TESTIMONY ON THE DEATH PENALTY AND PROPORTIONALITY REVIEW IN PENNSYLVANIA PRESENTED BEFORE THE HOUSE JUDICIARY COMMITTEE ON BEHALF OF THE DEFENDER ASSOCIATION OF PHILADELPHIA MAY 21, 1997

Good morning. My name is David Zuckerman. I am a staff attorney with the Defender Association of Philadelphia. I shall endeavor this morning to be informative and hopefully impart a practitioner's perspective on the role of proportionality review in Pennsylvania.

What is proportionality review?

Proportionality review has its origins in the landmark case of Furman v. Georgia[1]. In Furman, the Supreme Court of the United States struck down virtually every death penalty statute then in existence holding that the penalty of death could not be constitutionally imposed under sentencing schemes that resulted in the arbitrary and capricious infliction of the sanction. Noting that death is rarely imposed, the Supreme Court held that there must be a "meaning basis for distinguishing the few cases in which it is imposed from the many in which it is not."[2] One justice noted "[t]hese sentences were cruel and unusual in the same way that being struck by lightning is cruel and unusual."[3]

In response to Furman many states, including Pennsylvania, turned to statutory schemes requiring the presence of certain "aggravating factors" to identify the most

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[1]408 U.S. 208, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[2]Furman v. Georgia, 428 U.S. 238, 313 (1972).

[3]Id. at 2762 (Justice Stewart, concurring).

blameworthy of the total group of murder defendants.[4] In Gregg v. Georgia,[5] the Supreme Court gave its stamp of approval to these restructured schemes. One feature of the new Georgia statute which earned praise from the court was its provision for proportionality review. As a hedge against arbitrariness that may have survived from the former system, the statute authorized the Georgia Supreme Court to reverse death sentences that were excessive when compared to similar cases. Many states, including Pennsylvania, followed in Georgia's footsteps and adopted similar provisions in their death penalty statutes.[6] Under these provisions the highest court can "tweak" the system when a failure is perceived. This helps fulfil the Furman mandate that the system operate as a whole to reduce arbitrariness.

Is proportionality review required?

The Supreme Court has never dictated what form a constitutional death sentencing system must take and consequently proportionality review has never been a required element of death penalty schemes. Pulley v. Harris, 465 U.S. 67 (1984). Indeed, the Pennsylvania legislature was aware of this when it included proportionality review in 1978 in our death sentencing statute. In 1976, two years before our statute was enacted, the Supreme Court, in

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[4]As the constitution also requires that a capital defendant be permitted to present any relevant evidence of why he should not put to death, these statutes also provide for the presentation of mitigating evidence. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442 (1977).

[5]428 U.S. 153 (1976).

[6]Connecticut, Delaware, Georgia, Idaho, Kentucky, Louisiana, Maryland Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, Nevada New Mexico, North Carolina, Ohio, Oklahoma Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, and Washington.

Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976), approved the Texas scheme even though it did not boast of a proportionality clause nor did its state case law provide for such review. Proportionality review in Pennsylvania, as elsewhere, was one element of an entire scheme designed to ensure fair application of the death penalty.

While Pulley clarified that no one element was essential, it reaffirmed the original Furman requirement -- that statutes "minimize the risk of wholly arbitrary, capricious, or freakish sentences" -- retained its vitality. Pulley, 104 S.Ct at 877. Justice Stevens in his concurrence emphasized the role effective appellate review plays in ensuring an adequate death sentencing system: "I believe the case law does establish that appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by Furman . . and hence some form of meaningful appellate review is constitutionally required." Pulley, 104 S.Ct 881 (Stevens, concurring).

How is proportionality review practiced in Pennsylvania?

The death penalty statute enacted in 1978 imposed mandatory review by the Supreme Court for disproportionality.[7] Interpreting the proportionality clause in Commonwealth v. Frey, 475 A.2d 700 (1984), the court established a broad comparison universe which included not only cases where death was sought but any case resulting in a first degree murder conviction in which death could have been sought. It also imposed by rule a requirement of the president judges of Pennsylvania's sixty-seven counties to complete and submit a

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[7] The statute permits the Supreme Court to reverse if the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant." 42 Pa.C.S. §9711 (h)(3)(iii).

procedural questionnaire in all first degree murder convictions and it charged the administrative arm of the courts with the responsibility to collect and maintain the data generated.

Although the drafting in the statute was seemingly clear and unambiguous -- requiring the court to reverse the sentence of death if it was "excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant" -- some interpretive problems remained. The legislature did not delineate the relevant universe, or subset of cases from which the similar cases would be drawn. Nor did it define "similar cases". As in all of the post Gregg proportionality states, the Supreme Court of Pennsylvania was compelled to wrestle with universe and "similar case" issues when no matter what methodology was employed, the pool of cases was necessarily small. Although conceivably they could have turned to pre-Furman (and in the interim pre-Moody) cases for guidance, the very fact that pre-Furman decisions were plagued with arbitrariness rendered their utility as a gauge of common sentiment dubious. The issue was settled at least initially in Commonwealth v. Frey, where, addressing its obligation to conduct proportionality review, the Supreme Court of Pennsylvania stated:

> We are also obligated by statute to determine whether the sentence of death imposed in the instant case is "excessive or disproportionate to the penalty imposed in similar cases...". 42 Pa.C.S.A. §9711(h)(3)(iii). While the Sentencing Code does not define "similar cases" nor set forth any specific procedures for conducting this proportionality review, this Court conducts an independent evaluation of all cases of murder of the first degree convictions which were prosecuted or could have been prosecuted under the Act of September 13, 1978, P.L. 756, No. 141, 42 Pa.C.S.A. §9711. Commonwealth v. Zettlemoyer, supra at 454 A.2d 961.
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> In order to facilitate our review, this Court has ordered the

> President Judge of each county to supply to the Administrative Office of Pennsylvania Courts (the AOPC) information pertaining to each such conviction and imposed a continuing obligation on the President Judges to update the AOPC with data pertaining to future cases. This information includes the facts and circumstances of the crimes, the aggravating and mitigating circumstances arguably presented by the evidence, the gender and race of the defendant and the victim, and other information pertaining to the conduct and prosecution of the case. The data will be compiled and monitored by the AOPC to insure that the body of "similar cases" is complete and to expedite our proportionality review.

Commonwealth v. Frey, 475 A.2d 700, 707-708 (1984). By interpreting the universe to be "all cases of murder of the first degree convictions which were prosecuted or could have been prosecuted [capitally]", the court explicitly included death eligible cases which did not proceed to a penalty hearing. However, at the same time it limited the universe to those resulting in first degree convictions. Its choice omits from consideration those cases where the facts supported a first degree conviction and at least one aggravating circumstance but where the prosecuting authority it its discretion agreed to a plea bargain to a lesser offense (typically second degree murder which carries a mandatory life sentence). The consequence was that the prosecutor's unilateral decision not to seek death in a death eligible case dictated the scope of the universe. Nevertheless the Pennsylvania Supreme Court laid the groundwork for effective proportionality review. It established the relevant universe, imposed a reporting requirement on the president judge of each county, created a data collection instrument, and charged the administrative arm of the courts with the responsibility of collecting and maintaining the data.

Notwithstanding the broad universe in announced in Frey there is no indication the Supreme Court of Pennsylvania ever employed anything other than a penalty hearing universe. Only in the case decided four days after Frey was there an indication that the Frey universe

might be observed. In Commonwealth v. Stoyko, 475 A.2d 714 (1984), the Court stated, "'Similar cases' in the instant case encompasses all cases of murder of the first degree wherein the evidence would support an aggravating circumstance that in 'the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense'". The "would support" language seemingly invokes the broad Frey universe of all first degree cases which were or "could have been" prosecuted capitally. However in Stoyko, as in Frey, the Supreme did not identify the cases deemed similar so it remains uncertain whether non-penalty hearing cases were actually tapped. In the very few decisions where the similar cases were identified, they were in all instances penalty hearing cases. Confirmation of this suspicion is made difficult by the practice of the court to assert in boilerplate fashion that the review had been conducted and no disproportionality found without ever identifying or publicly analyzing the similar cases. Likewise the Administrative Office of the Pennsylvania Courts refuses to make public the actual reports submitted to the Supreme Court. The few reports that are available are those which were requested from the AOPC by the defendant on direct appeal. In these the universe was limited to penalty hearing cases.

In recent cases, there is indication that the universe is shrinking further. At oral argument in Commonwealth v. Gribble, in January, 1996, Justice Castille sua sponte raised the issue of the appropriate universe and requested the parties brief the issue. In opinions released subsequent to this oral argument the court stopped citing to Frey (which explicitly set forth the universe) reverting to citations to Zettlemoyer. Without explicitly overruling Frey the reviews were limited to similar cases "involving the sentence of death". See Commonwealth v. Gilbert Jones (Pa., September 18, 1996); Commonwealth v. Abdul-Salaam, 678 A.2d 342, 355 (1996); Commonwealth v. Cook, 676 A.2d 639, 652 (1996) ("pertaining

to similar death penalty cases"). Most recently however the Court shifted again and reverted to citing Frey in its reviews and reaffirming its commitment to fully conduct the review:

> Finally, in accordance with Zettlemoyer, 454 A.2d at 961, we are required to conduct a proportionality review of the sentence.
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> > This Court does not take lightly its statutory and constitutional duties and will conduct an independent evaluation of all cases decided since the effective date of the sentencing procedures under consideration (September 13, 1978). This independent review mandated by 42 Pa.C.S.A. @ 9711(h)(3)(iii) will utilize all available judicial resources and will encompass all similar cases, taking into consideration both the circumstances of the crime and the character and record of the defendant in order to determine whether the sentence of death is excessive or disproportionate to the circumstances.
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> Id. As this Court has mandated, we have conducted our own proportionality review by independently examining similar cases, by reviewing the facts underlying the first degree murder, and by considering the sentencing data compiled by the Administrative Office of the Pennsylvania Courts (AOPC) pertaining to similar cases and conclude that the sentence of death imposed upon appellant is not excessive or disproportionate to the sentences imposed in similar cases. Commonwealth v. Frey, 504 Pa. 428, 443, 475 A.2d 700, 707-08, cert. denied, 469 U.S. 963, 83 L. Ed. 2d 296, 105 S.Ct. 360 (1984).

Commonwealth v. Bronshtein, __ Pa. __, __ A.2d __ (March 25, 1997)

Also noteworthy in some recent cases, including Bronshtein, is the rare inclusion of some of the comparison cases, but introduced with an "e.g." Id. n.24. This may indicate a shift or schism in the type of proportionality review conducted by the court. There are ordinarily two primary methodologies used by courts in their proportionality review. The first is known as frequency analysis where the court looks to the relative frequency in which death is imposed in the class of similar cases. If death is imposed very infrequently, it presumably will reverse that case. The other method is known as the precedent seeking method. This is most often used in jurisdictions which limit the universe to death cases and under this system the court looks only to see if any comparable case has resulted in death. The frequency

approach is clearly the more effective of the two methods. Comparing comparable death and life sentenced defendants permits an assessment of evolving community sensibilities and identification of those cases in which the people as a whole do not generally find deathworthy. Conversely a death only universe, particularly under our system would do little to remedy excessiveness and disproportionality. With a "death only" universe, all the "similar" cases would by definition have a similar penalty, death. Cases thus culled, would, like peas in a pod, be factually alike and carry the same penalty. Review of such a sample would always lead to a finding of proportionality. Those cases which might have demonstrated that juries and prosecutors would overwhelmingly resolve the case with a life sentence would be excluded and never considered. The Pennsylvania Supreme Court has traditionally employed the first method, frequency analysis, comparing the number of similar life and death cases. See cases cited infra. However, the recent cases where only similar death cases are cited may signal a shift to the precedent seeking approach.

Related to the universe issue is the question of what constitutes a "similar" case. The Furman mandate was to eliminate reliance on arbitrary factors. Focus on community consensus as to what conduct is deemed sufficiently blameworthy to justify a death sentence permits the reviewing court to identify and reverse those sentences which when measured by community consensus were aberrational. See McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987) ("A societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense.").

The Supreme Court of Pennsylvania, while frequently commenting on the failure of the legislature to define similar, has never explicitly set forth an it own interpretation. The opinions in which the similar cases were identified indicate it primarily looks to cases with comparable

aggravating and mitigating circumstances. In Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), this Court did not interpret "similar," however, as it discussed as the sole comparison case one with an identical aggravating circumstance, it clearly assumed similar meant similar aggravating circumstances. In Commonwealth v. Travaglia/Lesko, 502 Pa. 474 A.2d 288 (1983), the second review, this Court again turned to cases with identical aggravating circumstances this time analyzing the cases for factual similarities and dissimilarities: "We have searched the records of these cases available to this Court for information as to the character of the defendants (e.g. intelligence, family background psychiatric history....). In Stoyko the court reviewed only those cases involving risk to others. In most of the remaining reviews the Supreme Court did not make public its similar case group. The few reports which have emerged publicly indicate the court tries to match aggravating and mitigating circumstances as closely as possible.

The Future of Proportionality Review.

The Supreme Court of Pennsylvania has never reversed a case on proportionality grounds. While most states which have proportionality review have reversed on these grounds, they have used it sparingly.[8] Nevertheless, the recent assurances by the Supreme Court that it continues to

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[8] See, e.g., Sinclair v. State, 657 So.2d 1138 (Fla. 1995) (felony aggravator with substantial mitigation); Thompson v. State, 647 So. 824 (Fla. 1994) (felony aggravator with substantial mitigation); Clark v. State, 609 So.2d 513 (Fla. 1992) (felony aggravator with substantial mitigation); State v. Pratt, 873 P.2d 800 (Idaho 1993) (emphasizing lack of prior record) ; People v. Leger, 597 N.E.2d 586 (Ill. 1992)(victim was ex-wife; history of marital discord and substantial mitigation); State v. Weiland, 505 So.2d 702, 708 (La. 1987) (emphasizing heat of passion as mitigation); Reddix v. State, 547 So.2d 792, 793-4 (Miss. 1989) (mental illness, mild retardation, not primary actor); Harvey v. State, 682 P.2d 1384 (Nev 1984) (age of defendant and mental and emotional disturbance); State v. Benson, 372 S.E.2d 517 (N.C. 1988)(no prior record, mental emotional disturbance, cooperated with authorities, abandoned by mother as child).

take this responsibility seriously speaks to its continued vitality.

While proportionality review is not constitutionally required, Pulley v. Harris, 465 U.S. 37, 45, 104 S.Ct. 871 (1984), it remains an effective tool against the arbitrariness condemned in Furman. Focus on community consensus as to what conduct is deemed sufficiently blameworthy to justify a death sentence permits the reviewing court to identify and reverse those sentences which, when measured by this yardstick, are aberrational. See McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987) ("A societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense."). It helps ensure that only those truly deserving of the penalty are sent to their death.

Proportionality review may play a larger role in Pennsylvania than in other states. The Supreme Court of the United States has consistently reaffirmed that it expects the states to monitor its systems for arbitrariness and capriciousness. The Pennsylvania system was approved in Blystone by a scant 5-4 majority. However the system then was a very different one than we have today -- and virtually all of the modifications have functioned to undermine the ability of the statute to answer the concerns outlined in Furman. We have gone from ten aggravating circumstances to seventeen, raising the question of whether our statute continues to narrow the class of person subject to the death penalty and otherwise permit the courts to discern a distinction between those receiving the death penalty and those who do not. Victim impact evidence is now admissible, increasing the possibility that improper factors such as the race and socioeconomic status of the victim may influence the decision-maker. The evisceration of state habeas review in the Unitary Capital Review Act has limited the effectiveness of the appellate process. The strict time limitations and onerous evidentiary burdens under the Act may preclude even valid claims of innocence.

Perhaps most, significantly proportionality review ensures that at least one objective entity, in this case the Supreme Court, is actively monitoring how well our death sentencing works. A civilized nation, if it elects to use the death penalty, must do so openly and fairly. We must be ever vigilant for influence of improper factors in our death sentencing systems. These concerns are not fanciful but well founded in our history; arbitrariness was so widespread prior to 1972 that it required the abandonment of the entire system. For the most part practitioners simply do not have the resources to independently monitor the system and rely heavily on the Supreme Court's work to identify those cases where a death sentence is aberrational.

Our Supreme Court has been actively collecting data for its proportionality review for nearly twenty years. By virtue of status as the highest court it can command the cooperation of the trial courts in submitting its review forms. It routinely audits for compliance and makes its information available free of charge. It now has a wealth of data from which policy-makers and others concerned with fairness in the system may draw, all with an extremely modest investment of time and money. Thus not only is the Supreme Court uniquely situated to collect data on the system, it is authorized to remedy inequities in a minimally disruptive way. This is how death sentencing systems, if they are to retain indefinite usefulness, are supposed to operate.