See Pulley v. Harris*, 465 U.S. 37 (1984).

35. *Id.* at 45.

36. *Zant v. Stephens*, 462 U.S. 862 (1983).

37. *Pulley v. Harris*, 465 U.S. at 59. Later, writing for the four dissenters in *Murray v. Giarratano*, 492 U.S. 1 (1989), Justice Stevens explained why the Eighth Amendment required that states conduct "meaningful appellate review" of death judgments:

The unique nature of the death penalty not only necessitates additional protections during pretrial, guilt, and sentencing phases, but also enhances the importance of the appellate process. Generally there is no constitutional right to appeal a conviction. [citation] "[M]eaningful appellate review" in capital cases, however, "serves as a check against the random or arbitrary imposition of the death penalty." *Gregg v. Georgia*, 428 U.S. 153, 195, 206 (1976) (opinion of Stewart, Powell and Stevens, JJ.). It is therefore an integral component of a State's "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). *Id.* at 22–23.

38. *Parker v. Dugger*, 498 U.S. 308, 321–23 (1991).

39. *See, e.g., State v. Ross*, 646 A.2d 1318, 1348 (Conn. App. 1994) ("The eighth amendment's mandate that the death penalty may only be imposed in a manner that is consistent and reliable also imposes other conditions on the validity of a death penalty statute. . . . [T]o provide a check against having a death sentence imposed under the influence of passion or prejudice, or in a random and arbitrary manner, there must be an opportunity for meaningful

The requirement that a state scheme provide for meaningful appellate review to promote “reliability and consistency” in death judgments⁴¹ and to guard against arbitrariness and irrationality in the administration of the death penalty⁴² constituted a recognition by the Court that, even a scheme with a sufficiently narrowed death-eligible class might, given the discretion accorded to prosecutors and juries, produce arbitrary results. What was required then was proportionality review of the death sentence, not simply review of the guilt or death-eligibility findings.⁴³ That is made clear in *Parker v. Dugger*,⁴⁴ where the Court said, “It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant’s actual record. ‘What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.’”⁴⁵ By defining the required appellate review in terms of the factors by which the sentencer determines the penalty, the Court made clear that the state courts must review the death sentence itself.⁴⁶

The meaningful appellate review requirement, like the

appellate review.”); *State v. Card*, 825 P.2d 1081, 1094 (Idaho 1991) (“meaningful appellate review” required by decisions of the Supreme Court); *Olsen v. State*, 67 P.3d 536, 610 (Wyo. 2003) (*Pulley* requires “thoughtful and effective appellate review”).

40. See, e.g., *Berry*, *supra*, note 18 at 689–90; Louis D. Billionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEXAS L. REV. 1301, 1358, n. 227 (1997).

41. *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990).

42. *Parker v. Dugger*, 498 U.S. at 321.

43. Logically, “meaningful appellate review” must consist of something more than ordinary appellate review for legal error because all states already provided for ordinary appellate review of capital cases before *Furman*, so merely stating as a requirement a procedure that was already in place would not address the problems identified in *Furman*.

44. *Parker v. Dugger*, 498 U.S. 308 (1991).

45. *Id.* at 321 (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)).

46. See *Clemons v. Mississippi*, 494 U.S. 738, 749 (1991) (referring to meaningful appellate review of death sentences). The only contrary indication comes from a single case cite in *Pulley v. Harris*, 465 U.S. 37, 53 (1984). After discussing the statutory requirement that the California Supreme Court review the trial judge’s refusal to modify a death verdict “focusing upon the circumstances present in each particular case” (quoting *People v. Frierson*, 599 P.2d 587, 609 (Cal. 1979)), the Court inexplicably cites as an example of such “effective appellate review” *People v. Thompson*, 611 P.2d 883, 893 (Cal. 1980), a case not involving review of the death sentence but of the admissibility of evidence used to support the special circumstances (death-eligibility) finding.

genuine narrowing requirement, is a systemic requirement aimed at limiting the *risk* of arbitrariness. Consequently, the defendant asserting that the state court does not conduct meaningful appellate review of death sentences does not have to prove that his death sentence is in fact arbitrary. Just as the Supreme Court did not inquire whether the death sentence in *Furman* was aberrant or whether Furman could have been sentenced to death under a narrower scheme, so, too, the question of whether a state provides for meaningful appellate review does not turn on the facts of an individual case. Again, as is the case with the “genuine narrowing” requirement, the meaningful appellate review requirement does not prescribe the standards each state court must apply. Just as the states are free to genuinely narrow the death-eligible class with different aggravating circumstances, the state courts are free to adopt different standards for determining proportionality so long as they achieve a reasonable level of consistency.

B. “Meaningful Appellate Review” Challenges in the Supreme Court: Barclay, Pulley, and Parker

Although it seems clear that the Eighth Amendment requires state courts to engage in meaningful appellate review of death sentences and that the purpose of such review is to reduce the risk of arbitrariness, it is far from clear what constitutes meaningful review, or, more precisely, how the Supreme Court is to determine whether the requirement has been satisfied. The Court has decided only three cases where the defendant challenged a death sentence on the basis that the state failed to provide meaningful appellate review: *Barclay v. Florida*,⁴⁷ *Pulley v. Harris*,⁴⁸ and *Parker v. Dugger*,⁴⁹ each of which is discussed below.

47. *Barclay v. Florida*, 463 U.S. 939 (1983).

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

49. *Parker v. Dugger*, 498 U.S. 308 (1991). More recently, the Court’s denial of certiorari in a “meaningful appellate review” challenge provoked an exchange between Justices Stevens and Thomas about the requirement. See *Walker v. Georgia*, 129 S.Ct. 453 (2008) (Stevens, J., statement respecting denial of certiorari) and 129 S.Ct. 481 (2008) (Thomas, J., concurring)). Justice Stevens argued that the Georgia Supreme Court had “significantly narrowed” its comparative proportionality review since *Zant*, and he labeled the review in the instant case as “utterly perfunctory” stating “the likely result of such a truncated review—particularly in conjunction with the remainder of the

1. Barclay v. Florida

The first of the three cases was *Barclay v. Florida*. Barclay and four others participated in a racially motivated killing.⁵⁰ Dougan, the actual shooter, was sentenced to death, and the other three were sentenced to prison.⁵¹ At Barclay's trial, the jury recommended a life sentence, but the trial judge—finding six aggravating factors and no mitigating factors (despite Barclay's introduction of non-statutory mitigating evidence)—rejected the jury's recommendation and sentenced Barclay to death.⁵² The Florida Supreme Court affirmed in a brief opinion, finding no error in the trial court's decision.⁵³ In the Supreme Court, Barclay challenged the trial judge's sentencing order as contrary to Florida law and unsupported by the facts, and he also challenged the Florida Supreme Court's review as, in effect, rubber-stamping the flawed sentencing order. A fractured Supreme Court rejected Barclay's claims.

The three principal opinions in the case—Justice Rehnquist's opinion for the plurality, Justice Stevens's concurring opinion for himself and Justice Powell and Justice Marshall's dissenting opinion for himself and Justice Brennan⁵⁴—all agreed that the trial court's sentencing order was flawed under state law. However, on the question whether the Florida Supreme Court engaged in meaningful appellate review, the justices differed in their analysis. Justice Rehnquist saw the question as being one of the state

Georgia scheme, which does not cabin the jury's discretion in weighing aggravating and mitigating factors—is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.” 129 S.Ct. at 455–57. Justice Thomas responded with the assertion that “[t]here is nothing constitutionally defective about the Georgia Supreme Court's determination. Proportionality review is not constitutionally required in any form.” 129 S.Ct. at 482. While the statement might be read to deny that even individual proportionality review is constitutionally required, given the context, the statement probably was intended as a reiteration of the holding in *Pulley* that *comparative* proportionality review was not required.

50. Justice Rehnquist's plurality opinion set out the facts in detail, quoting the trial judge, as quoted by the Florida Supreme Court. 463 U.S. at 942–44.

51. *Id.* at 944, n.1.

52. *Barclay v. State*, 343 So.2d 1266, 1270–71.

53. *Id.*

54. Justice Blackmun dissented with a brief statement. *Barclay v. Florida*, 463 U.S. 939, 991 (1984).

court's application of its own "harmless error" precedents.⁵⁵ So stated, the question was one of state law raising no federal constitutional question. Additionally, the decision was "buttressed" by the Florida court's practice of reviewing death sentences for excessiveness and the plurality's understanding that the state court "does not apply its harmless-error analysis in an automatic or mechanical fashion . . ."⁵⁶ In dissent, Justice Marshall disagreed with the plurality's premise that the Florida Supreme Court decision was based on "harmless error" and would have held the Florida court's "failure . . . to conduct any considered appellate review" violated the Constitution.⁵⁷

Justice Stevens, whose concurring opinion, as noted above, counts as the "holding" of the Court,⁵⁸ took a middle ground between Rehnquist and Marshall.⁵⁹ Unlike Rehnquist, Stevens recognized that a state court's failure to afford meaningful review of a death sentence might be the basis of an Eighth Amendment challenge, but unlike Marshall, he thought that whether a state court was providing meaningful review could not be determined based on the results of a single case: "[T]he question is whether, in its regular practice, the Florida Supreme Court has become a rubber stamp for lower court death-penalty determinations."⁶⁰ Stevens examined the record of the Florida Supreme Court and found that, since 1972, the court had affirmed only 120 of 212 death sentences and had set aside the remainder "with instructions either to hold a new sentencing proceeding or to impose a life sentence."⁶¹ For Stevens, that record confirmed the expectation of the Court, expressed in *Proffitt v. Florida*,⁶² that Florida's appellate review system would serve to minimize the risk that the death penalty would be imposed in an arbitrary or capricious manner.⁶³

55. *Id.* at 956–58.

56. *Id.* at 958.

57. *Id.* at 987–90.

58. *See supra* at note 54.

59. *Barclay v. Florida*, 463 U.S. at 972–74.

60. *Id.* at 973.

61. *Id.* Justice Stevens does not indicate what portion of these sentence reversals were actually based on the court's proportionality review, rather than on a finding of ordinary legal error.

62. *Proffitt v. Florida*, 428 U.S. 242, 253 (1976).

63. *Barclay*, 463 U.S. at 974.

2. Pulley v. Harris

In *Pulley v. Harris*, the defendant challenged California's 1977 death penalty law on the ground that it did not provide for comparative proportionality review of death sentences.⁶⁴ The defendant relied on the fact that, in approving the Georgia death penalty scheme in *Gregg v. Georgia*⁶⁵ and *Zant v. Stephens*,⁶⁶ the Court had emphasized the importance of Georgia's requirement of comparative proportionality review to prevent arbitrariness.⁶⁷ The Court rejected defendant's contention, finding that in *Gregg* and its companion cases the plurality had said such review was an "additional safeguard," but had never said such review was constitutionally required⁶⁸ and, in *Zant*, the Court "relied on the jury's finding of aggravating circumstances, not the State Supreme Court's finding of proportionality as rationalizing the sentence."⁶⁹ Although the Court acknowledged that some form of meaningful appellate review was required⁷⁰ and cited with approval Penal Code § 190.4(e) specifying that the trial court's decision not to modify a death sentence "shall be reviewed,"⁷¹ it held that comparative proportionality review (a feature of most states' death penalty schemes) was not required.⁷² The Court did not spell out what this less robust form of death sentence review would look like,⁷³ except that it equated meaningful review with prompt review.⁷⁴ In explaining that the Court had not required comparative

64. *Pulley v. Harris*, 465 U.S. at 42 n.5.

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

66. *Zant v. Stephens*, 462 U.S. 862 (1983).

67. *Gregg v. Georgia*, 428 U.S. at 206; *Zant*, 462 U.S. at 874–75.

68. *Pulley v. Harris*, 465 U.S. at 50.

69. *Id.* at 50.

70. *Id.* at 45.

71. *Id.* at 53. Quoting this provision might suggest that the Court thought review of the death sentence itself was mandatory. However, the California Supreme Court has never treated the review as mandatory, and there was no such review of Harris's sentence. See *People v. Harris*, 623 P.2d 240 (Cal. 1981).

72. *Pulley v. Harris*, 465 U.S. at 43–45.

73. It could be argued that proportionality review without comparison of like cases is an oxymoron. See *White*, *supra* note 18 at 834–35 (1999) ("To truly determine proportionality, a sentence must be viewed in light of other sentences; in other words, it must be compared."); *State v. Fields*, 908 P.2d 1211, 1225 (Idaho, 1995) (finding that the legislature's elimination of the requirement that the supreme court conduct comparative proportionality review rendered the requirement that the court review for excessiveness meaningless).

74. *Pulley v. Harris*, 465 U.S. at 48–49.

proportionality review, although both the Georgia and Florida schemes provided it, the Court said, “[R]eferences to appellate review in *Gregg* and *Proffitt* were focused not on proportionality review as such, but only on the provision of some sort of prompt and automatic appellate review.”⁷⁵ The Court then added the following qualification:

Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, the 1977 California statute is not of that sort.⁷⁶

The Court repeated this qualification in *McCleskey v. Kemp*: “[W]here the statutory procedures adequately channel the sentencer’s discretion, such proportionality review [of similar murders] is not constitutionally required.”⁷⁷ The Court did not indicate what such a defective scheme might look like, but, as discussed below,⁷⁸ it might look very much like the present California scheme.

3. *Parker v. Dugger*

Parker v. Dugger is the only case where the Court appears to have relied on a lack of meaningful appellate review to overturn a death sentence. Parker was convicted of two murders by a Florida jury. At the penalty phase, Parker presented substantial, and, in some respects, uncontroverted, mitigating evidence. The jury found aggravating circumstances rendering Parker death-eligible, but also found that the mitigating circumstances outweighed the aggravating circumstances and recommended that he be sentenced to life imprisonment. The trial judge accepted the jury’s recommendation as to one murder, but as to the other murder he concluded that there were no mitigating circumstances that outweighed the aggravating circumstances, and he sentenced Parker to death. On appeal, the Florida Supreme Court overturned two of the six aggravating circumstances found by the trial judge. The

75. *Id.* at 49 (emphasis added). See *Gregg v. Georgia*, 428 U.S. 153, 211 (1976) (“Prompt review by the Georgia Supreme Court is provided for in every case in which the death penalty is imposed.”)

76. *Pulley v. Harris*, 465 U.S. at 51.

77. *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987).

78. See *infra* at Part II.

court's practice was to remand for resentencing when it reversed findings as to one or more aggravating circumstances and the trial court had found one or more mitigating circumstances; however the court found there were no mitigating circumstances and affirmed the death sentence.

The Supreme Court held (5-4) that the Florida court's decision was arbitrary and amounted to a denial of meaningful appellate review.⁷⁹ Rejecting the dissent's claim that the Florida court's finding of no mitigating circumstances was entitled to deference and was a matter of state law not subject to review by the Supreme Court,⁸⁰ the majority said:

We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. . . . The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker's sentence at all.⁸¹

* * *

While it seems clear that meaningful appellate review of death sentences is a required element of a constitutional death penalty scheme, exactly what constitutes meaningful appellate review is far less clear. The three cases where the court has considered a challenge to a state court's review provide clues, but none gives a comprehensive explanation of the requirement. This much seems clear. The Court distinguishes between comparative proportionality review and individual proportionality review, and believes the former is more robust than the latter. Comparative proportionality review is not constitutionally required unless the state scheme is lacking in other checks on arbitrariness. Meaningful appellate review requires the state court to consider the defendant's mitigation evidence and to weigh it in some fashion against the evidence in aggravation. Except where the state court, as in *Parker*, wholly fails to engage in such a process, a meaningful appellate review challenge is a systemic challenge and can only be proved by showing that the state court, as a rule, does fulfill its review obligations.

79. *Parker v. Duggar*, 498 U.S. 301, 321–23.

80. *See id.* at 324–26 (White, J., dissenting).

81. *Id.* at 321.

Whether meaningful appellate review, as understood by the Supreme Court, has been implemented in state death penalty schemes is an open question, as the California experience demonstrates.

II. THE CALIFORNIA DEATH PENALTY SCHEME AND AUTOMATIC REVIEW IN DEATH PENALTY CASES

California's 1977 death penalty law, at issue in *Pulley v. Harris*,⁸² was superseded by the 1978 Briggs Death Penalty Initiative,⁸³ which created the scheme currently in effect. According to its author State Senator John V. Briggs, the initiative was intended to "give Californians the toughest death-penalty law in the country."⁸⁴ By "the toughest death penalty law," the proponents meant a law "which threatens to inflict that penalty on the maximum number of defendants."⁸⁵ That "toughest death penalty law" has since been expanded by voter initiatives on three occasions since 1978.⁸⁶ Because the law was enacted by initiative, the legislature has played no role in shaping the law, and, with the exception of two fairly limited holdings more than thirty years ago,⁸⁷ the California Supreme Court also has taken no role in defining its coverage.⁸⁸

The California Penal Code starts with an expansive definition of first-degree murder in §§ 187-89⁸⁹ and then, in §

82. *Pulley v. Harris*, 465 U.S. at 38 n.1.

83. Initiative Measure Proposition 7 (approved Nov. 7, 1978).

84. *Ballot Proposition Analysis and Rundown of Key District Races*, CAL. J., Nov. 1978, Special Section, at 4-5.

85. *Carlos v. Superior Court*, 672 P.2d 862, 871 n.13 (Cal. 1983).

86. See Initiative Measure Proposition 115 § 9 (approved June 5, 1990); 1995 Cal. Stat. 478, enacted by Proposition 196, § 2 (approved Mar. 26, 1996); 1998 Cal. Stat. 629, enacted by Proposition 18 (approved March 7, 2000); Initiative Measure Proposition 21 § 11 (approved March 7, 2000).

87. See *People v. Weidert*, 705 P.2d 380, 383 (Cal. 1985) (applying the rule of *People v. Green*, 609 P.2d 468, 505-06 (Cal. 1980) that the felony-murder special circumstances do not apply when the felony is only "incidental" to the killing, a holding partially overturned by a subsequent initiative); *People v. Superior Court (Engert)*, 647 P.2d 76, 77-78 (Cal. 1982) (holding unconstitutional the "heinous, atrocious, or cruel" special circumstance).

88. In 1983, the court in *Carlos v. Superior Court*, 672 P.2d 862, 869 (Cal. 1983), interpreted § 190.2 to require proof of intent to kill for a special circumstances finding, but less than four years later, that interpretation was held to be erroneous and *Carlos* was overruled in *People v. Anderson*, 742 P.2d 1306, 1138-39 (Cal. 1987).

89. There are twenty-one categories of first-degree murder.

190.2, enumerates thirty-three special circumstances that make a first-degree murderer death-eligible (i.e., that make the murder “capital murder”).⁹⁰ According to the California Supreme Court, the § 190.2 special circumstances perform the “constitutionally required ‘narrowing’ function.”⁹¹ However, this extensive list of special circumstances covers almost all forms of first-degree murder because virtually all first-degree murders are either premeditated killings or felony-murders. Most premeditated murders are capital murders under California’s unique lying in wait special circumstance⁹² that makes death-eligible a murderer who intentionally kills his victim by surprise and from a position of advantage. As for felony-murder, currently all but one of the thirteen felonies (torture) which may be the basis for a

90. CAL. PENAL CODE § 190.2(a). The section has twenty-two numbered special circumstances, one of which (felony-murder) has twelve separate sub-parts. The Briggs Initiative had twenty-seven special circumstances, and six special circumstances were added by the subsequent initiatives. The thirty-three current special circumstances may be grouped as follows:

2 “other murder” circumstances: the defendant was convicted of more than one murder ((a)(3)) or was previously convicted of murder ((a)(2));

8 “victim” circumstances: the defendant intentionally killed a peace officer ((a)(7)), federal law enforcement officer or agent ((a)(8)), firefighter ((a)(9)), witness ((a)(10)), prosecutor or former prosecutor ((a)(11)), judge or former judge ((a)(12)), elected official or former elected official ((a)(13)) or juror ((a)(20));

6 “manner” circumstances: the murder was committed by a destructive device, bomb or explosive planted ((a)(4)) or mailed ((a)(6)) or was intentionally committed by lying in wait ((a)(15)), by the infliction of torture ((a)(18)), by poison ((a)(19)) or by shooting from a motor vehicle ((a)(21));

4 “motive” circumstances: the defendant committed the murder for financial gain ((a)(1)), to escape arrest ((a)(5)), because of the victim’s race, color, religion, national origin or country of origin ((a)(16)) or to further the activities of a criminal street gang ((a)(22));

12 “commission of a felony” circumstances: the murder was committed while the defendant was engaged in, or an accomplice to robbery ((a)(17)(A)), kidnapping ((a)(17)(B)), rape ((a)(17)(C)), forcible sodomy ((a)(17)(D)), child molestation ((a)(17)(E)), forcible oral copulation ((a)(17)(F)), burglary ((a)(17)(G)), arson ((a)(17)(H)), train wrecking ((a)(17)(I)), mayhem ((a)(17)(J)), rape by instrument ((a)(17)(K)) or carjacking ((a)(17)(L)); and

1 “catchall” circumstance: the murder was especially heinous, atrocious, or cruel ((a)(14)).

Id. As noted above, *supra* note 87, this last circumstance was held unconstitutional on vagueness grounds.

91. *People v. Bacigalupo*, 862 P.2d 808, 813 (Cal. 1993).

92. CAL. PENAL CODE § 190.2(a)(15).

first-degree felony-murder conviction are also special circumstances,⁹³ and California is one of only a handful of states where a defendant would be death-eligible for an unintentional, even wholly accidental, killing during a felony.⁹⁴ The breadth of the special circumstances creates an extraordinarily large pool of potentially death-eligible defendants, and prosecutors have unfettered discretion to decide against which defendants they will seek death.⁹⁵

A. *The Trial Court*

The trial of a capital case takes place in two stages.⁹⁶ At the first stage, the “guilt phase,” the factfinder decides whether the defendant is guilty of first-degree murder, and, if so, whether one or more of the special circumstances charged by the prosecutor is proved true beyond a reasonable doubt.⁹⁷ Thus, unlike the procedure in many other states, the defendant’s death-eligibility is determined at the first phase of the bifurcated proceeding. If the defendant is found to be death-eligible, the case proceeds to a “penalty phase,” where, with certain limited exceptions, the prosecution and defense may introduce additional evidence “as to any matter relevant to aggravation, mitigation, and sentence.”⁹⁸

Except for additional evidence relating to the murder or the special circumstances proved at the guilt phase, the prosecution has to give advance notice of any evidence in

93. Compare CAL. PENAL CODE § 189 with CAL. PENAL CODE § 190.2(a)(17).

94. *People v. Watkins*, 290 P.3d 364, 390 (2013). The other states are: Florida, Georgia, Idaho and Mississippi. See Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 761 (2007) (also listing Maryland, which has since repealed the death penalty).

95. See, e.g., *People v. Ramirez*, 139 P.3d 64, 117 (Cal. 2006); *People v. Gray*, 118 P.3d 496, 543 (Cal. 2005).

96. CAL. PENAL CODE § 190.1. If the defendant pleads not guilty by reason of insanity, there will be a third stage—the “sanity phase”—between the “guilt phase” and the “penalty phase.” CAL. PENAL CODE §§ 190.1(c), 190.4(c).

97. CAL. PENAL CODE § 190.4(a).

98. CAL. PENAL CODE § 190.3. Such evidence may include:

the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant’s character, background, history, mental condition and physical condition.

aggravation it intends to introduce at the penalty phase.⁹⁹ The jury is instructed to take into account a list of eleven factors in reaching its penalty decision.¹⁰⁰ The listed factors are not “propositional,” in the sense that the jury is required to give “a yes or no answer to a specific question.”¹⁰¹ At one time, the California Supreme Court took the position that only three of the eleven factors—(a) circumstances of the crime and any special circumstances found; (b) criminal activity involving force or violence; and (c) prior felony conviction—could be aggravating, and the rest could only be mitigating.¹⁰² Now, however, it appears that all the factors are to be viewed as neutral sentencing factors,¹⁰³ and the jury is instructed at the conclusion of the penalty phase as follows:

99. *Id.*

100. CAL. PENAL CODE § 190.3 provides:

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

- (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
- (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
- (c) The presence or absence of any prior felony conviction.
- (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (e) Whether or not the victim was a participant in the defendant’s homicidal conduct or consented to the homicidal act.
- (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
- (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
- (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.
- (i) The age of the defendant at the time of the crime.
- (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
- (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

101. *Tuilaepa v. California*, 512 U.S. 967, 975 (1994).

102. *See People v. Whitt*, 798 P.2d 849, 869 (Cal. 1990) (factors (d), (e), (f), (h), and (k) can only mitigate); *People v. Hamilton*, 774 P.2d 730, 755 (Cal. 1989) (factors (d), (e), (f), (g), (h), and (j) can only mitigate); *People v. Rodriguez*, 726 P.2d 113, 151 (Cal. 1986) (factor (i), age, not an aggravating factor).

103. *See* Judicial Council of California Criminal Jury Instruction 763.

You have sole responsibility to decide which penalty [the] defendant will receive.

You must consider the arguments of counsel and all the evidence presented . . .

In reaching your decision, you must consider, take into account, and be guided by the aggravating and mitigating circumstances. Each of you is free to assign whatever moral or sympathetic value you find appropriate to each individual factor and to all of them together. Do not simply count the number of aggravating and mitigating factors and decide based on the higher number alone. Consider the relative or combined weight of the factors and evaluate them in terms of their relative convincing force on the question of punishment.

Each of you must decide for yourself whether aggravating or mitigating factors exist. You do not all need to agree whether such factors exist. If any juror individually concludes that a factor exists, that juror may give the factor whatever weight he or she believes is appropriate.

Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. Even without mitigating circumstances, you may decide that the aggravating circumstances are not substantial enough to warrant death. To return a judgment of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.¹⁰⁴

If the jury does return a death verdict, the defendant is deemed to have moved for a modification of that verdict by the trial judge.¹⁰⁵

In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence

104. Judicial Council of California Criminal Jury Instruction 766.

105. CAL. PENAL CODE § 190.4(e).

presented. The judge shall state on the record the reasons for his findings.¹⁰⁶

The California Supreme Court has generally described the trial court's review in broad terms:

In ruling on a verdict-modification application, the trial judge is required by section 190.4 [subdivision] (e) to "make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and the applicable law." That is to say, he must determine whether the jury's decision that death is appropriate under all the circumstances is adequately supported. And he must make that determination independently, i.e., *in accordance with the weight he himself believes the evidence deserves*.¹⁰⁷

The court's most recent discussion of the standard appears in *People v. Burgener*.¹⁰⁸ There the court reversed the denial of a § 190.4(e) motion because the record did not indicate that the trial judge "understood his duty to independently reweigh the evidence and make an independent determination" and the judge's remarks bore a "disturbing resemblance to the deferential substantial-evidence standard."¹⁰⁹ In early cases under the 1978 death penalty law, trial judges did modify death verdicts in at least ten cases.¹¹⁰ Then, in 1990,¹¹¹ and

106. *Id.*

107. *People v. Vieira*, 106 P.3d 990, 1013 (Cal. 2005), quoting *People v. Marshall*, 790 P.2d 676, 694 (Cal. 1990) (emphasis added) (citations omitted). On occasion, the court has indicated that the review is more equivalent to one for sufficiency of the evidence: "[I]n ruling on the automatic motion to modify a death verdict, the trial judge's function is not to make an independent and de novo penalty determination . . ." *People v. Lang*, 782 P.2d 627, 663 (Cal. 1989), citing with approval *People v. Allison*, 771 P.2d 1294, 1319 (Cal. 1989) (Kaufman, J., concurring) (standard is the "the long-settled standard for reviewing *any* jury verdict on a motion for new trial based on insufficiency of the evidence.").

108. *People v. Burgener*, 62 P.3d 1 (Cal. 2003).

109. *Id.* at 42–43.

110. See *People v. McDermid*, 211 Cal.Rptr. 773 (Ct. App. 1984); *People v. Harris*, 237 Cal.Rptr. 747 (Ct. App. 1987); *People v. Sparks*, No. 78647 (Santa Clara Cty Sup. Ct., 1984); *People v. Jones*, No. A56792 (Los Angeles Cty Sup. Ct. 1984); *People v. Polecat*, 236 Cal.Rptr. 453 (Ct. App., 1987); *People v. Bonillas*, No. 23117 (San Bernardino Cty Sup. Ct. 1990); *People v. Rodriguez*, No. C-8773 (San Mateo Cty Sup. Ct. 1991); *People v. Burgener*, 272 Cal.Rptr. 830 (1990); *People v. Charan*, No. KA006977 (Los Angeles Cty Sup. Ct. 1991) (noted in *People v. Cleveland*, 86 P.3d 302, 310 n.2 (Cal. 2004)); *People v. Crew*, 2 Cal. Rptr. 2d 755 (Ct. App. 1991).

111. *People v. Burgener*, 272 Cal.Rptr. 830 (Ct. App. 1990).

again in 1991,¹¹² the Court of Appeal overturned trial judges' grants of relief under § 190.4(e). Those decisions marked the end of robust review of death verdicts in the trial court—there appears to be only one case since 1991 where a judge granted a § 190.4(e) motion.¹¹³

B. The California Supreme Court

Upon entry of a death judgment, the case is automatically appealed to the California Supreme Court.¹¹⁴ Although the Supreme Court, in *Pulley*, equated meaningful appellate review with prompt review, review in the California Supreme Court is anything but prompt. In 2008, the California Commission on the Fair Administration of Justice (hereinafter, “Commission”), a bipartisan panel comprised of prosecutors, criminal defense attorneys, law enforcement officials, and a judge, undertook a comprehensive review of the California death penalty and found that “the average delay between judgment of death and final disposition of the automatic appeal is currently between 11.7 and 13.7 years” and that the delay was steadily increasing.¹¹⁵ To put that figure in context, the Commission reported that, in 2005, the nationwide average lapse of time between death sentence and execution was 12.25 years;¹¹⁶ so that, in the time it took other states to complete the review process in a death case—direct appeal, state collateral review and federal habeas corpus—the average California death row inmate might not yet have completed the first step.

The California Penal Code says nothing about the nature of the automatic appeal, except that, under § 190.4(e), on appeal, the trial court's denial of the modification of the death penalty verdict “shall be reviewed.”¹¹⁷ Although the review of

112. *People v. Crew*, 2 Cal.Rptr.2d 755 (Ct. App. 1991). __

113. See Jennie Rodriguez-Moore, *S.J. Judge Overturns Jury's Death Sentence*, RECORDNET.COM (June 11, 2013), http://www.recordnet.com/apps/pbcs.dll/article?AID=/20130611/A_NEWS/306110324/-1/A_NEWS. The text is qualified by the word “appears” because the issue is not easily researched and it is possible that a case or cases was missed.

114. CAL. PENAL CODE § 1239.

115. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT (Gerald Uelman ed., 2008) 131 [hereinafter, “Commission Report”], available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>.

116. *Id.* at 122.

117. CAL. PENAL CODE § 190.4(e).

a denial of a § 190.4(e) motion might have been the vehicle for a robust proportionality review, it has not turned out that way. Despite the seemingly mandatory nature of this review, the California Supreme Court does not in fact review the trial judge's 190.4(e) opinion in most cases,¹¹⁸ but only in those cases where the defendant requests such review. The court has described its review as follows:

On appeal, we subject a ruling on such an application to independent review: the decision resolves a mixed question of law and fact; a determination of this kind is generally examined *de novo*. Of course, when we conduct such scrutiny, we simply review the trial court's determination after independently considering the record; we do not make a *de novo* determination of penalty.¹¹⁹

How the court can subject the trial court's determination to *independent* and *de novo* review but not itself make a *de novo* determination is not clear, but in the end the test applied is whether the trial court's determination was "contrary to law or the evidence."¹²⁰ This is ordinary review for legal error and substantial evidence, not proportionality review.

On six occasions, the California Supreme Court has remanded the denial of a § 190.4(e) motion, but only for the failure of the trial judge to apply the correct standard or to make required findings, never on the merits of the death sentence.¹²¹ Since, in other cases with similar legal errors, the court has found the error to be harmless and affirmed the death sentence,¹²² in these six cases, the court presumably found the errors were not harmless. Might the court have intended the remands as a signal to the trial court that relief

118. See, e.g., *People v. Montes*, 320 P.3d 729, 796–97 (Cal. 2014) (discussing defendant's claim that his death sentence was disproportionate, with no mention of § 190.4(e)); *People v. Whalen*, 294 P.3d 915, 985–86 (Cal. 2013) (also discussing defendant's claim that his death sentence was disproportionate, with no mention of § 190.4(e)).

119. *People v. Zambrano*, 163 P.3d 4, 75 (Cal. 2007) (quoting *People v. Mickey*, 818 P.2d 84, 135 (Cal. 1991) (citation omitted)).

120. *Id.* at 76.

121. See *People v. Burgener*, 62 P.3d 1 (Cal. 2003); *People v. Lewis*, 786 P.2d 892 (Cal. 1990); *People v. Sheldon*, 771 P.2d 1330 (Cal. 1989); *People v. Bonillas*, 771 P.2d 844 (Cal. 1989); *People v. Brown*, 756 P.2d 204 (Cal. 1988); *People v. Rodriguez*, 726 P.2d 113 (Cal. 1986).

122. See *People v. Allison*, 771 P.2d 1294, 1317 (Cal. 1989); *People v. Heishman*, 753 P.2d 629, 665 (Cal. 1988).

should be granted? If so, the signal was ignored in four of the six cases,¹²³ and one of the cases illustrates what can go awry if the court was in fact trying to do indirectly what it could have done directly. Michael Ray Burgener was sentenced to death for the 1980 murder of a 7-Eleven clerk in the course of a robbery. In 1986, he obtained a penalty reversal because, acting pursuant to Burgener's instructions, Burgener's counsel had presented no mitigating evidence at the penalty phase, even though such evidence was available.¹²⁴ At the penalty retrial in 1988, Burgener was again sentenced to death, but the trial judge set aside the death sentence under § 190.4(e) and imposed a sentence of life without parole.¹²⁵ The People appealed the sentence, and the Court of Appeal reversed on the ground that the trial judge had based his ruling in part on matters he should not have considered (the risk the jury would consider evidence that had been stricken, the likelihood of reversal, the cost of a retrial).¹²⁶ On remand, the original trial judge having retired, the § 190.4(e) motion was heard before a different judge, who denied the motion.¹²⁷ On his automatic appeal, Burgener once more won a penalty reversal, this time on the ground that the trial judge had failed to conduct an "independent" review of the evidence.¹²⁸ On remand, Burgener was granted permission to represent himself at his § 190.4(e) hearing, and his motion again was denied.¹²⁹ In 2009, on Burgener's third automatic appeal, the California Supreme Court again set aside his sentence, holding that the trial court had failed to insure that Burgener's waiver of counsel was knowing and intelligent.¹³⁰ The judge who conducted the previous two § 190.4(e) hearings having died, the fifth such hearing was held before yet another judge, and again Burgener's motion was denied and he was sentenced to death.¹³¹ Thirty-four years after

123. Only defendants Bonillas and Rodriguez had their death sentences finally set aside.

124. *People v. Burgener*, 714 P.2d 1251 (Cal. 1986).

125. *People v. Burgener*, 272 Cal.Rptr. 830, 833 (Ct. App. 1990).

126. *Id.* at 834.

127. *People v. Burgener*, 62 P.3d 1, 14 (Cal. 2003).

128. *Id.* at 43.

129. *People v. Burgener*, 206 P.3d 420, 424 (Cal. 2009).

130. *Id.* at 428–30.

131. See Appellant's Opening Brief, *People v. Burgener*, 2012 Cal. LEXIS 1177 (2012) (No. S179181), 2012 WL 1365087, at *3.

Burgener was first sentenced to death, his fourth automatic appeal is currently pending before the California Supreme Court.

Apart from its review under § 190.4(e), the California Supreme Court has recognized that the Eighth Amendment requires the court to engage in “proportionality review,” at least when the defendant requests such review.¹³² The court has held that this Eighth Amendment requirement is satisfied by review under the state constitution’s “cruel or unusual punishment” provision, Article I, Section 17.¹³³ The predecessor to this provision was first applied to invalidate a sentence in the 1972 case, *In re Lynch*.¹³⁴ The court there described the standard to be applied in the following terms: a punishment would constitute cruel or unusual punishment if it was “so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.”¹³⁵ The court then went on to hold unconstitutional a recidivist provision setting the punishment for second offense indecent exposure at one year to life in prison.¹³⁶ Although the court did recite the facts of the case, which indicated that the exposure may have been unintentional,¹³⁷ the holding—that the provision imposed a disproportionate punishment—was categorical, not case-based.

Over the next decade, *Lynch* was followed in a series of cases striking down excessive prison terms. In *In re Foss*¹³⁸ and *In re Grant*,¹³⁹ the court struck provisions holding recidivist narcotics offenders parole-ineligible for ten years. In *In re Rodriguez*,¹⁴⁰ the court ordered the release of a defendant who had served twenty-two years in prison for a brief, nonviolent act of child molestation, when it appeared that neither the circumstances of his offense nor his personal characteristics made him a danger to society. In *In re*

132. *People v. Wallace*, 189 P.3d 911, 958–59 (Cal. 2008).

133. *People v. Dykes*, 209 P.3d 1, 71–73 (Cal. 2009).

134. *In re Lynch*, 503 P.2d 921 (Cal. 1972).

135. *Id.* at 930.

136. *Id.* at 940.

137. *Id.* at 939–40.

138. *In re Foss*, 519 P.2d 1073 (Cal. 1974).

139. *In re Grant*, 553 P.2d 590 (Cal. 1976).

140. *In re Rodriguez*, 537 P.2d 384 (Cal. 1975).

Reed,¹⁴¹ the court struck the requirement that persons convicted of misdemeanor public lewdness must register with the police as sex offenders. In all four cases, the court applied the *Lynch* “shock the conscience” test.¹⁴² Meanwhile, in a case under the 1977 death penalty law, the court stated that *Lynch* would govern its proportionality review of death sentences, and the court described its review under *Lynch* as requiring examination of “the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society” and comparison with other crimes punished less severely in this state and with punishments in other states all “to assure that justice is dispensed in a reasonably evenhanded manner.”¹⁴³

*People v. Dillon*¹⁴⁴ was the high water mark of the court’s Article 1, Section 17 jurisprudence. In *Dillon*, the defendant, a 17-year-old high school student, was convicted of first-degree murder on the following facts. Dillon and a friend decided to steal marijuana that grew on a secluded farm run by the victim, Johnson, and his brother. Dillon made two scouting trips to the farm, during one of which, Johnson appeared with a shotgun and ran him off. Dillon and a friend then recruited six other classmates to go to the farm to rob Johnson of his marijuana. Dillon was armed with a semi-automatic rifle, and several of the others were armed with shotguns or other weapons. The group split up and approached the marijuana field from different directions. Dillon saw Johnson coming up a trail toward him with a shotgun. When Johnson drew near, Dillon began firing at him, hitting him nine times and killing him. The majority, after citing to *Lynch* and the “shocks the conscience” standard,¹⁴⁵ held that the punishment for first-degree murder (twenty-five years to life) was disproportionate to Dillon’s culpability. According to the court, Dillon was immature and

141. In re *Reed*, 663 P.2d 216 (Cal. 1983). The case was later overruled on the ground the registration requirement was not “punishment.” In re *Alva*, 92 P.3d 311, 334 (2004).

142. The court also cited the provision in two other cases where it granted relief to a defendant, but the court’s decisions appear to be grounded in due process rather than cruel or unusual punishment. See *People v. Feagley*, 535 P.2d 373 (Cal. 1975); *People v. Schueren*, 516 P.2d 833 (1973).

143. *People v. Frierson*, 599 P.2d 587, 611–12 (Cal., 1979).

144. *People v. Dillon*, 668 P.2d 697 (Cal. 1983).

145. *Id.* at 719–20.

had no prior record, and he killed in a “suddenly developing situation” when he thought his life was in danger.¹⁴⁶ In support of its finding that Dillon’s punishment was excessive, the court emphasized that none of Dillon’s companions (who could have been prosecuted for first degree murder as accomplices to the attempted robbery) were convicted of any homicide or sent to state prison for any crime.¹⁴⁷

As was true at the time of the *Pulley* case, review under Article 1 Section 17 does not include comparative proportionality review.¹⁴⁸ The California Supreme Court has never fully explained its refusal to engage in comparative proportionality review under the 1978 law. When it first considered the issue under the 1977 death penalty law, it was in the context of an Eighth Amendment challenge to the statute based on its lack of an express requirement for such review.¹⁴⁹ The court noted that the legislature, in framing the law, had rejected a proposal to require such review, and then held (as the United States Supreme Court would later hold in *Pulley*) that comparative proportionality review was not constitutionally required.¹⁵⁰ The court described its review under *Lynch* as satisfying “minimum federal constitutional standards.”¹⁵¹ Subsequently, when the issue has been raised under the much broader 1978 death penalty law (which had no comparable legislative history), the court has reiterated its holding regarding the 1977 law and disposed of the issue with the statement that comparative proportionality review is not constitutionally required.¹⁵² For example, in *People v. Turner*,¹⁵³ the defendant, who was sentenced to death in a single-victim, robbery-murder case, where his testimony and some circumstantial evidence suggested that he stabbed the victim after being attacked and not for the purpose of theft, challenged the proportionality of his sentence. To support his challenge, the defendant presented “an elaborate survey of published Court of Appeal decisions to demonstrate the

146. *Id.* at 726–27.

147. *Id.* at 727.

148. *See, e.g.*, *People v. Pollock*, 89 P.3d 353, 380 (Cal. 2004).

149. *People v. Frierson*, 599 P.2d 587, 610–12 (Cal. 1979).

150. *Id.*

151. *Id.* at 612.

152. *See, e.g.*, *People v. Moore*, 247 P.3d 515, 539 (Cal. 2011); *People v. Snow*, 65 P.3d 749, 800 (Cal. 2003).

153. *People v. Turner*, 789 P.2d 887 (Cal. 1990).

hypothesis that many first degree murderers of equal or greater culpability have received sentences less than death.”¹⁵⁴ However, although the California Supreme Court could have considered the survey and thereby engaged in comparative proportionality review—just as courts in other death penalty states have adopted comparative proportionality review, although not required to by the Eighth Amendment or state statute¹⁵⁵—the court chose to ignore the survey, stating “[c]omparative proportionality review is not constitutionally required, and we have consistently declined to undertake it.”¹⁵⁶

The California Supreme Court’s position on *intracase* comparative proportionality review has not been quite so clear. In *Dillon*, the court relied heavily, in its proportionality analysis, on the disparate punishments that Dillon’s co-defendants received (terming them “petty chastisements”).¹⁵⁷ In the death penalty context, however, the court has stated consistently, and without explanation, that it will not engage in such review.

Although . . . proportionality analysis takes into account the defendant’s relative responsibility for the crime as compared to others who were involved, the disposition of codefendants’ cases is not part of the analysis.¹⁵⁸

Justice Mosk, the author of *Lynch* and *Dillon*, repeatedly dissented from this rule,¹⁵⁹ and the court seems not always to have applied it. For example, in *People v. Ochoa*,¹⁶⁰ the court

154. *Id.* at 916.

155. *See, e.g.*, *Pulley v. Harris*, 465 U.S. 37, 44 (1984) (describing review by Florida Supreme Court); *People v. Blackwell*, 665 N.E.2d 782, 792–93 (Ill. 1996); *State v. Lafferty*, 20 P.3d 342, 374 (Utah, 2001).

156. *People v. Turner*, 789 P.2d 887, 916 (Cal. 1990). The court then went on to find the death penalty not disproportionate because of the manner of the killing, “a savage, sustained, and murderous knife assault.”

157. *People v. Dillon*, 668 P.2d 697, 727 (Cal. 1983).

158. *People v. Ledesma*, 140 P.3d 657, 732–33 (Cal. 2006). Accord *People v. Hill*, 839 P.2d 984, 1016 (Cal. 1992) (“Properly understood, intracase proportionality review is ‘an examination of whether defendant’s death sentence is proportionate to his *individual* culpability, irrespective of the punishment imposed on others.’”) (quoting *People v. Adcox*, 763 P.2d 906, 944 (1988) (*italics in original*)).

159. *See People v. Beardslee*, 806 P.2d 1311, 1341 (Cal. 1991) (Mosk, J., concurring and dissenting); *People v. Carrera*, 777 P.2d 121, 156 (Cal. 1989) (Mosk, J., concurring); *People v. Adcox*, 763 P.2d 906, 947 (Cal. 1988) (Mosk, J. concurring and dissenting).

160. *People v. Ochoa*, 28 P.3d 78, 111–12 (Cal. 2001).

stated that, given the role he played in two murders, the defendant's death sentence was not disproportionate to the sentences received by his accomplices, and in *People v. Sanders*¹⁶¹ the court, in its proportionality analysis, compared the role played by Sanders with that of his life-sentenced co-defendant.¹⁶²

The court's refusal to consider the outcome of a co-defendant's case in its proportionality analysis also extends to a refusal to consider the factual theory and evidence presented by the prosecutor at the co-defendant's trial.¹⁶³ For example, in *People v. Allison*,¹⁶⁴ Allison and Bonner were charged with a break-in robbery-murder, and the prosecutor sought the death penalty against both. Bonner was tried first, and the prosecutor's theory was that Bonner and Allison had both entered the victim's apartment and that Bonner had been the one to shoot the victim. In support of this version of the facts, the prosecutor called a jailhouse informant, who testified that Bonner confessed the entire crime to him, including that Bonner had shot the victim. And, in his closing argument, the prosecutor said: "What evidence did I ask you to consider in putting the gun in the hand of Samuel Bonner? His own words saying he did it. That is not circumstantial evidence. It is direct evidence and an admission of fact, if you believe it."¹⁶⁵ At Allison's trial, the informant's testimony was not introduced, and the prosecutor

161. *People v. Sanders*, 797 P.2d 561, 596 (Cal. 1990).

162. *Id.* ("[W]e observe that of the two assailants, defendant was the one with the motive to silence [the victims]; he—and not Cebreros [the co-defendant]—was the one armed with a firearm. On the state of the evidence he was as likely as Cebreros to have been the actual killer and the jury found, at least impliedly, that he acted with the intent to kill, and that he had committed five prior armed robberies. Thus, even were we disposed to find significance in the fact that Cebreros received a life sentence, we cannot conclude that defendant's death sentence is constitutionally suspect.")

163. In a number of cases, California prosecutors have used inconsistent theories in the separate trials of co-defendants charged with capital crimes, using the evidence and attempting to draw the inferences most damning to the particular defendant on trial at the time. See generally Steven F. Shatz & Lazuli M. Whitt, *The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose With the Courts and the Defendants*, 36 U.S.F. L. REV. 853 (2002).

164. *People v. Allison*, 771 P.2d 1294 (Cal. 1989).

165. Notice of Motion and Motion for Evidentiary Hearing; Memorandum of Points and Authorities at 23, *Allison v. Calderon*, No. CV 92-6404-CAS (C.D. Cal. June 23, 2000).

ridiculed Allison's defense that Bonner was the actual killer: "The evidence all points to Allison is the one going in [sic], and all the evidence that's reasonable and believable that you will look at shows Bonner drove the [getaway car] and was not the inside man."¹⁶⁶ In its proportionality review of Allison's death sentence, the court ignored entirely the prosecutor's theory and evidence at the Bonner trial and affirmed the death sentence, stating "[d]efendant was found to have personally committed an execution-style murder in the course of a planned robbery of the victim."¹⁶⁷

The California Supreme Court has a statutory obligation to review death penalty verdicts under § 190.4(e), and the court has recognized its obligation under the Eighth Amendment to conduct proportionality review of death sentences. However, the court has taken a narrow view of both obligations, arguably too narrow to meet the Supreme Court's "meaningful appellate review" standard.

III. THE CASE FOR COMPARATIVE PROPORTIONALITY REVIEW OF DEATH SENTENCES IN CALIFORNIA

When the Supreme Court suggested in *Pulley* that comparative proportionality review might be required if a state's death penalty scheme was lacking in "other checks on arbitrariness,"¹⁶⁸ the principal "other check" the Court presumably had in mind was the other *Furman* requirement: statutory narrowing of the death-eligible class. Indeed, the Court emphasized that California's scheme seemed to limit death sentences to "a small subclass of capital-eligible cases."¹⁶⁹ The California Supreme Court has repeatedly cited

166. Petitioner's Reply to Respondent's Opposition to Motion for Evidentiary Hearing and Opposition to Respondent's Motion for Partial Summary Judgment at 46, *Allison v. Woodford*, No. CV 92-6404-CAS (C.D. Cal. June 1, 2001) (alteration in original).

167. *People v. Allison*, 771 P.2d 1294, 1318 (Cal. 1989). The court adopted a similar approach in *Sanchez*. *People v. Sanchez*, 906 P.2d 1129 (Cal. 1995). Defendant Sanchez was convicted of three murders as an accomplice, and the court, in considering the proportionality of the death sentence, ignored the fact that the prosecutor, in her case against co-defendant Reyes, presented evidence that, as to two of the victims, it was Reyes who struck the blows that, at Sanchez's trial, she had attributed to Sanchez. *Id.* at 1183.

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

169. *Id.* at 53.

Pulley, not only for the proposition that comparative proportionality review is not constitutionally required, but also for the proposition that the present California scheme satisfies *Furman*'s narrowing requirement.¹⁷⁰ However, *Pulley* is no authority for either proposition for two reasons. First, the 1978 Death Law is far broader than the 1977 law at issue in *Pulley*,¹⁷¹ and the Supreme Court has never held that the 1978 law satisfies the statutory narrowing requirement.¹⁷² Second, the Court, in *Pulley* only assumed that the special circumstances "limit[ed] the death sentence to a small subclass,"¹⁷³ but acknowledged the possibility that additional evidence might be presented to show that the scheme did not comply with *Furman*.¹⁷⁴

A. An Overbroad Death Penalty Scheme

In the last twenty years, that additional evidence has been developed. Of course, the drafters of the Briggs Initiative (and presumably the voters who passed it) never intended to narrow the death-eligible class; rather, their intent, as expressed in the ballot proposition arguments, was to make the death penalty applicable to all murderers:

And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition

170. See, e.g., *People v. Jennings*, 237 P.3d 474, 500, 529 (Cal. 2010); *People v. Stanley*, 897 P.2d 481, 530 (Cal. 1995).

171. See Shatz & Rivkind, *supra*, note 15 at 1310–13.

172. In *Tuilaepa v. California*, 512 U.S. 967 (1994), a case challenging the Penal Code § 190.3 selection factors, Justice Blackmun observed that the Supreme Court had never given the California system "a clean bill of health":

[T]he Court's opinion says nothing about the constitutional adequacy of California's eligibility process, which subjects a defendant to the death penalty if he is convicted of first-degree murder and the jury finds the existence of one "special circumstance." By creating nearly 20 such special circumstances, California creates an extraordinarily large death pool. Because petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing.

Id. at 994 (Blackmun, J., dissenting).

173. *Pulley v. Harris*, 465 U.S. 37, 53 (1984).

174. *Id.* at 53–54.

7 [the Briggs Initiative] would.¹⁷⁵

The initiative came close to achieving its purpose. Various empirical studies, using different databases and covering different time periods have demonstrated—what is apparent from the law on its face—that the special circumstances of Penal Code § 190.2 so overlap the definition of first degree murder in Penal Code §§ 187–189 as to make the overwhelming majority of first degree murderers death-eligible. Three of the empirical studies were conducted by this author¹⁷⁶—a pilot study of appellate murder cases decided 1988–92 (“Appellate Study”),¹⁷⁷ a study of murder convictions over a twenty-three year period in a single county (“Alameda Study”),¹⁷⁸ and a statewide study of first-degree murder convictions during the period 2003–05 (“Statewide Study”).¹⁷⁹ All three studies used databases of defendants convicted of first-degree murder.¹⁸⁰ The data from the three

175. STATE OF CALIFORNIA, VOTER'S PAMPHLET 34 (1978). Under California law, ballot arguments constitute the legislative history used to interpret initiative measures. *See, e.g.*, Long Beach City Employees Ass'n v. City of Long Beach, 719 P.2d 660, 663 n.5 (Cal. 1986).

176. Data from these studies is available from the author. Where particular findings have been previously discussed, citations are provided.

177. *See* Shatz & Rivkind, *supra*, note 15.

178. *See* Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227 (2013).

179. The study refers, for convenience, to convictions during the period 2003–2005. In fact, the study covered convicted defendants *received* by the California Department of Corrections and Rehabilitation during the period 2003–2005. Thus, the study included a few defendants convicted in late 2002 and excluded a few defendants convicted in late 2005. The initial data for the Statewide Study consisted of pre-sentence reports (“PSR”s) obtained through discovery in *People v. Lewis*, No SCD 193558 (San Diego Co.). The PSRs were produced under a protective order prohibiting the disclosure of confidential information. Although it seems clear that the crime facts discussed in this Article should not be covered by the protective order, I have chosen not to identify cases by name or court number unless the crime facts appear in the public record, either in an appellate opinion or a newspaper account. Otherwise, I identify cases by their number in the study. Researchers interested in obtaining additional data from the study may do so by agreeing to comply with the terms of the protective order. The study is discussed in Shatz & Shatz, *supra* note 17 at 64.

180. Juveniles convicted of first-degree murder are not death-eligible under both the Eighth Amendment (*Roper v. Simmons*, 543 U.S. 551 (2005)) and Penal Code § 190.5, and they are excluded from these calculations. The use of a data set limited to first degree murder cases is a more conservative approach than that taken by other researchers. *Compare* Marceau, Kamin & Foglia, *supra*, note 17 at 1070–71 (2013) (all murder convictions); Raymond Paternoster,

studies on the death-eligibility rates for adults convicted of first-degree murder and the death-sentence rate for those who were factually death-eligible is set out in the chart below:

	Data Set	Murder Dates	Death-eligibility Rate	Death-sentence Rate
Appellate Study	404 cases	Generally 1980s	87.0% ¹⁸¹	11.4% ¹⁸²
Alameda Study	473 cases	Generally 1980s, 1990s	87.0%	12.8% ¹⁸³
Statewide Study	1300 cases	Generally 2000s	84.5%	5.5% ¹⁸⁴

The largest ever study of death sentence rates in California was that completed in 2010 by David Baldus and his colleagues.¹⁸⁵ The study included all non-negligent homicide convictions for the period 1978–2002—27,453 cases in all—analyzed by means of a stratified sample of 1900 cases.¹⁸⁶ The study found a death-eligibility rate of 95% under the then current (2008) law:¹⁸⁷ “[T]he rate of death eligibility among California homicide cases is the highest in the nation by every measure. This result is a product of the number and breadth of special circumstances under California law.”¹⁸⁸ The study found a death-sentence rate among statutorily death-eligible defendants of 4.6%, “among the lowest in the nation and over two-thirds lower than the

Robert Brame, Sarah Bacon & Andrew Ditchfield, *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 MARGINS 1, 15 (2004) (all first- and second-degree murders); Baldus et al., note 2 at 90 (all non-negligent homicides).

181. Shatz & Rivkind, *supra*, note 15 at 1331.

182. *Id.* at 1332.

183. Shatz & Dalton, *supra*, note 178 at 1259.

184. In 510 of the 1,000 cases where the defendant was factually death-eligible, a special circumstance was found or admitted. Thus, the death-sentence rate for those as to whom all findings necessary for a death sentence had been made was 10.8%.

185. Declaration of David C. Baldus at 2, *Ashmus v. Wong* (N.D. Cal. Nov. 18, 2010) (No. C 93-0594 THE) [hereinafter “Baldus Declaration”].

186. *Id.*

187. *Id.* at 13.

188. *Id.* at 35.

death sentencing rate in pre-*Furman* Georgia.”¹⁸⁹ Taking all the studies together, it seems clear that the death sentence rate under the current California death penalty scheme has never produced a statewide death-sentence rate even approaching the 15–20% death-sentence rate produced by the schemes held unconstitutional in *Furman*.¹⁹⁰

In *Furman*, the overall death-sentence rate was sufficiently low that the majority justices were willing to assume that the results would be arbitrary and to reject Georgia’s contention that the infrequent use of the death penalty represented “informed selectivity.”¹⁹¹ The same assumption might be made based on the even less frequent use of the death penalty by California, but it may be useful to further unpack the data. Looking at the data and comparing various kinds of murder will (to borrow Justice Blackmun’s phrase) necessarily involve the “distasteful and absurd . . . project of parsing this lexicon of death.”¹⁹² However, there is no way to talk about whether a particular scheme reserves the death penalty for the defendants who have committed “‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution’”¹⁹³—the “worst of the worst”¹⁹⁴—without

189. *Id.* at 36.

190. *Id.* at 27. In a recent and provocative law review article arguing against challenging state death penalty schemes on *Furman* “failure-to-narrow” grounds, Professor Robert Smith asserts that arbitrariness and discrimination “are less of a blatant problem today than when the Court decided *Furman*” and states that “today, roughly 11% of offenders convicted of first-degree murder in California receive the death penalty.” Robert J. Smith, *Forgetting Furman*, 100 IOWA L. REV. 1149, 1160, 1169 (2015). The source of Smith’s 11% figure is unclear, but the figure is wrong. The percentage of defendants convicted of first-degree murder who are sentenced to death has never been that high, and today, as measured by the Statewide Study, the figure today would be 4.2%. In fact, the death-sentence rate for *death-eligible* defendants convicted of first degree murder is only 5.5%, far below the estimated 15% death-sentence rate in California at the time of *Furman*. See Petitioner’s Brief at 4f-5f, *Aikens v. California*, 406 U.S. 813 (1972) (No. 68-5027) (Citing estimate of former Director of California Department of Corrections and statistics from 1967 and 1969). In short, contrary to Smith’s assertion, arbitrariness, as measured by the death sentence rate, is a far greater problem in California today than it was pre-*Furman*.

191. *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring).

192. *Arave v. Creech*, 507 U.S. 463, 489 (1993) (Blackmun, J., dissenting).

193. *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

194. *Glossip v. Gross*, 135 S.Ct. 2726, 2760 (2015) (Breyer, J., dissenting)

discussing the facts of various murder cases.

What all three California studies by this author demonstrate is that Justice Stewart overstated his case when, in *Furman*, he analogized the imposition of the death penalty to being struck by lightning¹⁹⁵—death sentences are not imposed in an altogether random fashion. Certain kinds of death-eligible murder cases result in a much higher percentage of death sentences than others.¹⁹⁶ The three studies generated consistent findings about which types of murders were considered most egregious, most “death-worthy.” Because the Statewide Study was both much larger and more recent than the other studies, and because, unlike the two earlier studies, most of the murders occurred under the broadest (post-2000) version of the California death penalty scheme, the following findings are taken from that study. In the Statewide Study, the kind of murder cases most likely to end in a death sentence were murders accompanied by sexual assault, referred to here as “rape-murders.”¹⁹⁷ In rape-murder cases, the death-sentence rate was 35.3%. The kind of murder cases next most likely to result in a death sentence were cases involving more than one murder, *i.e.*, the defendant was convicted of two or more murders in the instant proceeding or had previously been convicted of murder (“multiple murder” cases).¹⁹⁸ The death-sentence rate for multiple murder cases was 16.6%.¹⁹⁹ In all other cases—

(quoting *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting)).

195. *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

196. The studies, unlike the Baldus Georgia study, or his later study of the New Jersey death penalty, did not attempt to identify the various factors beyond circumstances of the crime that might have affected death sentencing. See David Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences*, 26 SETON HALL L. REV. 1582 (1996).

197. Reflected in the special circumstances for rape, forcible sodomy, lewd and lascivious acts upon a child, forcible oral copulation and rape by instrument. CAL. PENAL CODE § 190.2(a)(17)(C), (D), (E), (F), (K).

198. Reflected in the special circumstances for prior murder conviction or multiple murder convictions. CAL. PENAL CODE § 190.2(a)(2), (3).

199. One much smaller category, the killing of particular victims—police officers, public officials, witnesses—did result in a higher death sentence rate, 22.9%, but the category is too small (35 cases, almost half of which overlapped the other two “aggravated” categories) to generate meaningful statistics. This category included eight police officer first degree murders, four resulting in a death sentence.

single-murder cases not involving sexual assault—the death-sentence rate was 1.6%. A substantial majority of these other cases fell within one or the other (or sometimes both) of two categories: theft-related felony-murders (robbery, carjacking burglary for purposes of theft), referred to here as “robbery-murders” and intentional murders committed for the benefit of a criminal street gang (“gang-murder” cases). The death sentence rate for cases in these two categories (where there was no other potentially more aggravating factor, *e.g.*, murder of a peace officer, murder for financial gain, murder during a non-theft felony, torture murder²⁰⁰) was 1.6% for robbery-murder and 0.0% for gang-murder. The data is set out in the chart below:

	TOTAL CASES	DEATH SENTENCE	DEATH SENTENCE RATE
MULTIPLE MURDER	157	26	16.6%
RAPE-MURDER	51	18	35.3%
ROBBERY-MURDER (1 vict.)	251	4	1.6%
GANG-MURDER (1 vict.)	279	1	0.0%

At 35.3%, the death-sentence rate for rape-murders is high enough that, were the California death penalty scheme limited to such murders, one might conclude that the scheme met *Furman*'s narrowing requirement because a “substantial portion” of those made death-eligible were being sentenced to death. Of course, the scheme is not so limited, and rape-murders account for less than a third (18/55) of the death sentences in the study.²⁰¹ Does the fact that eighteen rape-murderers were sentenced to death and thirty-three were not demonstrate “informed selectivity” on the part of the prosecutors and juries? Given the number of factors, legitimate and illegitimate, that might go into death-charging

200. Two statutory aggravating factors, lying in wait and shooting from a vehicle, which frequently occur with gang-murders and rarely result in death sentences, are not considered aggravating for these purposes.

201. The percentages in the earlier studies were: Appellate Study – 22.3%; Alameda Study – 20.4%.

and death-sentencing decisions, the question cannot be answered from the study data, but the facts as to some of the rape-murders that did *not* result in a death sentence might suggest arbitrariness. Two defendants not sentenced to death each raped and killed more than once.²⁰² One of these defendants admitted to having raped and killed two women, sodomized and killed two men, after torturing the victims, yet he was allowed to avoid the death penalty by pleading guilty.²⁰³ Four other defendants not sentenced to death were found to have tortured their victims in addition to sexually assaulting them.²⁰⁴

Unlike the much higher death-sentence rate for rape-murders, the 16.6% death-sentence rate for multiple murders falls within the range where the justices in the *Furman* majority would have characterized the death sentence as sufficiently infrequent so as to create a presumption of arbitrariness. Is there any non-arbitrary explanation for why twenty-six defendants convicted of multiple murders were sentenced to death while 131 were not? A majority (14/26) of those sentenced to death killed more than two victims, and, of the remainder, one tortured and sexually assaulted his victims²⁰⁵ and one killed a witness.²⁰⁶ However, seventeen defendants found guilty of committing three or more murders were *not* sentenced to death, and among the defendants who killed two victims and were not sentenced to death were the

202. *People v. Dixon*, No. SCD 160171 (San Diego Co.) (see Onell R. Soto, *Killer Sentenced to Four Consecutive Life Terms* SAN DIEGO UNION-TRIBUNE, 2003 WLNR 16801986 (Mar. 15, 2003)); *People v. Douglas*, No. C-54321 (Orange Co.) (see *Douglas v. Woodford*, 316 F.3d 1079 (9th Cir. 2003)).

203. *Dixon*, *supra* note 202.

204. *People v. Alcazar*, No. SCN-116325 (San Diego Co.) (see *People v. Alcazar*, 2005 WL 236533 (Ct. App. 2005)) *People v. McIntosh*, No. NCR54957 (see *People v. McIntosh*, 2004 WL 2677198 (Ct. App. 2004)); *People v. Wigley*, No. CRF02-9762 (Del Norte Co.) (see *People v. Wigley*, 2007 WL 4171631 (Ct. App. 2007)); Case #1188. The fact that some (or many) egregious murders are not punished with death does not, in itself, prove arbitrariness, but describing those murders gives reassurance that the arbitrariness shown in the studies is not simply a statistical construct. Justice Breyer used just this form of argument in his dissent in *Glossip v. Gross*, 135 S.Ct. 2726, 2763 (2015) (Breyer, J., dissenting).

205. *People v. Erskine*, No. SCD161640 (San Diego Co.) (see J. Harry Jones, *The Long and Costly Trail Leading to Erskine's Conviction in Slayings*, SAN DIEGO TRIBUNE, 2004 WLNR 17010302 (Aug. 29, 2004).

206. *People v. Mendez*, No. RIF090811 (Riverside Co.) (see *People v. Rodriguez*, 2011 WL 1885327 (Ct. App. 2011)).

two defendants mentioned above who sexually assaulted their victims, seven defendants who tortured or kidnapped their victims and numerous defendants who were guilty of theft-related felonies.

At the other end of the spectrum of death-eligible murders are robbery-murders and gang-murders. These were, by far, the most common of the death-eligible murders: 36.5% of the death-eligible cases involved a robbery-murder; and 33.9% a gang-murder.²⁰⁷ (Fifty-seven cases involved both.) These are commonplace murders. Absent some more aggravating factor, individually, or in combination, they rarely resulted in a death sentence. Where death sentences are virtually never imposed for certain kinds of murder cases, the imposition of a death sentence in such a case penalty is arbitrary and should be unconstitutional.²⁰⁸

B. The Absence of Checks on Arbitrariness in the Trial Court

California's overbroad definition of death eligibility is not mitigated by checks against arbitrariness elsewhere in the scheme. Prosecutors have unfettered discretion in their decisions to seek the death penalty in capital murder cases.²⁰⁹ That discretion is so jealously guarded that, when the Commission attempted to survey District Attorneys concerning the process by which their offices decided to seek the death penalty, the majority refused to respond.²¹⁰ Since California is not a "weighing" state, one in which "the only aggravating factors permitted to be considered by the sentencer [are] the specified eligibility factors,"²¹¹ the special circumstance(s) found at the guilt phase are just one of eleven factors the jury is instructed to consider in the penalty decision. The other ten factors, particularly the

207. When not committed in the course of a theft-related felony, gang-murders often implicated two other special circumstances: lying in wait (CAL. PENAL CODE § 190.2(a)(15)) or "drive-by" shooting (CAL. PENAL CODE § 190.2(a)(21)).

208. See *Gregg v. Georgia*, 428 U.S. 153, 205–06. (1976) (plurality opinion) (citing with approval the Georgia's Supreme Court's understanding of the law).

209. *People v. Ramirez*, 139 P.3d 64, 117 (Cal. 2006); *People v. Gray*, 118 P.3d 496, 543 (Cal. 2005).

210. Commission Report, *supra* note 115 at 152.

211. *Brown v. Sanders*, 546 U.S. 212, 217–22 (2006).

“circumstances of the crime” factor,²¹² give the prosecutor broad discretion to introduce and argue aggravating evidence.

The wide-open nature of the penalty phase is perhaps best illustrated by California prosecutors’ use of “victim impact” videos. In 1991, in *Payne v. Tennessee*,²¹³ the Supreme Court reversed recent precedents²¹⁴ and held that the Eighth Amendment did not bar the introduction of “victim impact” evidence during the penalty phase of a capital trial. Accordingly, the state could permit the prosecutor to introduce evidence about the victim—a “quick glimpse” of the victim’s life²¹⁵—and about the impact of the murder on the victim’s family.²¹⁶ In the twenty-four years since *Payne*, the Supreme Court has not revisited the issue of victim impact evidence, but the California Supreme Court has relied on *Payne* to admit, as a circumstance of the crime,²¹⁷ professionally made videos, with soundtracks and music, documenting the victim’s life. For example, in *People v. Kelly*,²¹⁸ a case where the defendant was convicted of the rape, robbery and murder of a nineteen-year-old woman, the court found no error in admitting a video later described by Justice Stevens as follows:

The prosecution played a 20-minute video consisting of a montage of still photographs and video footage documenting [the victim’s] life from her infancy until shortly before she was killed. The video was narrated by the victim’s mother with soft music playing in the background, and it showed scenes of her swimming, horseback riding, and attending school and social functions with her family and friends. The video ended with a view of her grave marker and footage of people riding horseback in Alberta, Canada—the “‘kind of heaven’” in which her mother said she belonged.²¹⁹

212. CAL. PENAL CODE § 190.3(a).

213. *Payne v. Tennessee*, 501 U.S. 808 (1991).

214. See *Booth v. Maryland*, 482 U.S. 496 (1987); *South Carolina v. Gathers*, 490 U.S. 805 (1989).

215. *Payne*, 501 U.S. at 822; See also *id.* at 830 (O’Connor, J., concurring).

216. *Id.* at 827.

217. *People v. Edwards*, 819 P.2d 436, 465–67 (Cal. 1991).

218. *People v. Kelly*, 171 P.3d 548 (Cal. 2007).

219. *Kelly v. California*, 555 U.S. 1020 (2008) (Stevens, J., statement respecting the denial of the petitions for writs of certiorari). The full video is available online. See Videotape, *Kelly v. California Video*, SUPREMECOURT.GOV (2008), http://www.supremecourt.gov/opinions/video/kelly_v_california.aspx.

One might reasonably ask what the victim's childhood activities, a staged scene at her grave, a Canadian horseman or the videographer's choice of "soft music" have to do with whether the defendant should be sentenced to death, but the California Supreme Court found no error in its admission.²²⁰ Justice Moreno, writing for himself alone, would have held that the admission of the video was error:

[T]his videotape . . . contained video footage and not merely still photographs, was accompanied by evocative music more appropriate to a memorial service, and concluded on a frankly religious note.

. . . [T]he punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." The videotape in the present case is akin to a eulogy, and should therefore not have been admitted as victim impact evidence.²²¹

Kelly is by no means an isolated case. The California Supreme Court has found no error in the presentation of victim impact videos to the sentencing jury in at least eleven other cases.²²² None of the other current death penalty states

220. *People v. Kelly*, 171 P.3d 548, 572 (Cal. 2007).

221. *Id.* at 576 (Moreno, J., concurring) (quoting *Salazar v. State*, 90 S.W.3d 330, 335–36 (Tex. 2002)).

222. See *People v. Montes*, 320 P.3d 729, 787–88 (Cal. 2014) (10½ minute video with 115 photos and a musical soundtrack, edited after objections in trial court); *People v. Garcia*, 258 P.3d 751, 783–84 (2011) (12-minute video of victim as a young boy, his wedding, asleep with a sleeping puppy, accompanied by music, lyrics, echo effects and voiceovers and a staged visit to the gravesite by the victim's wife and child); *People v. Vines*, 251 P.3d 943, 985–86 (Cal. 2011) (5-minute video of victim singing and dancing); *People v. Booker*, 245 P.3d 366, 405–06 (Cal. 2011) (three videos of photographs of victims totaling 16 minutes); *People v. Brady*, 236 P.3d 312, 337–39 (2010) (4-minute video of police officer victim at Christmas and 6-minute video of victim's memorial and funeral services, including flag-draped casket in church, attendance by 4,000 uniformed police officers and other mourners, motorcade that stretched for miles, and bagpipe procession to gravesite); *People v. Mills*, 226 P.3d 276 (Cal. 2010) (video of victim's boyfriend when he was told of victim's murder); *People v. Bramit*, 210 P.3d 1171, 1187 (2009) (video montage of 20 still photographs less than three minutes long); *People v. Dykes*, 209 P.3d 1, 45–48 (2009) (8-minute video of victim and his family preparing for, and going on a trip to Disneyland); *People v. Zamudio*, 181 P.3d 105, 134–37 (Cal. 2008) (14-minute video containing 118 photos spanning lives of elderly couple from birth to grave, including close-ups of grave markers with inscriptions); *People v. Prince*, 156 P.3d 1015, 1038,

has carried the practice to the extreme reached in California. In fact, it seems that the California Supreme Court has approved the admission of victim impact videos in more death penalty cases than have the courts of the rest of those states combined,²²³ and the court has never set aside a death sentence on a finding that a victim impact video—or any other evidence offered by the prosecution under the “circumstances of the crime” aggravator—was improperly admitted.

Finally, there is no check on arbitrariness at the jury’s selection decision. As set out above,²²⁴ after hearing the penalty phase evidence, the jurors are instructed to consider a list of eleven factors in making their decision and to determine “which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances.” They are not told which factors are aggravating and which are mitigating, and studies suggest many probably do not understand the terms and how to use the factors.²²⁵ The prosecutor has no burden of proof with regard to the existence of aggravating circumstances (except for evidence of other crimes), the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence.²²⁶ The jurors are not required to agree on the aggravating or mitigating circumstances, and they do not have to make findings in support of, or otherwise explain, their penalty

1091–94 (2007) (25-minute television interview with victim); *People v. Lewis*, 140 P.3d 775, 839–40 (2006) (brief video of victims in church).

223. There appear to be only eight cases from the other thirty death penalty states where the court has approved the introduction of a victim impact video before a jury at the penalty phase. See *State v. Nelson*, 273 P.3d 632, 642 (Ariz. 2012); *Hicks v. State*, 940 S.W.2d 855, 855–57 (Ark. 1997); *Tollette v. State*, 621 S.E.2d 742, 748 (Ga. 2005); *State v. Leon*, 132 P.3d 462, 464–67 (Ida. 2006); *State v. Holmes*, 5 So.3d 42, 73–75 (La. 2008); *State v. Gray*, 887 S.W.2d 369, 389 (Mo. 1994); *State v. Addison*, 87 A.3d 1, 110–14 (N.H. 2014); *State v. Bixby*, 698 S.E.2d 572, 586–87 (S.C. 2010).

224. *Supra*, text accompanying notes 100–04.

225. See Craig Haney and Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California’s Capital Penalty Instructions*, 18 LAW AND HUM. BEHAV. 411, 420 (1994); Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 LAW AND HUM. BEHAV. 575, 577–79 (1997).

226. *People v. Barnwell*, 162 P.3d 596, 609–10 (Cal. 2007).

decision.²²⁷

C. *Arbitrary Death Sentences*

Given the absence of checks on arbitrariness in the California scheme, it would not be surprising if the scheme produced arbitrary results, and a number of empirical studies have found that to be the case. In turn, the fact of arbitrary outcomes tends to prove that the scheme is not designed in a way to generate consistent results. The outcomes reveal significant racial disparities. In their study of death sentences during the period 1990–99, Glenn Pierce and Michael Radelet found “glaring differences in the rate of death sentences across categories of victim race/ethnicity.”²²⁸ The Alameda Study found statistically significant evidence of intra-county “race of neighborhood” disparities in death charging and death sentencing.²²⁹ In brief, in Alameda County, a substantial majority of whites (68%) live in the southern half of the county, and the overwhelming majority of African-Americans (84%) live in the northern half. The study found: that the District Attorney was almost two-and-a-half times more likely to seek death, and more than three-and-a-half times more likely to obtain a death verdict, when the killing(s) occurred in the southern half of the county; and that this disparity could not be explained by the nature of the crime or the gender of the victim (two common explanatory factors).²³⁰

In the Statewide Study, there were substantial, and otherwise unexplained, gender disparities.²³¹ Although there were both gender-of-defendant disparities and gender-of-victim disparities, the gender-of-victim disparities were dramatic. In single-victim cases, factually death-eligible defendants convicted of killing women were more than seven times as likely to be sentenced to death as factually death-eligible defendants who killed men.²³² Pierce and Radelet

227. *People v. Solomon*, 234 P.3d 501, 539 (Cal. 2010).

228. Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999*, 46 SANTA CLARA L. REV. 1, 19 (2005).

229. See Shatz & Dalton, *supra* note 178 at 1260–63 (describing the study).

230. *Id.* at 1266–68.

231. See Shatz & Shatz, *supra* note 17 at 105–10.

232. *Id.* at 107. While more than half that disparity can be accounted for by

also found substantial geographic disparities in California. In their ten-year study, almost half the counties (28/58) had no death sentences whatsoever, and, in the counties with at least five death sentences, the ratio of death sentences per 100 homicides varied from .58 to 5.0.²³³ The Statewide Study found similar geographic disparities. Most of the counties (42/58) had no death sentences during the three-year period of the study. Of the nine counties with at least twenty defendants convicted of first-degree murder and death-eligible, the ratio of death sentences to death-eligible defendants ranged from .04 (Los Angeles) to more than .10 (Orange, Riverside, San Diego).

D. Arbitrary Executions

California's overbroad definition of death-eligibility and the absence of any checks on prosecutors' or jurors' discretion has led to an overproduction of death sentences, in turn causing the death penalty scheme to become dysfunctional. That point was made twenty years ago by Ninth Circuit Judge Alex Kozinski. Speaking primarily of the California experience, he said:

Increasing the number of crimes punishable by death, widening the circumstances under which death may be imposed, obtaining more guilty verdicts, and expanding the population of death rows will not do a single thing to accomplish the objective, namely to ensure that the very worst members of our society—those who, by their heinous and depraved conduct have relinquished all claim to human compassion—are put to death.²³⁴

A decade later, several witnesses before the Commission testified to the same effect, that “the primary reason that the California Death Penalty Law is dysfunctional is because it is too broad, and simply permits too many murder cases to be prosecuted as death penalty cases.”²³⁵ Gerald Kogan, former

the extraordinarily high death sentence rate for rape-murderers—almost sixteen times the death sentence rate for all other death-eligible murderers—when rape-murders were excluded, the death sentence rate in female victim cases remained more than three times the rate for male victim cases. *Id.* at 108.

233. Pierce & Radelet, *supra* note 228 at 27.

234. Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 29 (1995).

235. Commission Report, *supra* note 115 at 138.

Chief Justice of the Florida Supreme Court, told the Commission that the number of special circumstances in California was “unfathomable.”²³⁶ Four commissioners, in their separate statement explained the problem as follows:

One of the most significant findings in our Report is that the death penalty encompasses 87% of all first degree murders committed in this state. . . . There are now 670 condemned inmates on death row.²³⁷ On the average, we had 20 new death judgments entering the appellate system annually in the last eight years. We have an accumulated backlog in the Supreme Court of 180 fully briefed direct appeals and habeas cases awaiting decision, and the Court cannot process more than 30–40 of these cases a year. The sheer volume, statewide, is overwhelming the appellate system.²³⁸

The Commission found that the clogging of the Supreme Court docket and the inability, or unwillingness, of the state to commit sufficient resources to the processing of death penalty cases had resulted in excessive delay. The Commission found that the average time between sentence and execution for the thirteen defendants executed was 17.2 years,²³⁹ with delays growing worse every year.²⁴⁰ The Commission reported, “The delay between sentence and execution in California is the longest of any of the death penalty states.”²⁴¹ In 2008, Ronald M. George, then Chief Justice of the California Supreme Court labeled the California system as “dysfunctional,” a description adopted by the Commission.²⁴² The Commission made a number of recommendations for ending the excessive delay, but, seven years later, none has been adopted.

In 2014, Judge Carmac Carney, in *Jones v. Chappell*,²⁴³

236. Commission Report, *supra* note 115 at 138.

237. That was the number in 2007. As of April 4, 2015, the number was 754. California Department of Corrections and Rehabilitation, *Condemned Inmate Summary List*, available at: http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf.

238. Commission Report, *supra* note 115 at 177. (Separate Statement of Commissioners Jon Streeter, Kathleen (Cookie) Ridolfi, Michael Hersek, and Michael Laurence) (emphasis in the original).

239. Commission Report, *supra* note 115 at 122.

240. Commission Report, *supra* note 115 at 125.

241. Commission Report, *supra* note 115 at 125.

242. Commission Report, *supra* note 115 at 114–15.

243. *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014).

addressed a challenge to the California death penalty scheme based on the arbitrariness of executions. He found that, for those whose challenge to their death sentence was denied at every level, the review process was taking an average of twenty-five years and the delay was only getting longer.²⁴⁴ As a result, Judge Carney found that the overwhelming majority of death row inmates whose death sentences were affirmed were not executed, but died of natural causes or suicides.²⁴⁵ As Judge Carney explained,

Since 1978, when the current death penalty system was adopted by the California voters, over 900 people have been sentenced to death for their crimes. Of them, only 13 have been executed. For the rest, the dysfunctional administration of California's death penalty system has resulted, and will continue to result, in an inordinate and unpredictable period of delay preceding their actual execution. Indeed, for most, systemic delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death.*²⁴⁶

Judge Carney found that any executions under such a scheme would be arbitrary for two reasons. First, the few defendants who ultimately will be executed will not be chosen based on the nature of their crimes or their individual culpability, but on factors outside the inmate's control: the speed with which the case proceeds through the state's dysfunctional system and the inmate's age and state of health.²⁴⁷ Second, "[a]s for the random few for whom execution does become a reality, they will have languished for so long on Death Row that their

244. *Id.* at 1062.

245. *Id.* at 1054, 1062.

246. *Id.* at 1053 (emphasis in the original). The decision was reversed by the Ninth Circuit, without reaching the merits, on the ground that Jones's claim relied on a new rule of criminal procedure, and, therefore, was barred by *Teague v. Lane*, 489 U.S. 288 (1989). *Davis v. Jones*, 806 F.3d 538 (9th Cir. 2015). In his dissent in *Gossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2764–72 (2015), Justice Breyer discussed at length the "cruelty" of excessive delay and the constitutional questions raised as a result. Of course, he was talking about delay in execution on a national level, not the far longer delays produced by California's scheme.

247. *See id.* at 1062.

execution will serve no retributive or deterrent purpose . . .”²⁴⁸

* * *

Each of these aspects of the California death penalty scheme alone might be, and has been, the basis of Eighth Amendment challenges to the scheme, and, taken together, the various flaws constitute a powerful argument that California’s dysfunctional scheme is unconstitutional. However, the argument here is a more modest one, and one that was made by Justice Blackmun twenty years ago.²⁴⁹ The Supreme Court, in *Pulley* and later in *McCleskey*, left open the door to reexamining the holding in *Pulley* about the need for comparative proportionality review if presented with an extreme case. California is that extreme case. There is no “genuine narrowing” of the death-eligible class; there are no limits on the prosecutor in seeking death and few limits in presenting penalty-phase evidence; the jury is not required to make any findings as to aggravation and/or mitigation, nor is it instructed that any particular burden of proof that must be met for a death verdict; and meaningful review by the trial judge was all but abandoned more than two decades ago. The scheme produces arbitrary death sentences and—because of the excessive delays brought about by the overproduction of death sentences—arbitrary executions. In sum, the scheme is so devoid of checks on arbitrariness that comparative proportionality review should be constitutionally required.²⁵⁰

248. *Id.* at 1053. In his dissent in *Glossip v. Gross*, 135 S.Ct. 2726, 2764–72 (2015), Justice Breyer discussed at length the “cruelty” of excessive delay and the constitutional questions raised as a result. Of course he was talking about delay in executions on a national level, not the far longer delays produced by California’s scheme.

249. Speaking of the California death penalty scheme, he said: “As litigation exposes the failure of [the narrowing] factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris*. *Tuilaepa v. California*, 512 U.S. 967, 995 (1994) (Blackmun, J., dissenting).

250. Of course, comparative proportionality review is no panacea. Studies of comparative proportionality review in other states reveal that such review can be applied in a manner that is superficial and ineffectual. See William W. Berry III, *Ending the Death Lottery: A Case Study of Ohio’s Broken Proportionality Review*, 76 OHIO ST. L.J. 67 (2015); Bidish J. Sarma, Robert J. Smith & Ben G. Cohen, *Struck by Lightning: Walker v. Georgia and Louisiana’s Proportionality Review of Death Sentences*, 37 S.U.L. L. REV. 65 (2009); Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons from Washington State)*, 79 WASH. L. REV. 775 (2004).

IV. INDIVIDUAL PROPORTIONALITY REVIEW AND THE CALIFORNIA SUPREME COURT

When a court eschews comparative proportionality review and limits itself to individual proportionality review, as has the California Supreme Court, the risk is that the determination in any individual case will reflect nothing more than the untethered subjective views of the justices as to the heinousness of the crime or the weight of the mitigation. In that case, individual proportionality review will simply add another level of arbitrariness to the state's death penalty scheme. Section A addresses how the California Supreme Court might make individual proportionality review meaningful. Section B describes the actual practice of the court.

A. Meaningful Individual Proportionality Review

A court approaching individual proportionality review of course starts with a presumption that the death verdict rendered by the jury and approved by the trial judge is proportional. At the same time, the court must recognize that aberrant results are possible because the jury sat on a single case and had no reference point for its decision that the defendant was the “worst of the worst,” and most trial judges will have seen no more than a few death cases in the course of a career.²⁵¹

If individual proportionality review is to serve its purpose of reducing the risk of arbitrariness, the court cannot approach each case as an ad hoc decision. Rather, while each decision will ultimately turn on particular facts, the court can, and should, develop standards for its review. Of necessity, the court will focus primarily on the aggravating factors in the case, as studies have established that the statutory aggravating factors play the major role in a death sentencing decision.²⁵² The effect of mitigating evidence is, of

251. In California, the risk of an aberrant decision by a jury is increased by the fact of overbroad death-eligibility. When jurors find a special circumstance, making a defendant death-eligible, they may be misled into voting for death on the assumption that the voters, on behalf of the community, have already determined that the defendant before them is among the “worst of the worst.” They have no way of knowing that the voters have so labeled virtually all first degree murderers.

252. See, e.g., David C. Baldus, *et al.*, *Arbitrariness and Discrimination in*

its nature, less predictable, making it more difficult to develop standards for categorizing such evidence and judging its effect. One source for developing standards for individual proportionality review is the general understandings we share regarding the relative culpability of murderers. For example, we know that an intentional killing is “worse” than an unintentional killing.

Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.²⁵³

We also know that the actual killer is deemed to be “worse” than a non-killing accomplice.²⁵⁴ And, of course, it is “worse” to do more harm, so intentionally killing more than one person is “worse” than killing one person.

However, these general propositions will only take the California Supreme Court so far in developing standards for individual proportionality review. The challenge for the court will be to do what the voters failed to do in adopting and amending the Briggs Initiative: decide which types of first-degree murder are among “the worst of crimes,” for which the death penalty might be imposed,²⁵⁵ and which are not. On a national level, the current best thinking about what are the

the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999), 81 NEB. L. REV. 486, 548–49 (2002).

253. *Tison v. Arizona*, 481 U.S. 137, 156 (1987). See also *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008) (twice suggesting that the death penalty should be applied *only* in the case of intentional murders). These decisions call into question the constitutionality of the rule in California and four other states allowing the imposition of the death-penalty for felony-murder *simpliciter* (i.e., for what may be a negligent or even accidental killing). See Shatz, *supra* note 94 at 752–68 (arguing that the rule does not meet contemporary standards because so few states employ it and that imposing the death penalty on those who kill negligently or accidentally does not serve deterrence or retribution). At the very least, a California court reviewing a death sentence based on felony-murder *simpliciter* ought to weigh heavily against proportionality the prosecution’s failure to prove *mens rea*.

254. See *Green v. Georgia*, 442 U.S. 95, 97 (testimony about who shot the victim was “highly relevant to a critical issue in the punishment phase of the trial”). The one exception to this general rule might be for contract killings, where the party planning the killing and paying the money may be thought to be just as culpable as the actual killer. In the Statewide Study, the only defendant sentenced to death as an aider and abettor in a single victim case had hired a “hitman” to kill his fiancée for insurance money. Case #354.

255. *Kennedy v. Louisiana*, 554 U.S. 407, 457 (2008).

most aggravated types of murder might be reflected in the recent reports of three state commissions.²⁵⁶ The most ambitious set of reform recommendations is contained in the report of Massachusetts' Council on Capital Punishment, issued as a result of Governor Mitt Romney's call to reintroduce the death penalty in Massachusetts.²⁵⁷ The recommendations would have limited the death penalty to six types of premeditated murder, summarized as follows: (1) committed as an act political terrorism; (2) committed to interfere with the criminal justice system; (3) the defendant intentionally tortured the victim; (4) multiple murders; (5) prior first degree murder; (6) the defendant was under a sentence of life without possibility of parole.²⁵⁸ Prior to the abolition of the death penalty in Illinois, the Illinois Governor's Commission adopted the recommendations of the bi-partisan Constitution Project and recommended reducing the number of death-eligibility factors to five, summarized as follows: (1) murder of a peace officer or firefighter; (2) murder at a correctional institution; (3) multiple murder; (4) intentional murder with torture; (5) when the defendant is being investigated for, or has been charged with, a felony-murder, murder of anyone involved in the investigation or prosecution.²⁵⁹ Recently, the Ohio Joint Task Force issued a report with fifty-six recommendations for reform of the Ohio death penalty, among which was the recommendation to eliminate felony-murder as a basis for death-eligibility because:

[P]rosecutors and juries overwhelmingly do not find felony

256. See Joint Task Force to Review the Administration of Ohio's Death Penalty, *Final Report & Recommendations* (2014), available at <http://www.supremecourt.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf>; Symposium, *Toward a Model Death Penalty Code: The Massachusetts Governor's Council Report*, 80 IND. L.J. 1 (2005); *Report of the Governor's Commission on Capital Punishment (Illinois)* (2002), available at http://illinoismurderindictments.law.northwestern.edu/docs/Illinois_Moratorium_Commission_complete-report.pdf.

257. Symposium, *Toward a Model Death Penalty Code: The Massachusetts Governor's Council Report*, 80 IND. L.J. 1 (2005).

258. *Id.* at 4–6.

259. *Report of the Governor's Commission on Capital Punishment (Illinois)* 67–68 (2002), available at http://www.state.il.us/defender/report/complete_report.pdf. See The Constitution Project, *Mandatory Justice: The Death Penalty Revisited*, pp. xxiv–xxv (2001; 2005 Update), available at <http://www.constitutionproject.org/manage/file/30.pdf>.

murder to be the worst of the worst murders, further finding that such specifications result in death verdicts 7% of the time or less when charged as a death penalty case, and further finding that removal of these specifications will reduce the race disparity of the death penalty . . .”²⁶⁰

Legal scholars have also proposed lists of the most aggravated murders based on their empirical analysis of prosecutors’ and juries’ behaviors. David Baldus listed six types of murder as most aggravated: “multiple killings, defendants with prior murder convictions, contract killings, police victim cases, extreme torture, and sexual assaults with particular violence and terror.”²⁶¹ David McCord offered a list of nine “most aggravating factors”: additional murder, sexual assault, murder to revenge official acts, murder for insurance, etc. motive, torture, murder by a prisoner or escapee, murder in a penal institution, murder for hire, terrorist motive.²⁶² For a California court, what is most significant about all of these attempts to describe the most aggravated murders is that none of them include the two most commonly occurring types of death-eligible murders in California: robbery-murders and gang-murders. In fact, all of the proposals would eliminate felony-murder entirely as a basis for death-eligibility.

The California Supreme Court should also look to the California-specific empirical studies that reveal California prosecutors’ and jurors’ views about what kinds of murders are most death-worthy. Consideration of state-specific empirical evidence, of course, amounts to “comparative

260. Joint Task Force to Review the Administration of Ohio’s Death Penalty, *Final Report & Recommendations* 14 (2014), available at <http://www.supremecourt.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf>

261. David Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences*, 26 SETON HALL L. REV. 1582, 1605 (1996).

262. David McCord, *Lightning Still Strikes*, 71 BROOKLYN L. REV. 798, 834–35 (2005). Professor McCord analyzed 583 murder cases nationwide in 2004 (the middle year of the period covered by the Statewide Study) by means of an aggravation scale based on “depravity points.” It was this study that Justice Thomas cited disdainfully in the course of voicing his objections to the use of empirical evidence in the context of constitutional adjudication: “[T]he results of these studies are inherently unreliable because they purport to control for egregiousness by quantifying moral depravity in a process that is itself arbitrary, not to mention dehumanizing.” *Glossip v. Gross*, S.Ct. 2726, 2752 (2015) (Thomas, J., concurring).

proportionality review lite,” substituting for the court’s own review of all death-eligible cases the snapshots of sentencing taken by researchers. What the court would find in these studies is that the outcomes in California roughly mirror the opinions of the commissions and legal scholars as to “egregiousness,” except that California prosecutors and jurors rank rape-murder as among the most death-worthy types of murder. As set out above,²⁶³ the Statewide Study reveals that the two most aggravated types of death-eligible murders in California are: multiple murders (including prior murder by the defendant) and rape-murders, but with rape-murder seen as far more egregious.²⁶⁴ The two earlier California studies also show multiple-murder and rape-murder to be the most egregious types of murder, but with roughly equivalent death-sentence rates. Again, as noted above,²⁶⁵ the Statewide Study establishes that, at the other end of the scale, robbery-murder and gang-murder, far and away the most common types of death-eligible murders, are not considered to be egregious. In fact, the death-sentence rates for these two types of murder (robbery-murder 1.6%; gang-murder 0.0%) are so low as to create a presumption that any death sentence for such a murder is disproportionate.

Yet another source of information that might be highly relevant to the California Supreme Court’s individual proportionality review is the prosecutors’ and juries’ treatment of a defendant’s accomplices.²⁶⁶ The court’s refusal to engage in such comparative intracase proportionality review is both unexplained and inexplicable, particularly in light of the fact that the court engaged in just such comparative review in *Dillon*, the court’s leading case on proportionality review. The differential treatment of the defendant and his accomplices, especially when the accomplices are also convicted of first-degree murder on the same facts, might suggest that the prosecutor (if she did not

263. See *supra*, text accompanying notes 197–202.

264. Some other less frequently occurring types of murder, *e.g.* police officer killings, may also be considered highly aggravated, but the data is insufficient to confirm that hypothesis.

265. See *supra*, text accompanying notes 197–202.

266. The United States Supreme Court has assumed that evidence of such differential treatment is relevant mitigating evidence. See *Parker v. Dugger*, 498 U.S. at 315–16, 318.

seek death) or the jury (if they did not impose death) did not see the murder itself as among the “worse crimes.” Of course, there may be other explanations for the different treatment—for example, the roles played by the parties in committing the murder or their different character and records—but the court conducting a meaningful review should at least address the issue. The need to address the issue is especially strong when the prosecutor takes inconsistent positions in the separate trials of co-defendants. To return to the *Allison* case discussed earlier,²⁶⁷ the fact that the prosecutor himself, the person most familiar with the facts, did not know whether Allison was the principal in the killing (as he argued at Allison’s trial) or Bonner was the triggerman (as he had argued at Bonner’s trial), should weigh heavily in the court’s proportionality analysis.

Finally, the California Supreme Court, in its proportionality review, ought to consider what courts in many other states are expressly required to consider by statute: whether the particular death sentence might have been influenced by illegitimate factors.²⁶⁸ On a national level, numerous studies have found race, gender and geographic disparities in the administration of the death penalty, and these same disparities have been found in California.²⁶⁹ In cases consistent with such documented sentencing disparities, the court should acknowledge the existence of the disparities and explicitly address whether any illegitimate factors may have played a role in the prosecutor’s decision to charge death and the jury’s decision to impose it.

To illustrate how this approach might be applied, consider the death sentence cases from the Statewide Study. In thirty-eight of the fifty-five death sentence cases, the prosecution proved multiple murder or a rape-murder, the two most aggravating factors in California. Four other cases involved the murder of a peace officer, which might also be a highly aggravating factor.²⁷⁰ So, in forty-two of the fifty-five

267. See *supra*, text accompanying notes 164–67.

268. See, e.g., Ga. Code Ann., § 17-10-35(c)(1) (Supreme Court to determine whether death sentence “imposed under the influence of passion, prejudice, or any other arbitrary factor”); Miss. Code Ann. § 99-19-105(3)(a) (same); 42 Pa.C.S.A. § 9711(h)(3)(i).

269. See *supra* at Part III.C.

270. There were too few peace officer killings in the study to validate this

cases, the initial presumption in favor of proportionality is only confirmed by the facts of the murder(s). However, what of the other thirteen cases? Take two of the cases, one a robbery-murder case,²⁷¹ and the other a gang-murder case.²⁷²

In the robbery-murder case, the defendant (on parole from the Youth Authority) and a co-defendant, both nineteen-year-old African-American men with prior felony records, went to the apartment of two drug dealers they knew, seeking to acquire a gun. One of the dealers was not home, and the defendant and co-defendant decided to rob the other, a twenty-year-old woman. When she resisted, the two stabbed and strangled her and stole a gun, money and other items. Apparently the murder was unplanned because the two did not bring a weapon to the encounter. Given that, in the study, murders such as this one—unaggravated by additional homicide victims, sexual assault, torture or other non-theft felonies—resulted in a death sentence less than 1.6% of the time, there ought to be no presumption that this death sentence is proportional. In fact, consistent with *Furman*, there ought to be a strong presumption that the sentence is arbitrary. In *Furman*, Justice Brennan, speaking of a death sentence rate of 15–20%, said:

When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.²⁷³

If a death sentence rate of 15–20% smacks of a lottery system, what would Justice Brennan have said about a scheme that imposes the death penalty less than 2% of the time? The

assumption.

271. *People v. Winbush*, No. 128408B (Alameda Co.); *See People v. Patterson*, 2005 WL 2716538 (Ct. App. 2005).

272. *People v. Mataele*, No. 00NF347 (Orange Co.); *See People v. Lee*, 2008 WL 4527793 (Ct. App. 2008). Although the defendant was not made death-eligible on the basis of the gang-murder special circumstance (which was enacted in 2000, three years after the murder), the case was tried by the prosecution as a gang case, with testimony from a police gang expert that the murder and a contemporaneous attempted murder were for the benefit of a gang. The defendant was made death-eligible by the lying in wait special circumstance (CAL. PENAL CODE § 190.2(a)(15)), which, along with the “drive-by” shooting special circumstance (CAL. PENAL CODE § 190.2(a)(21)), are frequently proved in gang cases.

273. *Furman v. Georgia*, 408 U.S. 238, 295 (1972) (Brennan, J., concurring).

defendant did have a prior felony record as a juvenile, but that would not go far toward explaining the result because, in the study, more than half of the death-eligible defendants had a prior felony record. The reviewing court should also take into account that the co-defendant, who participated fully in the killing, whose subsequent armed robbery led to his arrest and that of the defendant, and who was found in possession of the robbery proceeds, was not sentenced to death. Finally, the court should consider the possibility that the death sentence was influenced by the defendant's and victim's race and gender, found to be powerful explanatory factors for death sentences in numerous empirical studies, beginning with the Baldus study in Georgia.²⁷⁴

The gang-murder case involved a falling out among thieves. The defendant and the murder victim were members of different street gangs, and they and other gang members from the two gangs had been working together committing various theft and drug crimes in Los Angeles County. As a result of the falling out, the defendant and at least three others decided to kill the victim and his roommate. The defendant and an accomplice lured the intended victims to a parking lot in Orange County where the other accomplices were waiting, and both the victim and roommate were shot, probably by the defendant. The victim died, and the roommate survived. Again, a meaningful proportionality analysis has to begin with an awareness of how rare a death sentence is for this kind of killing. In the study, this was the only gang killing of its kind where the defendant was sentenced to death.²⁷⁵ Was there anything extraordinary about this murder to distinguish this defendant from the 278 other defendants who committed similar first-degree murders for the benefit of a gang but were not sentenced to death? There were three factors that might be thought to be additional aggravation in this case: (1) the defendant had a felony record; (2) the murder was planned, rather than spontaneous; and (3) the defendant attempted to murder a second victim. As noted above, the defendant's felony record

274. See Shatz & Dalton, *supra* note 178 at 1246–53 (describing race and gender studies).

275. Six other defendants who committed gang-murders during this period were sentenced to death, but five of the six committed multiple murders, and the sixth killed a police officer to effect an escape.

does not distinguish this case from majority of cases in the study. Nor does the fact that the murder was planned. All gang-murders qualifying for the death penalty are intentional, and most are first-degree murders because they are premeditated.²⁷⁶ The fact of the additional attempted murder plainly is an aggravating factor, but not as aggravating as at first it might appear. In the study, there were thirty-one gang-murder cases where the defendants *actually* killed two victims, and only one was sentenced to death (3.2%). Again, as in the robbery-murder case, the court should also consider the outcomes for defendant's accomplices, all of whom were death-eligible: one was not convicted of murder; another entered a plea for a life sentence; and the third, a co-defendant at the defendant's trial, who was armed and who was a principal in at least the attempted murder, also received a life sentence. Finally, the court should consider a possible explanatory factor for this unique death sentence that has nothing to do with the circumstances of the crime or the character of the defendant. Although the sequence of events that led to the murder began in Los Angeles County, the murder took place in Orange County, a "high death" county. In the 1990s, the Orange County death sentence ratio (death sentences to homicides) was almost three times that of Los Angeles County,²⁷⁷ and, in the Statewide Study, the death sentence rate (death sentences per death-eligible defendants) was two-and-a-half times that of Los Angeles County.

The above discussion of these two cases is not an argument that the death sentences in these cases were disproportionate—the sentencing juries may have heard evidence indicating the crimes or the defendants were "worse" than might appear from the probation reports and appellate opinions. Rather, the point is to suggest what meaningful review might look like. It would start with the court acknowledging that robbery-murders and gang-murders are not thought to be aggravated murders, and, in California, the imposition of the death penalty for such murders is

276. The exception is for drive-by shootings—an intentional killing by discharging a firearm from a motor vehicle is first degree murder without proof of premeditation. CAL. PENAL CODE § 189

277. Pierce & Radelet, *supra* note 228 at 27.

exceedingly rare. The rarity of the death sentences should create a presumption that they are disproportionate, and the court would then examine the factors that might account for such an unusual result. This examination would involve consideration of why the prosecutor did not seek, or the jury did not impose, a death sentence on the defendant's accomplices. And it would include consideration of the illegitimate factors (race, gender, geography) that might account for the result. Unfortunately, the California Supreme Court has not addressed proportionality review with anything approaching this level of care.

B. Individual Proportionality Review in the California Supreme Court

Other than its statements to the effect that meaningful appellate review of death sentences is required by the Eighth Amendment to “rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not,”²⁷⁸ and its holding in *Parker* that such review must “consider the defendant’s actual record,” *i.e.*, the character of the defendant in addition to the circumstances of the crime,²⁷⁹ the Supreme Court has not described the constitutionally required individual proportionality review. However, by any measure, the sentence review by the California Supreme Court comes up short.

1. The Court’s “Shock the Conscience” Standard for Reviewing Death Sentences

The “shock the conscience” standard for finding a death sentence disproportionate creates an extraordinarily high bar for granting relief.²⁸⁰ The United States Supreme Court has never used such a test in its Eighth Amendment review of death sentences, or even in its review of prison sentences.²⁸¹ Of the other 31 death penalty states, in only two—Oklahoma

278. *Parker v. Dugger*, 498 U.S. 308, 321 (1991) (quoting *Spaziano v. Florida*, 468 U.S. 447, 460 (1984)).

279. *Id.*

280. In challenges to sentences under the California Constitution, “[f]indings of disproportionality have occurred with exquisite rarity in the case law.” *People v. Weddle*, 2 Cal. Rptr. 2d 714, 718 (Ct. App. 1991).

281. *See Ewing v. California*, 538 U.S. 11, 20–24 (2003).

and Utah—does the state supreme court apply such a stringent standard in its review of death sentences.²⁸²

Review under a “shock the conscience” standard is almost certainly not what the Supreme Court had in mind when it held that the Eighth Amendment required meaningful appellate review. The “shock the conscience” standard is taken from the Supreme Court’s substantive due process cases,²⁸³ and the California court’s use of a due process standard to fulfill its Eighth Amendment responsibility is inconsistent with *Furman* itself. The lesson of *Furman* is that, in the context of the death penalty, the Eighth Amendment requires more of a state sentencing scheme than that it satisfy substantive due process. Just a year prior to its decision in *Furman*, the Court had upheld state death penalty schemes against a substantive due process challenge,²⁸⁴ but held in *Furman* that the schemes, which presumably satisfied substantive due process, still created too great a risk of arbitrariness to satisfy the Eighth Amendment.²⁸⁵ The Supreme Court requires appellate review of death sentences in order to bring about reasonable

282. See *Battenfield v. State*, 816 P.2d 555, 563–64 (Okla. Cr., 1991); *State v. Lafferty*, 20 P.3d 342, 365 (2001). The Washington Supreme Court, in *State v. Elmore*, 985 P.2d 289, 324 (Wash. 1999), after conducting a thorough intercase proportionality review of a death sentence, stated: “[W]e cannot say Elmore’s death sentence shocks the conscience of this Court. Elmore’s death sentence is neither excessive nor disproportionate to other cases in which the death penalty has been imposed.” However, the phrase “shocks the conscience” appears to be an off-hand remark rather than a statement of the standard of review since the phrase appears in no other death penalty case reviewed by that court. See, e.g., *State v. Cross*, 132 P.3d 80 (Wash. 2006).

283. That standard was first used in *Rochin v. California*, 342 U.S. 165, 172–73 (1952), a case where the Court found that the forced pumping of a suspect’s stomach violated due process, and it has been applied in subsequent due process cases. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846–50 (1998) (discussing cases).

284. See generally *McGautha v. California*, 402 U.S. 183 (1971).

285. See *supra* note 3. See also Justice Blackmun’s dissenting opinion in *Herrera v. Collins*, 506 U.S. 390 (1993) where he clearly differentiates between a broader Eighth Amendment claim and a narrower due process claim. At issue in *Herrera* was whether the defendant’s assertion of “actual innocence” stated a cognizable claim for purposes of federal habeas corpus. Only after first arguing that the defendant had stated an Eighth Amendment claim for relief did Justice Blackmun turn to the due process clause and argue the execution of an innocent man would “shock the conscience.” *Id.* at 435–36. Justice Scalia responded by questioning “the usefulness of ‘conscience shocking’ as a legal test.” *Id.* at 428 (Scalia, J., concurring).

consistency in the administration of the death penalty, to weed out aberrant decisions by particular prosecutors and juries. That purpose requires that the state courts develop standards for evaluating aggravating and mitigating circumstances, a far cry from the California court's subjective "shocks the conscience" approach.

2. *The Court's Failure to Review Most Death Sentences*

As noted above, the California Supreme Court does not routinely engage in proportionality review of death sentences. The court apparently feels obliged to conduct such review only at the request of the defendant; however, without explanation, it sometimes conducts such review even absent a request.²⁸⁶ Thus, the decision *whether* to review the death sentence itself appears to be arbitrary. Perhaps because of the unlikelihood of success under the court's standard, most defendants sentenced to death do not seek review of the sentence itself. Through 2014, the court had reviewed 593 death penalty cases on direct appeal under the 1978 death penalty law. In those 593 cases, the court engaged in even cursory proportionality review in only 164 cases not otherwise reversed or remanded, and that count includes both categorical proportionality challenges, *e.g.*, to death sentences based on felony-murder *simpliciter*,²⁸⁷ and individual case review. California is one of a distinct minority of states where the supreme court fails to review the appropriateness of all death sentences.²⁸⁸ The fact that the California Supreme Court does not review all death sentences, itself, probably does not raise a constitutional question. The Supreme Court, in *Pulley*, did not seem concerned by the California court's practice, making no mention of the fact that *Pulley* had not sought, and was not accorded, proportionality

286. See *People v. Jones*, 247 P.3d 82, 109 n.7 (2011) (sentence reviewed without request); *People v. Parson*, 187 P.3d 1, 27 (2008) (same).

287. See *People v. Chism*, 324 P.3d 183, 232 (2014); *People v. Watkins*, 290 P.3d 364, 390 (2012).

288. There appear to be only four others: Arkansas (*e.g.*, *Taylor v. State*, 372 S.W.3d 769 (2010)); Oregon (*e.g.*, *State v. Haugen*, 243 P.3d 31 (2010)); Pennsylvania (*e.g.*, *Commonwealth v. Perez*, 93 A.3d 829 (2014)); and Texas (*e.g.*, *Cade v. State*, 2015 WL 832421 (2015)). The position of the Supreme Court in Colorado and Kansas is unclear.

review. However, if the purpose of meaningful appellate review is not to give relief to a particular defendant, but to ensure that scheme as whole does not operate in an arbitrary fashion, it would seem that purpose cannot be served if the court only reviews a relatively small portion of the death sentences.

3. *The Quality of the Court's Review When it Occurs*

The California Supreme Court has described its review as follows:

To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities.²⁸⁹

In fact, the court rarely conducts such a searching review of a death sentence. In most cases, the sentence review consists of a brief paragraph, or sometimes just a single sentence. Consider the following examples:

Defendant contends that we should . . . consider whether the death penalty is cruel or unusual punishment as applied to him. He offers, however, no persuasive analysis of the facts to support this claim.²⁹⁰

To the extent defendant contends his sentence must be reduced under the reasoning of *Dillon*, we find no disproportionality on this record and therefore reject the contention.²⁹¹

Defendant makes an *intracase* proportionality claim, arguing his sentence is grossly disproportionate to his offense, in violation of the Eighth Amendment to the United States Constitution, due to his asserted mental illness. Although a death sentence is subject to such review, the record fails to support the factual premise of

289. *People v. Steele*, 47 P.3d 225, 250 (Cal. 2002) (quoting *People v. Hines*, 938 P.2d 388, 443 (Cal. 1997)).

290. *People v. Thompson*, 753 P.2d 37, 73 (Cal. 1988) (citations omitted).

291. *People v. Marshall*, 919 P.2d 1280, 1318 (Cal. 1996).

his argument.²⁹²

Even where the court does spend more time on the issue, the review falls short of that promised. For example, in *People v. Adcox*,²⁹³ where the defendant and another killed the victim in the course of a robbery and where, at trial, the defendant testified (with some corroboration) that he was not the “triggerman” and, at the penalty phase, presented four mitigation witnesses, the court had this to say:

Defendant was convicted on extremely strong evidence that he deliberately, intentionally, and with premeditation, committed a senseless, pitiless murder of an unwitting victim who was unknown to him. The murder occurred in the course of a calculated plan to rob the victim. After the crimes, defendant personally removed money from the victim’s wallet, devised a plan to dispose of his vehicle, and removed its stereo cassette player, which he gave away to some friends. In the penalty phase the jury was fully apprised of all the factors properly bearing upon whether defendant was eligible for, and deserved, the death penalty. There was, of course, defendant’s relative youth. However nothing in the prior decisions of this court, or of the federal courts, suggests that his punishment is constitutionally disproportionate to “the offense” or “the offender.”²⁹⁴

In *People v. Lang*,²⁹⁵ a subsequent case involving another single-victim robbery-murder, where the circumstances of the killing were disputed and the defendant offered some mitigation evidence by way of his trial testimony and through a correctional officer at the penalty phase, the court said:

To the extent defendant contends the penalty of death is disproportionate to his individual culpability, we reject the contention on its merits. Defendant murdered a stranger to obtain his possessions, shooting him five times and stripping the body of valuables. Defendant’s claim of

292. *People v. Koontz*, 46 P.3d 335, 370–71 n.10 (Cal. 2002) (citation omitted).

293. *People v. Adcox*, 763 P.2d 906 (Cal. 1988).

294. *Id.* 946. The court’s emphasis on the fact that the murder was premeditated seems a bit disingenuous since the court has repeatedly upheld robbery-murder death sentences against disproportionality challenges where the killing was assumed to be unintentional, or even wholly accidental. *See, e.g.*, *People v. Chism*, 324 P.3d 183, 232 (2014); *People v. Watkins*, 290 P.3d 364, 390–91 (2012).

295. *People v. Lang*, 782 P.2d 627 (Cal. 1989).

provocation was found wanting by both the jury and the trial court and, as the trial court remarked in denying the automatic motion to modify penalty, defendant's conduct exhibited "a high degree of cruelty and callousness."²⁹⁶

Two facts are striking about the court's sentence review in these two cases. First, the court seems to believe that single-victim robbery-murders are highly aggravated murders. Despite the court's florid language—"senseless, pitiless murder of an unwitting victim" (*Adcox*); "high degree of cruelty and callousness" (*Lang*)—such murders are not considered highly aggravated. Such murders are commonplace, and empirical studies consistently demonstrate that, in those states that make robbery-murder a death-eligible crime, such murders are among the least likely to result in a death sentence.²⁹⁷ The same is clearly true in California.²⁹⁸ Second, despite the fact both defendants had introduced some mitigation evidence, the court did not discuss it.

Finally, even when the court acknowledges that the defendant's crime is not among the worst, the court's review is perfunctory. For example, in *People v. Hughes*,²⁹⁹ a case where the defendant offered extensive evidence in mitigation, the court's entire analysis was as follows:

Defendant also asserts that his sentence is so disproportionate to his personal culpability as to "shock the conscience" or "offend fundamental notions of human dignity." Even though defendant may not be among the most heinous of murderers and his crimes may not be as abominable as some of the others we have reviewed, based upon the facts presented we cannot conclude that the sentence he received "is disproportionate to defendant's 'personal responsibility and moral guilt.'"³⁰⁰

4. *The Court's Record*

The appeal outcomes themselves demonstrate the absence of meaningful review. In the 593 cases reviewed by the California Supreme Court, the court affirmed the death

296. *Id.* at 663 (citations omitted).

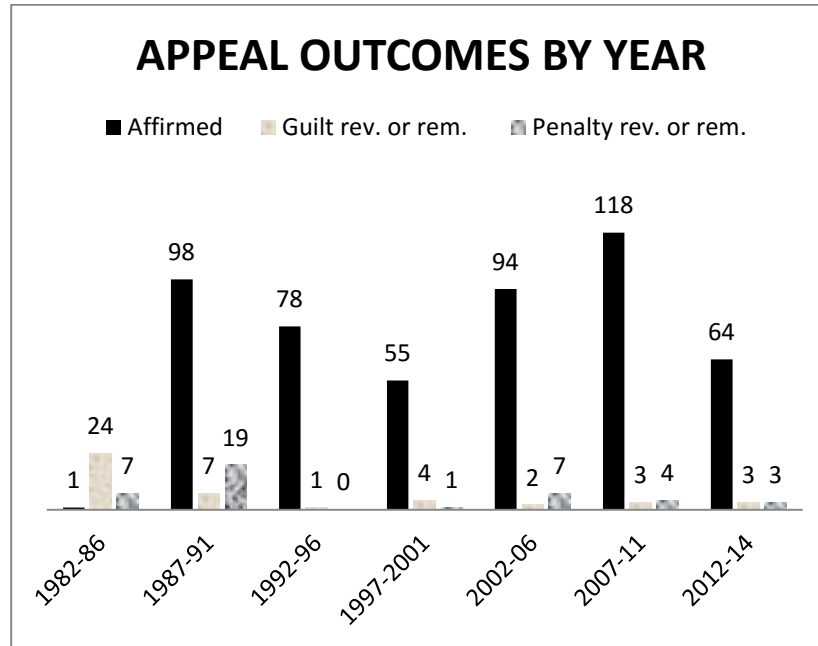
297. *See Shatz, supra* note 94 at 739–45.

298. *See supra* at Part III.A.

299. *People v. Hughes*, 39 P.3d 432 (Cal. 2002).

300. *Id.* at 510–11 (citations and footnote omitted).

sentence in 508 (86%) of the cases.³⁰¹ The court reversed, or remanded for further fact-finding, for guilt phase legal error, in 44 cases (7%) and for penalty phase legal error, in 41 cases (7%). The following chart sets out the appeal outcomes over time.



Thus, the court has occasionally reversed for guilt or penalty phase legal error,³⁰² but, not surprisingly given the court's extraordinarily high bar for relief, its failure to review most sentences and its often cursory treatment of those it does review, the court *never* found a death sentence to be disproportionate.³⁰³ To borrow a term from the Supreme

301. In some of these cases, the court reversed one or more counts or special circumstances, but affirmed the death judgment. *See, e.g.,* *People v. Roberts*, 826 P.2d 274 (Cal. 1992) (reversing one of two murders and the multiple murder special circumstance); *People v. Sanders*, 797 P.2d 561 (Cal. 1990) (reversing two of four special circumstances).

302. Most of the reversals or remands occurred in the first decade of review under the 1978 Law. Since 1991, the Supreme Court has affirmed 93% of the death judgments.

303. In this respect only, California is not an outlier. In the states with at least 100 death sentences since *Furman* (seventeen states), only a bare majority of the state high courts have overturned a death sentence on the ground that it was disproportionate. Those states are: Arizona (*see State v. Stevens*, 764 P.2d

Court, this “inexorable zero”³⁰⁴ establishes that, in plain violation of the Eighth Amendment, the court simply does not engage in appellate review (meaningful or otherwise) of death sentences.

CONCLUSION

The Supreme Court’s remedy for the unconstitutional risk of arbitrariness in the administration of the death penalty was to require the state legislatures to genuinely narrow the definition of the death-eligible class and to require the state courts to meaningfully review death sentences in order to eliminate aberrant sentences. This remedy was an effort to engage in a form of “cooperative federalism.”³⁰⁵ The Court did not tell the legislatures *how* they were to narrow the death-eligible class nor did the Court set out any guidelines for *how* the state courts were to weigh aggravating and mitigating circumstances in reviewing death sentences. Each state retained a large measure of autonomy: it was free to define for itself the “worst of the worst,” so long as the definition resulted in “reasonable consistency”³⁰⁶ in the administration of the death penalty within the state. Thus, the Court found an innovative middle ground approach between the Scylla of dictating to the states substantive limits on the death penalty³⁰⁷ and the Charybdis of retreating from the field and leaving the death penalty entirely

724 (Ariz. 1988)); Florida (*see* Crook v. State, 908 So.2d 350 (Fla. 2005)); Georgia (*see* Hall v. State, 244 S.E.2d 833 (Ga. 1978)); Illinois (*see* People v. Blackwell, 665 N.E.2d 782 (Ill. 1996)); Louisiana (*see* State v. Weiland, 505 So.2d 702 (La. 1987)); Nevada (*see* Servin v. State, 32 P.3d 1277 (Nev. 2001)); North Carolina (*see* State v. Kemmerlin, 573 S.E.2d 870 (N.C. 2002)); Ohio (*see* State v. Watson, 572 N.E.2d 97 (Ohio 1991)); Oklahoma (*see* Munn v. State, 658 P.2d 482 (Okla. 1983)).

304. *International Broth. of Teamsters v. U.S.* 431 U.S. 324, 342 n.23 (1977).

305. This term has generally been used to describe federal-state programs created by Congress (*see, e.g.*, *Wisconsin Dept. of Health and Family Services v. Blumer*, 534 U.S. 473, 495 (2002) (Medicaid statute)), but seems aptly applied to the Court’s program here.

306. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

307. As the Court has nonetheless done in some recent cases. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding the death penalty for rape of a child unconstitutional); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding the death penalty for juvenile crimes unconstitutional); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding the death penalty for intellectually disabled defendants unconstitutional).

unregulated. This understanding of the Court's *Furman* jurisprudence is similar to, although less sweeping than, that put forward by James Liebman several years ago in his exhaustive review of the Court's death penalty cases.³⁰⁸ Professor Liebman labeled the Court's approach "democratic experimentalist jurisprudence"³⁰⁹ and argued, in effect, that the autonomy given to states to develop standards for a proportionate death penalty was only temporary, *i.e.*, that, at some point the Supreme Court, informed by the product of the states' efforts, would interpret the Eighth Amendment to define a national proportionality standard.³¹⁰ Professor Liebman was effusive in his praise of the Court's *Furman* approach, variously referring to the Court's *Furman* jurisprudence as an "ingenious system of delegated proportionality,"³¹¹ a "brilliant system,"³¹² an "imaginative scheme."³¹³ And he is right that had the state legislatures and state courts accepted the Court's invitation to participate in a regime of shared responsibility and had the Supreme Court monitored the states' performance, the *Furman* problem, arbitrary administration of the death penalty might have been substantially ameliorated.

However, the California voters and the California Supreme Court declined the Court's invitation and flouted the Court's requirements. Far from narrowing the death-eligible class, the voters, in 1978, adopted the broadest death penalty scheme in the country—with the express intent, noted above, to make the death penalty applicable to all murderers—and

308. See Liebman, *supra*, note 15.

309. Liebman, *supra*, note 15 at 113.

310. See Liebman, *supra*, note 15 at 115–16. Recently, Liebman's democratic experimentalist jurisprudence thesis received some support from the Court's decision in another area of death penalty law. At issue in *Hall v. Florida*, 134 S.Ct. 1986 (2014), was the state's implementation of *Atkins v. Virginia*, 536 U.S. 304 (2002), forbidding the execution of persons with intellectual disability. The Court described the respective roles of the Supreme Court and the states in terms similar to Liebman's:

[T]he States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed. But *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.

Hall, 134 S.Ct. at 1998.

311. Liebman, *supra* note 15 at 113.

312. Liebman, *supra* note 15 at 121.

313. Liebman, *supra* note 15 at 122.

then broadened that scheme three times. The California Supreme Court, for its part, simply ignored the requirement that it engage in review of death sentences and has consistently rubber-stamped death judgments no matter what the aggravating and mitigating circumstances.

Although California may be the most extreme case—combining the broadest death penalty scheme with a complete failure to review death sentences—most other death penalty states, also have increasingly ignored the two *Furman* requirements. The politics of the death penalty exert powerful pressures on legislatures continually to expand the death penalty and on elected judges to avoid meaningful review of death sentences. The various death penalty schemes are expanded by adding death-eligibility factors. Since the initial approval by the Supreme Court of post-*Furman* statutes, aggravating factors “have been added to capital statutes . . . like Christmas tree ornaments.”³¹⁴ In fact, in each state where the Supreme Court has rejected a “failure to narrow” challenge to a death penalty scheme—Arizona,³¹⁵ Idaho³¹⁶ and Louisiana³¹⁷—the legislature shortly thereafter expanded the scheme.³¹⁸ According to one commentator,

[T]he number and breadth of these aggravating factors have expanded over the last few decades, with most states listing more than ten factors, such that more than 90% of murderers are death eligible in many states.³¹⁹

Empirical studies of other states’ death penalty schemes have found them to be so broad as to produce a death sentence rate far below that in Georgia at the time of *Furman*.³²⁰ With regard to meaningful appellate review,

314. Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in Austin Sarat, ed., *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 81, 82 (1999).

315. *Walton v. Arizona*, 497 U.S. 639 (1990).

316. *Arave v. Creech*, 507 U.S. 463 (1993).

317. *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

318. See *Ariz. Rev. Stat. Ann.* § 13-703(F); *Idaho Code* § 19-2515; *La. Rev. Stat. Ann.* § 14:30(A).

319. Chelsea Creo Sharon, *The “Most Deserving” of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 *HARV. C.R.-C.L. L. REV.* 223, 223 (2011).

320. See, e.g., Marceau, Kamin & Foglia, *supra*, note 17 (Colorado); Raymond Paternoster & Robert Brame, *An Empirical Analysis of Maryland’s*

many of the states have backpedaled since the Court's decision in *Pulley*. Of the current death penalty states, seven that had previously engaged in comparative proportionality review abandoned it in favor of less robust review,³²¹ and, in three other states where the courts had reversed death sentences for disproportionality in the past—Georgia, Louisiana and Ohio—the state supreme courts have not found a sentence disproportionate in more than two decades.

In 2008, in *Kennedy v. Louisiana*,³²² Justice Kennedy, writing for the majority, asserted that, starting with *Gregg*, the Court had “developed a foundational jurisprudence” “to avoid the death penalty’s arbitrary imposition.”³²³ In fact, the Court did develop a foundational jurisprudence to implement *Furman*—the genuine narrowing and meaningful appellate review requirements—but, as the case of California demonstrates, the Court’s inattention to those requirements since declaring them has permitted the states to disregard that jurisprudence. More than twenty-five years have passed since the Court last considered (and rejected) a failure-to-narrow challenge to a state scheme,³²⁴ and it has been almost that long since the Court last considered (and upheld) a meaningful appellate review challenge.³²⁵ Assuming that deregulating the death penalty—overturning *Furman*—is no longer a realistic option for the Supreme Court,³²⁶ and that

Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction (2003) available at <http://www.newsdesk.umd.edu/pdf/finalrep.pdf> (Maryland); Donohue III, *supra* note 17 (Connecticut).

321. In five of the states, comparative proportionality review was required by statute, and the statutes were amended to remove the requirements. *See* 1994 Idaho Sess. Laws 127; 1985 Nev. Stat. 527; 1985 Okla. Sess. Laws 265; 1997 Pa. Legis. Serv. 1997-28 (West); 1989 Wyo. Sess. Laws 171. In two of the states where the state supreme court had adopted comparative proportionality review, not pursuant to a statutory mandate—Arizona and Arkansas—the supreme court reversed field and abandoned the practice. *See State v. Salazar*, 844 P.2d 566, 584 (Ariz. 1992); *Williams v. State*, 902 S.W.2d 767, 772 (Ark. 1995).

322. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

323. *Id.* at 440.

324. *Lowenfield v. Phelps*, 484 U.S. 231 (1988). In 1993, the Court did grant cert. to consider a “failure-to-narrow” challenge to Tennessee’s scheme, but subsequently dismissed cert. as improvidently granted. *See Tennessee v. Middlebrooks*, 507 U.S. 1028 (granting cert.); *Tennessee v. Middlebrooks*, 510 U.S. 124 (dismissing cert.).

325. *Parker v. Dugger*, 498 U.S. 308 (1991).

326. *See Liebman*, note 15 at 126.

the Court is not prepared to throw up its hands and abolish the death penalty, then the Court must enforce *Furman*, which means monitoring the states' adherence to "genuine narrowing" and "meaningful appellate review." The lesson from California is that the Supreme Court's "meaningful review" of state schemes is long overdue.