Criminal Procedure: Comparative Proportionality Review of Death Sentences: Is It a Meaningful Safeguard in Oklahoma?

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NOTES

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On August 23, 1979, Leslie Gail Buford was repeatedly raped and sodomized by four men. Her throat was then slashed and each of the assailants stabbed her. Although the four defendants were originally charged with first degree murder, the punishments imposed upon those convicted were disparate. David Owens was acquitted; John Webster pled guilty to first degree manslaughter and received a sentence of ten years' imprisonment; David Blackwell was sentenced to life imprisonment; and Kirk Brogie was sentenced to die. Pursuant to statutory mandate, the Oklahoma Court of Criminal Appeals decided, inter alia, whether Brogie's death sentence was comparatively proportionate to the penalty imposed in similar cases. More than thirty Oklahoma capital punishment cases await the same type of automatic appellate review.

The purpose of this note is to examine the capital punishment judicial review technique called "comparative proportionality review" and its role in death sentencing in Oklahoma. This will be done by discussing a recent United States Supreme Court decision, Pulley v. Harris, and several Oklahoma death penalty cases. This examination is timely because the Oklahoma legislature is, at this writing, questioning the value of comparative proportionality review. A bill

7. The Court of Criminal Appeals chose not to use Brogie's codefendants' cases in its comparative analysis. The court stated that the two cases were distinguishable and thus unsuited for comparative purposes because Brogie was the "leader" on the night in question. Id. at 61. Brogie's death sentence was found not excessive after being compared to a host of cases in which the defendants received the death penalty. Id. at 62.

Brogie was handed down the same day as Newbury v. State, 56 Okla. B.J. 53 (Okla. Crim. App. 1985), a factually similar case. The Brogie opinion, however, makes no reference to Newbury. Newbury was sentenced to life imprisonment for the murder of a 15-year-old girl. The prosecutor had asked that Newbury be given the death penalty. Like Brogie's victim, Newbury's victim was raped and stabbed before her death. Why the Newbury case was not used in comparison with Brogie is unclear. (The Newbury opinion makes no note of the fact that the prosecutor sought the death penalty. The fact was uncovered in a review of the record.)

has been introduced into the Oklahoma House of Representatives that calls for the termination of the review procedure. Following an examination of the status of comparative proportionality review in Oklahoma, recommendations for changes in Oklahoma appellate review procedure will be presented.

The Beginning

In Furman v. Georgia, the United States Supreme Court held that the imposition of the death penalty under death-penalty statutes in three states constituted cruel and unusual punishment prohibited by the eighth and fourteenth amendments to the United States Constitution. The Court condemned the capital-sentencing statutes because the death penalty was being meted out in such an arbitrary and capricious manner that any given sentence was unconstitutional. The unconstitutional arbitrariness in sentencing was generally attributed to the standardless discretion the statutes vested in juries and trial judges. The majority opinions, however, revealed no unifying rationale for the Court’s action. Thus, the exact requirements for a constitutional death-penalty statute remained unclear.

9. H.R. 1063, 40th Leg., 1st Sess., 1985. Presumably this proposed change in Oklahoma’s death statute is constitutional. Oklahoma’s death penalty statute is modeled after Georgia’s, and comparative proportionality review is not constitutionally required under Georgia’s statute. See infra text accompanying notes 41-42.


11. The eighth amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. Const. amend. VIII.


Justices Brennan and Marshall concluded that capital punishment is in all cases prohibited by the eighth amendment. Justice Brennan took the position that the death penalty is degrading to human dignity and thus does not comport with the eighth amendment. Id. at 291 (Brennan, J., concurring). Justice Marshall reasoned that capital punishment is per se unconstitutional because it is excessive, serves no legitimate purpose, and is abhorrent to currently existing moral values. Id. at 332-34, 359-60 (Marshall, J., concurring).

The three remaining members of the majority were not convinced that the death penalty is completely prohibited by the eighth amendment. Rather, they viewed the imposition of the death penalty as impermissible under statutes granting juries unfettered discretion. Each Justice, however, focused upon different concerns to reach his conclusion. For example, Justice Douglas believed that the statutes under review were unconstitutional because they operated in a manner that discriminated between defendants. He observed: “They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual punishment.’” Id. at 256-57 (Douglas, J., concurring). Justice Stewart found the infliction of the death penalty intolerable under procedures that permitted the penalty to be wantonly and freakishly imposed. Id. at 310 (Stewart, J., concurring). Justice White challenged the capital sentencing statutes because the death penalty was infrequently imposed and provided no meaningful basis for distinguishing the few cases in which the penalty was imposed from the many cases in which it was not. Id. at 313 (White, J., concurring).

In the wake of *Furman*, nearly two-thirds of the states rushed to redraft their laws in an effort to reduce jury discretion and avoid inconsistent results.\(^{14}\) State legislatures across the nation hoped to comply with *Furman*’s mandate. The Supreme Court reviewed its first post-*Furman* death-sentencing statutes in 1976, declaring that the “guided-discretion sentencing” statutes\(^{15}\) of Georgia,\(^{16}\) Florida,\(^{17}\) and Texas\(^{18}\) passed constitutional muster. The Court rejected the capital-sentencing schemes of two states which made death the mandatory penalty for specific crimes.\(^{19}\) Within days of the decisions, the Oklahoma legislature enacted a new death-penalty statute modeled after the Georgia statutory scheme.\(^{20}\) Although the sentencing schemes of Georgia, Florida, and Texas differed, language in various opinions indicated that mandatory appellate review of death sentences was a prominent factor in ensuring consistency and evenhandedness in capital sentencing.\(^{21}\) Yet, the Court did not answer the question of whether comparative proportionality review is demanded by the Constitution. An answer came in *Pulley v. Harris.*\(^{22}\)

In *Harris*, the United States Supreme Court addressed the specific issue of “whether the Eighth Amendment . . . requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case with the penalties imposed in similar cases if requested to do so by the prisoner.”\(^{23}\) The Court in *Harris* adopted the position that comparative proportionality review by an appellate court is not required in every case in which the death penalty is imposed and the defendant requests review.\(^{24}\)

*The Harris Decision*

“Proportionality” with respect to criminal punishment has been discussed

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15. With the use of statutory standards for imposing the death penalty, the sentencing authority’s discretion is guided so that the arbitrariness in sentencing that *Furman* condemned is minimized.
21. *Gregg*, 428 U.S. at 206 (plurality); *Proffitt*, 428 U.S. at 258-59 (plurality); *Jurek*, 428 U.S. at 276 (plurality).
23. *Id.* at 876.
24. *Id.* at 879. In Oklahoma, a defendant does not have to request comparative propor-
by the United States Supreme Court in two different contexts. Traditionally, proportionality referred to the abstract evaluation of the appropriateness of a penalty for a particular crime: by assessing the gravity of the offense and the severity of the punishment to determine whether the sanction is disproportionate to the crime and therefore cruel and unusual. In contrast, the proportionality review discussed in *Harris* is a review measure that "presumes that the penalty is not disproportionate to the crime in the traditional sense." The review procedure instead inquires whether a sentence is proportionate to sentences imposed upon other defendants convicted of the same crime in the same jurisdiction. A death sentence has been called disproportionate or comparatively excessive if other defendants under similar circumstances generally receive sentences other than death for committing similar crimes.

In *Harris*, the Supreme Court used its 1976 decisions, which upheld various death-sentencing schemes, as a basis to determine whether comparative proportionality review is an indispensable element to a constitutional death penalty scheme. As a result, a survey of these decisions is helpful in understanding the *Harris* holding.

The decision most often relied on for appraising the individual components of a statutory death-sentencing scheme is *Gregg v. Georgia*. In *Gregg*, the Supreme Court concluded that Georgia's statute contained adequate safeguards to satisfy the concerns of *Furman*. Comparative proportionality review is a prominent element of the Georgia statute. Among other measures, Georgia's guided discretion statute requires that the Georgia Supreme Court conduct an automatic review of all death sentences. On review, the state supreme court is obliged to consider not only regular appellate issues, such as errors assigned on appeal, but also whether the evidence supports the finding of an aggravated circumstance, whether the sentence was imposed under the influence of passion, and whether the sentence is disproportionate to that imposed in similar circumstances.

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25. *Id.* at 875. An example of this abstract proportionality evaluation is found in *Coker v. Georgia*, 433 U.S. 584, 591-92 (1977) (plurality) (death is grossly disproportionate penalty for rape of an adult). *See, e.g.,* *Enmund v. Florida*, 458 U.S. 782 (1982) (death disproportionate penalty for accessory to robbery who did not attempt or intend to take life, and who was convicted solely under felony-murder doctrine).


27. *Id.*


29. *See supra* notes 16-18 and accompanying text.


31. *Id.* at 198 (plurality).

cases.\textsuperscript{33} The last review measure, comparative proportionality review, was judged to be of significant value because it "substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury."\textsuperscript{34}

Georgia's death-sentencing statute was approved on the same day that the Court sanctioned Florida's capital penalty statute in \textit{Proffitt v. Florida}.\textsuperscript{35} In \textit{Proffitt}, the plurality opinion of Justices Stewart, Powell, and Stevens recognized that, unlike Georgia's statute, Florida's death-sentencing scheme did not require that the state's highest court perform any express form of appellate review, let alone comparative proportionality review.\textsuperscript{36} Nonetheless, the Supreme Court was satisfied that Florida's capital-sentencing statute was constitutionally sound. In approving the statute, the plurality observed that it was the Florida Supreme Court's practice to review each death sentence to ensure similar results are reached in similar cases.\textsuperscript{37} The plurality reasoned that "by following this procedure the Florida court [had] in effect adopted the proportionality review mandated by the Georgia statute."\textsuperscript{38}

In contrast to \textit{Gregg} and \textit{Proffitt}, which both discussed the importance of comparative proportionality review, the Supreme Court in \textit{Jurek v. Texas}\textsuperscript{39} sanctioned a capital-sentencing scheme that made no mention of the proportionality review measure. \textit{Jurek} was handed down by the Court on the same day as \textit{Gregg} and \textit{Proffitt}. The \textit{Jurek} Court's limited comment on Texas's automatic appellate review of the jury's decision was that "Texas [had] provided a means to promote the evenhanded, rational, and consistent imposition of the death sentence under law."\textsuperscript{40}

It might appear from the emphasis given to comparative proportionality review in \textit{Gregg} and \textit{Proffitt} that the review procedure might be constitutionally required. The \textit{Harris} Court, however, clearly stated that its case law did not establish proportionality review as a constitutional requirement.\textsuperscript{41} The Court explained that comparative proportionality review was merely an additional, but not constitutionally demanded, safeguard against irrational sentencing in the schemes examined in \textit{Gregg} and \textit{Proffitt}.\textsuperscript{42}

Consistent with this idea, the Court held that the California capital scheme under which Robert Harris, the petitioner in \textit{Pulley v. Harris}, was convicted and sentenced to die passed constitutional muster without the proportionality review measure.\textsuperscript{43} The Court found that California's sentencing system pro-

\textsuperscript{34} 428 U.S. at 206.
\textsuperscript{35} 428 U.S. 242 (1976).
\textsuperscript{36} \textit{Id.} at 250-51 (plurality).
\textsuperscript{37} \textit{Id.} at 258 (plurality).
\textsuperscript{38} \textit{Id.} at 259 (plurality).
\textsuperscript{39} 428 U.S. 262 (1976).
\textsuperscript{40} \textit{Id.} at 276 (plurality).
\textsuperscript{41} \textit{Harris}, 104 S. Ct. at 876.
\textsuperscript{42} \textit{Id.} at 877.
\textsuperscript{43} \textit{Id.} at 880. The majority pointed out that before a defendant receives the death penalty under California's scheme, the jury must find that one or more special circumstances exist beyond
vided for alternative checks that adequately protected defendants from the systematic defects identified in Furman. The Supreme Court suggested, however, that if a capital-sentencing system were deficient in safeguards that sufficiently minimize the risk of arbitrary and capricious action, comparative proportionality review could be constitutionally required.

The Harris Dissent

The majority opinion in Harris was met with a dissent by Justice Brennan. The essence of the dissent is that the Constitution demands comparative proportionality review. To hold otherwise, Brennan suggested, is to disregard the meaning of Furman. Brennan argued that the review procedure is needed because it "serves to eliminate some, if only a small part, of the irrationality that infects the current imposition of death sentences."

Justice Brennan emphasized that the concerns surrounding the application of the death penalty before Furman—irrational, arbitrary, and discriminate sentencing—were real. These very concerns, Brennan noted, persuaded the Court in Furman to question the manner in which the death penalty was then administered. As Justice Brennan recognized, the concern about arbitrary imposition of the death penalty did not disappear with the Court's action in Furman. Subsequent cases have reflected the Court's continued preoccupation with the subject. Likewise, Justice Brennan indicated that the Harris Court never addressed the concerns identified in Furman because it simply assumed the procedural safeguards provided by California's sentencing scheme eliminate irrational sentencing. Thus, Brennan suggested, the Harris decision sanctioned a death-sentencing system without earnestly questioning whether the statute's procedural protections truly remove irrationality from the sentencing procedure.

As Justice Brennan observed, the literature supporting the proposition that the death penalty is irrationally applied continues to expand. Scholarly research, he stated, indicates the irrationality in sentencing is based not only on race but also on factors such as gender, socioeconomic status, and even geographic location within a state. Thus, Brennan is convinced "similarly-

a reasonable doubt. The trial judge is then responsible for reviewing the jury's finding and stating his reasons for not granting defendant's motion to modify the sentence to life. If the trial judge denies the motion, there is an automatic appeal.

44. Id. at 880-81.
45. Id.
46. Justice Marshall joined Justice Brennan's dissenting opinion. Id. at 884.
47. Id. at 888.
48. Id. at 886.
50. Harris, 104 S. Ct. at 888.
51. Id. at 887-88.
52. Id. at 888. It is the opinion of Oklahoma Deputy Appellate Public Defender Patti Palmer that geographic location is a factor in Oklahoma capital sentencing. Ms. Palmer believes that
situated defendants, charged and convicted for similar capital crimes are often given disparate sentences. Justice Brennan believes that comparative proportionality review is therefore constitutionally mandated to facilitate evenhanded sentencing. The “best evidence” of this, according to Brennan, “can be gathered by examining the actual results obtained in those States which now require such review.” Brennan stated that Oklahoma is among several states whose case law has demonstrated the value of comparative proportionality review. He specifically directed readers’ attention to the Oklahoma case of *Munn v. State.*

**Comparative Proportionality Review in Oklahoma**

The Oklahoma Court of Criminal Appeals is required by statute to undertake an automatic appellate review of each death sentence, and comparative proportionality review is mandated. Oklahoma’s statute provides that the Court of Criminal Appeals must determine in each death penalty case: “Whether the sentence is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.” In addition, the court is required to “include in its decision a reference to those similar cases which it took into consideration.” An examination of *Munn v. State* and other Oklahoma capital cases raises the question whether comparative proportionality review—as conducted by the Oklahoma Court of Criminal Appeals—is truly a meaningful safeguard against arbitrary and irrational capital sentencing.

At the outset it is important to note that the most difficult and critical step in undertaking a comparative proportionality review is selecting the group of similar cases with which to compare the death sentence under review. The key is to select a group of “cases which represent a sufficient cross section of similar cases upon which an adequate comparative review can be made.” Unfortunately, the Oklahoma Court of Criminal Appeals has not clearly spoken on the issue of what characterizes a homicide case as “similar” to one under review. The majority of Oklahoma capital penalty cases suggests that the court considers comparative cases to be limited to homicide cases

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53. *Harris*, 104 S. Ct. at 889.
54. *Id.* at 890.
55. *Id.* at 891 (citing *Munn v. State*, 658 P.2d 482 (Okla. Crim. App. 1983)).
56. 21 OKLA. STAT. § 701.13(a) (1981).
57. 21 OKLA. STAT. § 701.13(c) (1981) (emphasis added). Legislation in approximately twenty other states calls for comparative proportionality review of a death sentence before it is affirmed. For a list of these states, see Baldus, Pulaski & Woodworth, *supra* note 28, at 663 n.3.
in which a defendant has been charged and convicted of first degree murder and given the death penalty.\textsuperscript{60} This, however, is not always the situation, as \textit{Munn} illustrates.

\textbf{Munn v. State}

\textit{Munn} is of special interest because it is the only case in which a death sentence has been vacated by the Court of Criminal Appeals because the penalty was comparatively excessive.\textsuperscript{61} Each judge filed a separate opinion in \textit{Munn}: Judge Cornish wrote to vacate the defendant’s death penalty on the basis of disproportionality;\textsuperscript{62} Judge Brett wrote to vacate the defendant’s

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61. This conclusion is based upon an examination of death-penalty cases decided from the enactment of 21 \textit{Okla. Stat.} § 701.13 to November 1984. See \textit{supra} note 60 for a list of these cases. The judgment to vacate defendant Munn's sentence was, in part, due to error at trial. \textit{Munn}, 658 P.2d at 489 (Brett, J., specially concurring).

sentence due to error at trial.63 and Judge Bussey stated he was against vacating the defendant’s sentence.64

The case involves a “sadistic murder.” Munn knocked down his parents’ bedroom door and beat and stabbed his father forty times. He then eviscerated his father’s abdominal organs and heart.65 Without citing a case to support his claim, Munn argued that his sentence was disproportionate and excessive as compared to similar cases.66 As prescribed by statute, the court conducted a comparative review of the sentence. The comparative proportionality analysis in Judge Cornish’s opinion67 consisted of examining the sentence received by defendants in other cases where (1) “an accused . . . killed a close family member without provocation,”68 and (2) “a reasonable doubt as to [the defendant’s] insanity [sic] at the time of the crime” was raised.69 The opinion expressly noted that the Munn case was parallel to Hogue v. State70 and that because the jury recommended life imprisonment for Hogue, Munn should also be sentenced to life imprisonment.71 Hogue was one of ten cases that formed the “universe” or group of similar cases used in the comparative analysis.72

These ten cases raise important methodological questions regarding the selection of similar cases. For example, scrutiny of the cases indicates that not all the “similar” cases actually fit the pattern used to categorize them as similar. In three cases, the opinions make no reference to the insanity of the

63. Id. at 489 (Brett, J., specially concurring).
64. Id. (Bussey, J., dissenting).
65. Id. at 484.
66. Id. at 487. See infra note 123 and accompanying text, suggesting that attorneys be required to cite authority supporting their proportionality arguments.
67. Judge Cornish’s opinion is the only opinion that referenced the similar cases used for comparative proportionality review purposes as demanded by 21 Okla. Stat. § 701.13(e) (1981).
68. Munn, 658 P.2d at 487.
69. Id.
70. Id. at 498 (citing Hogue v. State, 652 P.2d 300 (Okla. Crim. App. 1982)).
71. Munn, 658 P.2d at 488.
defendants," and the facts of two cases suggest the murder involved
provocation.44 Thus it is unclear whether the cases provided a real basis for
meaningful comparison. To complicate matters, Judge Brett’s opinion
questioned whether the criteria identified should have been the "sole criteria [sic]
chosen on which to base a comparison with other cases."45 Presumably, Judge
Cornish considered that the two factors identified were suited for comparative
purposes because he perceived them as notable characteristics that probably
stood out in the sentencing authority’s mind when assessing the defendant’s
punishment.46 However, Munn’s universe includes pre-Furman cases, which
permitted unfettered discretion in sentencing.47 It is therefore difficult, if not
impossible, to identify the factors that influenced the sentencing authority
in those decisions.

In contrast, Judge Brett determined that Munn’s sentence was not excessive
or disproportionate to the penalty imposed in similar cases. Brett rejected
the comparative criteria used in Judge Cornish’s opinion. Instead, his ap-
proach to comparative proportionality review was to focus upon the "factors
enunciated in Godfrey [v. Georgia]."48 According to Brett, the notable
characteristics in Godfrey were that the victim died instantaneously, the defen-
dant immediately acknowledged responsibility for the crime, and the defen-
dant did not "[reflect] a consciousness materially more ‘depraved’ than that of
any person guilty of murder."49 "From an analysis of these factors, [Brett
could not] say the sentence of death was excessive or disproportionate to the
penalty imposed in similar cases."50 Judge Brett explained that Hogue’s vic-
tim was instantaneously killed and that Hogue did not resist custody. In con-

defendant shot his wife because she attempted to attack him with scissors); Meadows v. State,
487 P.2d 359, 360 (Okla. Crim. App. 1971) (defendant’s father told defendant he was going
to get a butcher knife so that he could kill defendant, his mother, brother, and sister).
75. Munn, 658 P.2d at 488.
76. For an excellent discussion of what is called the “salient factors method” for identifying
similar cases, see Baldus, Pulaski & Woodworth, supra note 28, at 681-84: “Salient factors
include those features of the case that seem most likely to have affected the jury’s sentencing
decision.” Id. at 681.
1965). Using pre-Furman cases in a comparative examination is not unconstitutional. Gregg v.
Georgia, 428 U.S. 153, 204-05 n.56 (1976).
78. Munn, 658 P.2d at 488-49 (citing Godfrey v. Georgia, 445 U.S. 420 (1980)). As explained
in the Munn opinion, the defendant’s death sentence in Godfrey was reversed because the Georgia
Supreme Court had adopted such a broad and vague construction of the Georgia statute as to
violate the eighth and fourteenth amendments to the United States Constitution. Munn, 658
P.2d at 488.
79. Munn, 658 P.2d at 489.
80. Id.
trast, Munn attempted to flee from the police and his victim was beaten and stabbed before death. Brett stated that "the decision to impose the penalty in one case, but not in another, may be justified by any factual circumstance which relates to the offense itself or to the character or record of the defendant."81

Judge Brett's opinion implies that the cases upon which he primarily relied, Godfrey and Hogue, are dissimilar to the case under review. Yet, because comparative proportionality review is an inquiry into whether the defendant's sentence is excessive or disproportionate to the penalty imposed in similar cases, it is critical that the cases used for comparative analysis be similar to the defendant's. Judge Brett, however, compared Munn's death sentence with distinguishable cases in which the defendant was not given the death penalty, and then reasoned that therefore Munn's sentence was not excessive. This analysis is unresponsive to the principal inquiry of comparative proportionality review. After all, the group of similar cases is used to determine whether the death penalty is "unusual for a specific set of circumstances"82 and thus comparatively excessive. This determination is impossible if the cases are not similar.

Another methodological question generated by Munn is whether the cases used for comparative purposes should include cases in which the sentencing authority was precluded from imposing the death penalty. This includes homicide cases in which the jury returned a verdict of a lesser offense, such as second degree murder or manslaughter, and cases in which the prosecutor either did not seek the capital penalty or charged a crime other than first degree murder. Munn clearly suggests the court has taken the position that "similar" cases are not limited to first degree murder cases in which a bill of particulars83 was filed and the sentencing authority chose to inflict the death penalty. The universe used in Munn included cases in which the defendants were either charged with and/or convicted of first degree manslaughter, second degree murder, or first degree murder.84 The defendants' sentences ranged from ten years' imprisonment to death.85 In fact, in only one case did a defendant receive the death penalty, and, on appeal, the penalty was modified to life imprisonment.86

A more appropriate universe in Munn would have consisted only of cases in which the defendants were convicted of first degree murder, including first degree murder conviction cases in which a bill of particulars was filed and

81. Id. at 488.
83. A bill of particulars is a document that alleges the defendant should be punished by death because of the aggravating circumstance(s) surrounding the murder. Okla. Unif. Jury Instructions—CR 78 (1981).
84. See cases cited supra note 72.
85. See cases cited supra note 72.
first degree murder conviction cases where the death penalty was not sought. A universe predominantly composed of cases in which the defendants were convicted of second degree murder or manslaughter is so slanted toward concluding a death sentence is excessively disproportionate that the universe is unsuited for comparative analysis. *Munn*, however, is unique in this respect. In nearly all other Oklahoma capital penalty cases in which comparative proportionality review has been discussed, the similar cases used as comparative yardsticks consisted solely of cases in which the defendants received the death penalty. 87

**Other Capital Punishment Decisions**

The Court of Criminal Appeals’ typical treatment of comparative proportionality review consists of comparing a defendant’s sentence to all state cases in which the defendant was sentenced to death. *Coleman v. State* illustrates this methodology. 88 Coleman murdered a husband and wife who had stumbled upon him while he was committing a burglary. The jury assessed his punishment at death, finding several statutory aggravating circumstances supporting the sentence. It was determined that Coleman had previously been convicted of a felony involving violence, had created a risk of death to more than one person, had carried out the killings in a heinous fashion, had committed murder to avoid arrest, and would in all likelihood commit future acts of violence that would constitute a continuing threat to society. 89 No mitigating circumstances were disclosed in the court’s opinion. The court’s proportionality survey consisted of comparing Coleman’s sentence to all state cases in which the defendant was sentenced to death. 90 No rationale was articulated as to why the cases were similar, other than that the penalty imposed upon each defendant was alike. It is also unclear from the court’s opinion whether the aggravating circumstances found by the jury played any role in the court’s comparative analysis.

If a universe is made up only of cases in which the defendants’ sentences are death, the death penalty under review will naturally be found comparatively proportionate. Comparative proportionality review can, therefore, be a meaningless check against excessive capital sentencing when a court simply compares one death sentence to another death sentence. To prevent this, a


89. 668 P.2d at 1138.

90. Id.
thoughtful determination of what cases should be chosen for comparison to the case under review is necessary. Nevertheless, it is unclear from the Court of Criminal Appeals' opinions whether this determination is being made.

It is not unusual for the court to determine the appropriateness of the defendant’s death sentence without mention of any particular facts and circumstances of the case. This was done in Smith v. State. Smith, a 19-year-old, was sentenced to death for the murder of a man who he and 16-year-old Ralph Goforth had beaten into insensibility, dumped into a pickup, and set ablaze. The jury found the death penalty to be warranted because the murder was especially heinous. Although "the evidence against Goforth was as strong as that against [Smith]" and Goforth received a sentence of life imprisonment for the same crime in another proceeding, the court nonetheless affirmed Smith's capital sentence. According to the court, the three years' difference in age was responsible for the disparity.

The court's comparative study compared Smith's case to cases in which the defendants received the death penalty as the result of a barroom shooting spree, an unprovoked murder of a service station attendant, a murder committed during a store robbery, a kidnapping-murder for pay, and a slaying of a highway patrolman by a 16-year-old runaway. The opinion took no notice of the dissimilarities or even the similarities in the aggravating circumstances, nor does it explain why these cases, which are factually distinguishable, were used for comparative purposes.

Smith also illustrates the court's common practice of comparing a defendant's death sentence to capital punishment cases in which the sentence had been modified to life or reversed on appeal. The propriety of this practice is not explained and is arguably questionable. A comparative proportionality review is logically an ineffective measure of appropriate sentencing when comparable cases include capital penalty cases reversed because of errors of law, such as highly prejudicial conduct by the prosecutor and introduction of improper evidence at trial. These errors materially deprive a defendant of a fair trial and, moreover, improperly and materially influence the defendant's

91. 659 P.2d 330 (Okla. Crim. App. 1983), rev'd, 55 Okla. B.J. 371 (Okla. Crim. App. 1984). The Court of Criminal Appeals reversed and remanded Smith with instructions to dismiss the case because the defendant was prosecuted and found guilty of murder with malice aforethought. The conviction could not stand in light of the Oklahoma Attorney General's admission that it was not certain the defendant contemplated that life be taken; charging defendant with felony-murder would violate the double jeopardy clause of the United States Constitution.

92. Smith, 659 P.2d at 332.
93. Id. at 337.
94. Id.
100. See Smith, 659 P.2d at 338.
punishment. Absent the prejudicial error, the defendant might not have received the death penalty.

Thus, employing these cases in a comparative study is fundamentally unfair to the defendant whose sentence is under review and is of limited value in determining the extent to which juries throughout the state are willing to impose the death penalty in appropriate cases. It is also unfair to use, as comparative yardsticks, death-penalty cases that have been reversed due to the use of defective verdict forms and trial court action amounting to a directed verdict for the death penalty. Yet, it is not unusual for the Court of Criminal Appeals to use in its proportionality review capital punishment cases that have been modified and reversed for these very reasons.101 Indeed, such was the practice in Smith.102

Consequently, a comparative proportionality review undertaken by the Court of Criminal Appeals often consists of comparing the defendant’s case with all the state’s post-Furman capital punishment cases. There is usually no explanation why the cases are similar to the one under review. Moreover, the universe typically encompasses cases that have been modified or reversed on appeal.

For example, in Parks v. State,103 the court discharged its proportionality review responsibility by comparing the defendant’s sentence with “all of the death penalty cases decided”104 under Oklahoma’s current death-penalty statute. Of the seven capital punishment cases in the court’s universe, three of the defendants’ sentences had been modified on appeal,105 one case had


104. 651 P.2d at 696 n.3.

been reversed,\(^{106}\) and three sentences had been affirmed.\(^{107}\) The court failed to reveal why the cases were similar to Parks', except that the defendant in all the cases received the death penalty.

Parks murdered a service station attendant who he believed was going to notify authorities that he had used a stolen credit card to purchase gasoline. The "similar" cases used by the court involved a fatal car crash while the defendant was escaping the scene of a crime,\(^{108}\) a wife-killer with a history of violent behavior,\(^{109}\) a kidnapping-murder for extortion,\(^{110}\) and an unprovoked slaying of a highway patrolman by a juvenile.\(^{111}\) In three cases, the defendant committed murder during an armed robbery.\(^{112}\)

It is of special interest to Oklahoma criminal defense lawyers faced with arguing disproportionality of a capital sentence that one of the "similar" cases used in Parks is unpublished.\(^{113}\) Lawyers who do not regularly defend capital-penalty defendants may be unaware that the disposition of a few death-penalty cases has been by unpublished opinion. This method of disposition is unfortunate: it presents a risk that lawyers will overlook an unpublished death-penalty case that may be of assistance in arguing that a sentence is disproportionate.

Perhaps the most telling criticism of the court's comparative proportionality review stems from its review in Davis v. State.\(^{114}\) In Davis, the Court of Criminal Appeals discharged its review responsibility simply by stating that it found the sentence of death not disproportionate to the penalty imposed in other similar cases. The court's opinion reveals no comparative analysis and cites no cases to support the finding.

As it is currently conducted by the Oklahoma Court of Criminal Appeals, comparative proportionality review is of marginal value in identifying disproportionality in capital sentencing between similarly situated defendants. Munn represents the court's best effort at a meaningful comparative propor-


tionality review. Even there, the court failed to analyze whether Munn's sentence was disproportionate or proportionate to the sentences imposed in similar cases.

Comparative reviews of the sort undertaken in Munn are fraught with shortcomings that thwart the enlightened goals of comparative proportionality review. In addition, it is uncertain whether the "similar" cases used in the discharge of comparative proportionality review in other Oklahoma capital punishment cases provided a real basis for thoughtful comparison. Under these circumstances, it is difficult to view comparative proportionality review as a meaningful safeguard to evenhanded capital sentencing in Oklahoma.

Recommendations

The Oklahoma Court of Criminal Appeals confronted what some legal commentators regard as a major issue in capital sentencing\(^\text{115}\) when it undertook a comparative proportionality review of the death sentence in Brogie v. State.\(^\text{116}\) The court was faced with deciding not only whether Brogie's codefendant, Blackwell,\(^\text{117}\) who received life imprisonment, should be among the group of similar cases used for comparative purposes, but also whether to consider codefendant Webster's\(^\text{118}\) ten-year prison sentence, a product of a plea bargain. Brogie is the perfect example of why comparative proportionality review is vital to a death-sentencing scheme. If the codefendants are equally culpable and there is no significant distinction among the three, a thoughtful comparative analysis should identify any disproportionality in sentencing. Therefore, the following recommendations are made in an attempt to develop comparative proportionality review into an effective tool for reducing arbitrariness in death sentencing.

First, the Oklahoma legislature should adopt a measure like that found in Georgia. To assist the Georgia Supreme Court in conducting a meaningful death-sentence review, the court is statutorily authorized to employ appropriate staff to compile data necessary to determine the validity of a sentence.\(^\text{119}\) Such a measure in Oklahoma would probably enhance the availability of research on similar cases. Thus, when selecting similar cases for comparative analysis, the Court of Criminal Appeals would have the opportunity to give more informed consideration to the salient facts of the crime and aggravating and mitigating circumstances.

The Report of the Trial Judge can assist the court in obtaining the data needed to conduct a meaningful review. In each case in which the death penalty is imposed, the trial judge is required to complete a Report of the Trial

\(^{115}\) See Goodpaster, supra note 82, at 811 n.144 ("Fairness in sentencing between capital defendants who receive a capital sentence and those who plea bargain and receive a lesser sentence is a major issue in capital sentencing law.").


\(^{117}\) See supra text accompanying note 4.

\(^{118}\) See supra text accompanying note 3.

The report contains information concerning the defendant, the trial, the offense, and the defendant's representation. For example, the report inquires into such things as the defendant's work history, the type of weapon used in the crime, the intelligence level of the defendant, and the aggravating and mitigating circumstances found by the sentencer. Court staff should index and compile the data for systematic computer reference. In this way, the information can be used as a means of determining whether cases are similar.

Second, it is suggested that the group of similar cases used for comparison should encompass similar first degree murder cases in which the defendant received life imprisonment as punishment. Without the benefit of these cases, the court will not have a complete picture of the usual sentencing practices of Oklahoma juries. Clearly, if comparative proportionality review is to serve as a check against disproportionality in death sentencing, similar "life" cases must be in the comparative analysis. So that information concerning "life" cases is readily available to the court, the Report of the Trial Judge should be completed each time a defendant is convicted of first degree murder.

Third, because the court must undertake a comparative review of each death sentence, Oklahoma criminal defense attorneys have the chance to assist the court in selecting the similar cases that play a crucial role in the comparative analysis. Right now it is unclear from the court's opinions whether attorneys in capital-sentence cases realize that disproportionality of sentencing may be a meritorious argument. Therefore, to encourage and facilitate a meaningful comparative proportionality review, the Oklahoma Court of Criminal Appeals should promulgate a court rule requiring attorneys to address the issue of proportionality in their appellate briefs and to cite authority supporting their arguments.

Fourth, to aid attorneys in the formation of a disproportionality sentencing argument, it would be beneficial for the court's capital-murder opinions to state whether a bill of particulars was filed against a defendant who received life imprisonment as punishment. This fact would significantly contribute to determining under what circumstances capital-murder defendants are generally given life imprisonment rather than the death penalty.

As a further aid in the review process, opinions should make special note of any mitigating circumstances because this may clearly distinguish apparently factually similar cases from the case under review. Finally, to facilitate ready access to capital-murder decisions, all capital-murder opinions should be

121. This author suggests that the Trial Judge's Report should also ask: (1) the length of premeditation: was it greater than five minutes; (2) did the crime occur in a public place; (3) did defendant commit crimes after the murder; (4) did the victim plead for his life prior to being murdered; (5) did defendant have a history of drug or alcohol abuse; and (6) did defendant consume drugs or alcohol prior to the murder?
122. See Goodpaster, supra note 82, at 816 (discussing the shortcomings of excluding cases in which defendant has received life imprisonment from cases used for comparative proportionality review purposes).
123. See supra note 66 and accompanying text.