THE PENNSYLVANIA DEATH PENALTY AND PROPORTIONALITY REVIEW

House Judiciary Committee
Thomas P. Gannon, Chairman

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As you know, defense lawyers have employed a variety of legal maneuvers to block imposition of capital punishment for the most serious crimes under the law of this Commonwealth. To date, despite strong new legislation from this body, those efforts have been almost entirely successful with the Pennsylvania courts.

The latest strategy has the potential to knock out every single existing death penalty case in a single blow. Ironically, this strategy is based not on constitutional principle or court-made law, but on the very capital sentencing statute passed by the Legislature twenty years ago to ensure implementation of the death penalty in this state.

This new defense claim is called "proportionality review," and it arises from 42 Pa. C.S.A. § 9711(h)(3)(iii). That subsection provides simply that the supreme court must affirm a sentence of death unless it determines that "the sentence of death 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." The provision was originally included in the statute because it was feared that some sort of proportionality review was necessary for a constitutional capital sentencing scheme in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), which had temporarily halted the death penalty in this country. The United States Supreme Court later made clear that proportionality review is not required by the federal constitution. *Pulley v. Harris*, 465 U.S. 37 (1984).

In conformity with the statutory mandate, however, the Pennsylvania Supreme Court has amassed information about every death penalty case since 1978, and conducts a proportionality review before any capital sentence is affirmed. But defense lawyers are now arguing that this is not good enough. They say that the court must compare not only the hundreds of capital cases, but also the thousands of *non*-capital cases, and that social science "experts" must be allowed to develop "studies" to accumulate and assess the volumes of data that would result. The argument, which is now being entertained by the Pennsylvania Supreme Court, is that the legislative enactment of § 9711(h)(3)(iii) requires invalidation of the sentences of all 200+ murderers on death row in Pennsylvania.

The Legislature should not allow its statutory enactment to be misused in this fashion. The sentencing statute was intended to implement the death penalty, not to frustrate it. Since it is now clear that the proportionality provision is not legally required, it can be appropriately deleted. In the end, it is impossible and improper to compare thousands of cases and make value judgments about which specific sentences were "right" and which were "wrong." Such value judgments are to be made by the citizens of this Commonwealth, through the jury system, in individual cases. Neither social science "experts" nor appellate judges should be allowed to

second-guess those decisions by claiming that they can evaluate and compare the unique facts of thousands of court records containing millions of pages. The only real purpose for such "proportionality review" is to prevent the death penalty from being carried out at all. The Legislature should make clear that the sentencing statute cannot support such a result.

The following pages contain more detailed discussion of the defense arguments for "proportionality review."

"Proportionality" Review: An Overview of Issues

The arguments of the defense bar do not truly address proper death penalty review. Rather, the defense redefines "proportionality" to mean something else entirely. The defense would have the supreme court become the ultimate sentencing body, undertaking a "proportionality" review that instead decides the appropriateness of the sentence. This appropriateness review would rule on the accuracy of the jury's verdict, relying on "subtle similarities and differences in the cases" through a "social science investigation," using standards and value judgments prescribed by so-called experts in such "science." This is not appropriate appellate review.

Consistent with its extra-legal purpose of bypassing the legislature, the defense claims that the proper "universe" of "similar" cases refers not merely to capital cases -- which the defense finds to be excessively "alike" -- but rather to any homicide that "could have been" similar. Since one can imagine circumstances that would make any homicide capital, what the defense really means is that every homicide must be so included. To the extent this contorted definition of "similar" does not simply paralyze the review process -- which clearly would suit the defense -- it serves no legitimate purpose at all. Directly contrary to the understanding of the defense, if cases are not highly similar, comparing them is pointless, since a greater "universe" of less similar cases would tend to make an aberrant capital case more difficult to detect. For purposes of proportionality review, the only cases that are similar to capital cases are other capital cases.

The jury's sentencing decision is a moral one, not a mathematical one. The defense effort to remove the sentencing decision from the jury, and to cast the supreme court in the role of an

arbitrary super-sentencing body, has nothing to do with "science," and has nothing to do with proper capital review.

Proportionality Review: Accuracy of Existing Data

The defense claims that the data collected to date by the court system through the Administrative Office of Pennsylvania Courts (AOPC) are "fatally compromised," citing "systemic flaws" and "methodological limitations." These purported "flaws," however, simply have nothing to do with the usefulness of the AOPC data as a tool for the supreme court to use in proportionality review. The defense does not discuss the usefulness of the data in determining if the penalty in a given case is proportionate to the crime committed in that case -- which is what proportionality review, if it is to exist at all, seeks to determine. Instead the defense looks upon the data through the distorting lens of what it wants proportionality review to be. As noted below, this view would eliminate the jury as the ultimate decisionmaker in capital sentencing, and cast the supreme court in the role of a super-sentencing body. Since the data were collected to aid the supreme court in determining the proportionality of the penalty to the crime, and were never intended to serve the unique vision of the defense, it is not surprising that the defense finds them to be "flawed."

The defense bar argues that, if only enough detailed information were collected, the supreme court would be in a position to compare "all similar cases", and rely on "subtle similarities and differences in the cases" through a "social science investigation." By "similar" cases, the defense refers not only to capital cases, but to any cases that "could have been" capital. As a result of this comparison, the supreme court can supposedly determine -- using standards

and values established by "social scientists" -- whether the penalty verdict was "administered fairly," or whether the jury relied on "improper factors" in reaching its penalty verdict.

But the question of whether the jury's verdict was "administered fairly," or was the result of "improper factors," simply has nothing to do with the question of whether the penalty is proportionate to the crime. Indeed, the defense is clearly not discussing proportionality at all, as that term is ordinarily understood. Rather, the defense redefines "proportionality" to mean "appropriateness," and casts the supreme court in the role of determining what is or is not appropriate. Thus, for the defense, it is incidental to "proportionality" (meaning appropriateness) review that a jury found aggravating circumstances beyond a reasonable doubt, and that the decision was supported by the law and the evidence. The real question is whether the jury acted "unfairly" or relied on "improper factors" -- under standards and value judgments to be determined by "social scientists." Since the jury's verdict is not really final even if supported by the law and the evidence, the ultimate sentencing body would become the supreme court, not the jury. Under "proportionality" review as the defense redefines it, the supreme court could determine that the jury "improperly" or "unfairly" decided that aggravating circumstances outweighed mitigating circumstances, or failed to realize that various mitigating circumstances it had rejected were really proven. None of these things, of course, has the slightest relationship to proper capital review.

Defense attorneys presents a variety of so-called "flaws" in the data-collection practices of the AOPC. The defense complains that the AOPC review form does not attempt to identify which mitigating circumstances were actually found by any of the individual jurors; does not state whether a life sentence resulted from a hung jury; does not require "complete factual

narratives"; does not ask for a "comprehensive breakdown" of the catchall mitigation provision; and does not provide a "comprehensive instruction manual." Finally, the defense complains about "the secrecy" that "surround[s]" proportionality review.

How do these "flaws" hinder the supreme court in deciding if the penalty is disproportionate to the crime in a given case? There is no hindrance whatever. These things can be called "flaws" only to the extent they fail to relate to the type of "proportionality" (appropriateness) review that the defense would like to create. Where the jury decides that mitigating circumstances were outweighed by aggravating circumstances, there is no point relevant to proportionality in recording what mitigating circumstances individual jurors found. The only possible reason for seeking such data would be to second-guess the jury's weighing decision, in order to re-determine the appropriateness of the penalty. The defense would put this information before its experts in social science, who would measure the decisions of each jury against their own value judgments. These experts would reweigh the verdicts based on their application of "social science" -- "science" being a euphemism for the elevation of the experts' own value judgments above those of the jury -- which the supreme court would then supposedly adopt as its standard for "proportionality."

Thus, the supposed "flaws" identified by the defense merely serve to illustrate the vast difference between proper appellate review and the appropriateness review the defense advocates. For example, whether a life sentence was imposed because a jury deadlocked says exactly nothing about cases in which the jury unanimously agreed that the appropriate sentence was death. Similarly, requiring an essay (factual narrative) on the AOPC form would be pointless, unless the purpose were to use the narrative to determine that another jury's verdict in a

"similar" case (the very use of the term "similar" in this context is chimerical) somehow demonstrated, by "subtle similarities and differences" between the cases, that the jury's decision in the case being reviewed was inappropriate.[1]

The defense asserts that "[l]awyers and judges are uniquely qualified" to identify "factual similarities and distinctions" based on "complete and accurate factual narratives." Putting aside whether lawyers and judges are truly qualified for the super-sentencing role,[2] the defense fails to explain how such narratives can possibly be either complete or accurate -- even though it describes these qualities as "essential." The defense apparently assumes that the trial judge can identify all the facts that the jury believed and found to be significant, as well as the extent of that significance, and present these facts in a "narrative." There is no precedent for such a feat. A judge can summarize the trial testimony in a way that relates to whatever legal issues the parties may have raised, but a judge can no more produce an "accurate" or "complete" narrative than he can read the jurors' minds. The idea that appellate judges can read narratives written by trial judges about the unknowable perceptions of thousands of jurors and thereby detect "subtle

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[1] While the defense observes that a narrative could serve to explain apparent discrepancies in recorded data, the same goal can be accomplished in any number of ways, including simply looking at the original record. Moreover, as noted below, the very process of creating essays can create discrepancies all by itself. The defense is clearly not interested in avoiding discrepancies so much as creating them.

[2] Attorneys are trained to identify subtle distinctions in fact patterns, but only in relation to discrete rules known to them, i.e., laws. In the "proportionality" review envisioned by the defense, however, the rules are known only by those who make them -- social science professors -- and are ultimately based on the value judgments of these "experts." The appropriateness of the penalty, in the vision of the defense, is to be determined by the insight of those with greater intellectual abilities than the mere jurors who decided the verdicts. It is not clear how lawyers or judges, let alone social science "experts," are qualified or authorized to make these distinctions. In reality, attempting such "review" could only produce arbitrary decisions by individuals with far less information, and thus far less insight, than the juries whose decisions are being reviewed.

similarities and differences in the cases" is utterly ridiculous.[3]

The defense complains that "widely different mitigators" -- apparently meaning, "widely different factual claims of mitigation" -- are "lumped into the catchall" on the AOPC review form. But this, of course, is the reason the "catchall" provision exists -- to permit the jury to consider mitigating evidence that defies categorization. Thus, the defense argues that the AOPC review form is "flawed" because it does not attempt to categorize that which, by legislative definition, is incapable of being categorized. How this could "increase the utility of the review form," the defense fails to explain. In reality, such sub-categorization and sub-sub-categorization, to the extent it does not paralyze the review process entirely, could never serve the purpose of deciding if the penalty was disproportionate to the crime. It could only serve the supreme court in the role of super-sentencer, in deciding if the jury's sentencing decision was appropriate.

Moreover, the idea that such categorization can be accomplished, however pointless the effort, is an illusion. The only way it could occur would be to require the jurors to fill out a form during deliberation. (Otherwise, the judge would have to guess, making "accuracy" impossible). But the whole point of the "catchall" provision is that it benefits the defendant by allowing jurors to find mitigation even when they are unable to articulate the basis for their finding. If jurors were required to articulate their justification for finding the "catchall" provision, they might simply conclude that the catchall provision was not proven. Although this might further the

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[3] Further, as noted below, the defense defines the "universe" of relevant cases in a way that would include virtually every homicide case in existence. Apparently, the supreme court is expected to read narratives in thousands of cases each and every time proportionality review occurs. Clearly, in addition to being prodigies of accuracy and completeness, these narratives must also be extremely short. The defense does not address the extent to which the imperative of brevity conflicts with those of completeness and accuracy.

cause of "social science," one wonders if a defendant sentenced to death as a consequence would appreciate the benefit.

It has already been noted that an enumerated mitigating circumstance found in one case may be found in another based on different facts. But even jurors in the same case do not have to agree on what facts establish a given mitigating factor. Since mitigating circumstances need not be found unanimously, it is unclear what the defense means when it describes a mitigating circumstance "found" by the jury. Presumably, a mitigating circumstance found by one juror should be distinguished from the same one found by two, three, or twelve. A mitigating factor found by one juror could be of less weight, or more weight, than one found by two. Perhaps the defense would have the jurors fill out additional forms, so that each one can attempt to justify his or her weighing decision. Then, presumably, the supreme court can decide if the juror's reasons were adequate.

All of this flies in the face of the supreme court's settled decisions construing the capital sentencing statute. Many elements of the jury's verdict are unreviewable, because the jury's sentencing decision is a moral one. The capital sentencing statute has "at its core a function of character analysis." Thus, when considering as an aggravating factor the offender's record of violent felonies, the jury is not expected to consider only the fact of those convictions, nor is it expected to merely count them. The jury is to determine what the circumstances surrounding the prior crimes have to say about the offender's character:

> [T]he central idea of the present sentencing statute is to allow a jury to take into account such relevant information, bearing upon a defendant's character and record, as is applicable to the task of considering the enumerated aggravating circumstances. Consideration of prior "convictions" was not intended to be a meaningless and abstract ritual, but rather a process through which a jury would gain considerable insight into a defendant's character.

Commonwealth v. Beasley, 505 Pa. 279, 289, 479 A.2d 460 (1984); accord Commonwealth v. Marshall, 537 Pa. 336, 343, 643 A.2d 1070 (1994). Contrary to the view of the defense, a process of this kind cannot be understood through accounting, statistics, mathematics, or any other "social science" convention. No conclusion based on such methods can be "accurate," since the process cannot be measured by methods that depend on quantification.

The defense calls for a "comprehensive instruction manual" to eliminate "problems of interpretation." What these "problems" might be, however, the defense makes absolutely no effort to explain. Clearly, the "problem" is that the data have been deemed inadequate by the defense's social science experts: which is simply another way of saying that the data do not relate to what, in the defense's view, proportionality review is supposed to accomplish. Again, the failure of the data to conform to the views of the defense shows only that any "problem" resides with the defense, not with the data. Indeed, as is by now apparent, "correcting" the "problems" identified by the defense is like severing the hydra's heads: several new problems arise for every one "solved." But while making review more difficult may serve the ends of the defense, it has nothing at all to do with giving effect to the legislative intent.

Finally, defendant's defense complains about "the secrecy surrounding the [proportionality review] process." But the process in not secret at all. The supreme court has clearly stated that, in addition to the record in the case being reviewed, it relies on the AOPC data. Those data are publicly available. What the defense labels a "complete mystery" is "how the results were achieved" -- i.e., the thought processes of the individual Justices, which are not publicly announced or recorded except to the extent they are announced in the court's opinion. How this practice differs from that of any other court that has existed since the dawn of history,

the defense again fails to explain.[4] Nor does the defense explain how, if the process is "secret" now, it would be any less "secret" if the supreme court were to purport to rely on "subtle similarities and differences" between cases in determining that the penalty in a given case was "disproportionate" (inappropriate).[5] There is, of course, no "mystery," except in the mind of the defense. Since it chooses to redefine the inherently straightforward proportionality review process as one of byzantine complexity, the defense finds it "mysterious" that the review can take place without signs that a "social science investigation" has occurred.

Plainly, the defense is not interested in proportionality review at all -- other than to the extent it has been redefined to mean something else entirely. Instead, the defense wants to supplant the jury's sentencing verdict with an appellate trial, focusing on "subtle similarities and differences" in "the universe of cases" which "could have been capital." Of course, it is

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[4] Nor does this so-called "secrecy," which is nothing more than typical appellate practice, in any way justify the defense's rather arrogant complaint that, "in the vast majority of cases the [proportionality] issue is resolved with a boiler-plate assertion [that] the Court has conducted the review and found no excessiveness or disproportionality." This plainly implies that the court is either lying about having conducted the review, or that it is lying about the result. It is difficult to imagine a more insulting argument, or one that is less relevant.

Much of what the defense chooses to describe as "secrecy" merely reflects the fact that the AOPC collects data to support the supreme court's proportionality review, and not the appropriateness review prescribed by the defense. Thus the defense asks, "Is there any attempt to define cases in terms of comparable culpability beyond simply comparing similar aggravating and mitigating circumstances?" The defense seems unwilling to grapple with the idea that it simply may not be possible to measure "comparable culpability" with forms and statistics.

[5] At this point the argument of the defense actually becomes self-contradicting. The defense calls for a "comprehensive instruction manual" to eliminate "problems of interpretation." But, under the fundamentally subjective design of the defense, the "proportionality" decision must ultimately be an arbitrary one. Clearly, if the real purpose of "proportionality review" is to disguise the fact that the jury's verdict is being arbitrarily overturned, "problems of interpretation" and "secrecy" would not be problems at all -- they would be indispensable. Otherwise, the arbitrariness of the decision would be obvious.

impossible to weigh "subtle similarities and differences" between jury verdicts in even a small number of trials, let alone the plethora of cases the defense would include in its absurdly complex design. It is impossible to record or comprehend all the myriad factors that influence a jury's moral decision in two cases, let alone thousands. "Proportionality" (appropriateness) decisions that purport to rely on such "subtle similarities and differences" in unrelated cases can never be anything but arbitrary, no matter how much effort is expended.[6]

Moreover, if the sheer volume of steps and sub-categorizations required by the "social science" methodology recommended by the defense defense seems excessive, this is no accident. Such pointless, needlessly convoluted "reforms" are not only doomed to fail, but designed to fail.[7] This is confirmed by the defense' argument that, until these supposed "flaws" are corrected,

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[6] The defense protests that "[j]udicial decisions determinative of life or death should not be based on incomplete or inaccurate data" -- as if proportionality review, and not the jury's verdict, was the stage of the process that determined whether the penalty would be life or death. That, however, is precisely wrong. The jury determines the penalty, and does not have, or need, information about unrelated cases in order to reach an accurate verdict. To suggest that the penalty decision requires "complete" data on thousands of unrelated cases, and that such "completeness" requires the kind of "social science" approach the defense advocates, is to remove the jury from the decisionmaking process.

[7] For example, the defense would prefer to enlarge the "universe" of cases to be reviewed to any case that was "death eligible." This would immediately expand the pool of cases to be reviewed so that it would number in the thousands. Indeed, the uniform crime reports for Pennsylvania show that there were 8,094 homicides in the ten-year period from 1984 through 1994. At an average of over 700 homicides per year (there has not been a year with less than 700 since 1988), the total number of homicides since 1984 will easily exceed ten thousand by next year. Moreover, the view of the defense would not exclude review of cases occurring before 1984. (Indeed, if the number of cases in Pennsylvania is not sufficiently unmanageable, one can confidently expect the defense to urge the inclusion of cases from other states). In reviewing a given case, the supreme court would apparently be required to compare it with "factual narratives" in these thousands of other cases. Since "secrecy" is to be avoided, perhaps the supreme court would be required to explain in its opinion how the case being reviewed was like, or not like, the narratives in the thousands of other cases to be considered. If all of this happens to make the review process extraordinarily cumbersome and complex, that is no coincidence.

the AOPC data are "unreliable," and the supreme court should "declare a moratorium on [proportionality] reviews." Since the statute makes proportionality review mandatory, the court would be unable to affirm any capital case. The "moratorium" would of course be permanent, since the myriad steps that must be taken to cure the supposed "flaws" are not merely pointless, but impossible to implement.

As already noted, proportionality review is not a "social science investigation." Sentencing is a moral decision for the jury, and review of that decision is not an "investigation" nor a matter of applied mathematics. Perversely, the defense uses the term "science," which connotes logic and reason, as justification for a kind of "proportionality" review that could never be anything other than arbitrary, if it could be implemented at all. The pseudo-science of the defense should be rejected.

Proportionality Review: the Universe of Cases

The sentencing statute requires affirmance unless "the sentence of death 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). The defense, pointing to dicta in early decisions that discuss proportionality review, urges the supreme court to construe the word "similar" as loosely as it possibly can, so as to expand the "universe" of cases to be considered. The term "universe" is apt, since the number of cases would thus be astronomical.

The argument of the defense is typically sophistic. The plain meaning of the word "similar," when used in the context of capital cases, plainly refers to other capital cases. The defense explains that this meaning is unsatisfactory, not because it is inconsistent with the plain

language of the statute, but because it is too consistent -- capital cases are so similar, the defense complains, they are "like peas in a pod," and "factually alike." The Orwellian argument that the word "similar" cannot be read to refer to cases that are too much alike is hardly consistent with principles of statutory construction.

Moreover, the defense protests, capital cases are so alike -- i.e., "similar" -- that using such cases would make proportionality review "a rote exercise with preordained results." But this is simply false. Proportionality review asks if the penalty in the case being reviewed is disproportionate to the crime the defendant committed. Considering other cases is not an end in itself, but is intended to aid the court in addressing this question, since the comparison may reveal an aberration in the case being reviewed. A high similarity between the cases is what makes a meaningful comparison possible. Thus, it was logical for the Legislature, believing that some form of proportionality review would be required, to provide that apples be compared with apples, not apples with oranges. That the cases compared are capital cases does not preordain the result of the review. Just the opposite: actual similarity is essential to determining if the case being reviewed is aberrant. An aberration that led to a death sentence in a capital case would tend to disappear in a sea of various homicide cases, because what may appear aberrant in a capital case can be unremarkable or harmless in a non-capital case. Greatly expanding the "universe" of cases would tend to make an aberrant case more, not less, difficult to detect.

Indeed, proportionality review of "similar" cases in New Jersey is now limited by statute to capital cases alone. The New Jersey legislature clearly understands what the defense does not: that the value, if any, in comparing capital cases is lost when the comparison is extended to cases that "could have been" capital.[8] The defense's insistence that the word "similar" be read in such a

way that the resulting comparison is utterly meaningless for purposes of proportionality review is inconsistent with the plain meaning and purpose of the statute, and is not a reasonable construction. 1 Pa.C.S.A. § 1903 (a) (statutes to be construed according to their plain language).

But the defense, of course, is operating under its own definition of proportionality review, meaning appropriateness review. Exponentially expanding the amount of information that must be considered is perfectly consistent with the vision of the defense, in which the supreme court is to act as a super-sentencing body, deciding the appropriateness of the sentence based on "subtle similarities and differences" in the "universe" of dissimilar cases. And if this elephantine review process simply collapses of its own weight, that too is satisfactory to the defense. Such a collapse is not unlikely if the vision of the defense is adopted, since the number of cases to be reviewed under its "could have been" construction will inevitably number in the tens of thousands.

The defense contends that "[t]he question of the appropriate universe has already been decided by the supreme court." But in reality, the proper construction of the word "similar" in §

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[8] In 1992, the New Jersey legislature amended its statute, requiring that proportionality review "shall be limited to similar cases in which a sentence of death has been imposed." N.J.S.A. e 2C:11-3e (New Jersey Assembly Act No. 894, P.L. 1992).

The legislative history of this amendment indicates that it was a response to the New Jersey Supreme Court's adoption of "social science" methods of proportionality review, which were (and continue to be -- as described in more detail below) a nightmare of statistical irrelevance and unimaginable complexity. Testifying before the New Jersey Judiciary, Law and Public Safety Committee, New Jersey Attorney General Robert J. Del Tufo noted that three years after the New Jersey Supreme Court had begun its study, and in spite of considerable public money dedicated to the project, that court had still failed to even define what kinds of cases were to be considered. The methods used by the New Jersey court -- which are identical to the methods the defense now recommends to the supreme court -- were attacked as "uncertain, unreliable, and ultimately futile" (Public Hearing before Judiciary, Law and Public Safety Committee, January 31, 1991, 3-7).

9711(h) has never before been raised or decided as an issue. Thus, what the defense treats as "decisions" -- holdings -- in early cases discussing proportionality review, implying that the analysis may extend to life-sentence cases, are merely dicta. Moreover, not even these dicta support the expanding "universe" prescribed by the defense.

The defense never clearly states what it means by a case that "could have been" capital. The defense notes that its private (yet publicly funded) "study" includes "[n]on-penalty hearing cases," and "death eligible cases that pled to murder of the second or third degree," but it points to no principle that defines these limits. Indeed, these self-selected limits are illusory. The defense argues that "similar" is properly defined as "could have been similar." The phrase "could have been," however, is vague; there is no objective way to determine what "could have been." What the defense deems a "death eligible case" may be a case in which no jury would have found an aggravating circumstance, either because of evidence in the case that the defense inaccurately evaluated or did not know about, or because the defense overestimated apparent evidence of aggravation. Indeed, one could argue that <u>any</u> homicide "could have been" capital by inferring that there was evidence that was never introduced, and that the evidence was not introduced because, even though the case "could have been" capital, it was in fact something else -- an acquittal, an escape, a plea, a discretionary decision by the prosecution, a Rule 1100 discharge, a case in which the perpetrator was never arrested, and so on. If, as the defense claims, "similar" means "could have been similar," the defense does not explain why the latter cases are not required to be considered in the "universe" it advocates.

In reality, there is only one instance in which it is certain that a case "could have been capital" -- namely, where the case was, in fact, capital. Only in a capital case is there a finding

by the jury that aggravating circumstances have been proven beyond a reasonable doubt, and that there are either no mitigating circumstances or mitigating circumstances that are outweighed by the aggravating circumstances. Anything else is speculation. Given its insistence on accuracy, the defense should recoil in horror at the prospect of using such speculation in the supreme court's proportionality review.

Not least among the things missing from the argument of the defense is any serious discussion of the legislative intent. Short of noting that it is the legislature that decided to require proportionality review, the defense seems utterly unconcerned with the question of what the legislature intended the supreme court to do when it amended § 9711(h). But this too is not surprising, because the defense seeks to bypass the legislature. Its arguments do not involve questions of law appropriate for appellate review of capital cases. In the process of considering whether to have the death penalty at all, the Legislature may choose to consider a "universe" of cases and consider "studies" that purport to quantify "comparable culpability" or "subtle similarities and differences," or to determine what cases "could have been" (if they were not something else). But a court has no occasion to do so in the guise of conducting proportionality review in capital cases. Since the supreme court is not a legislature, the defense' reliance on legislative policy considerations should be rejected.

Proportionality Review: the Role of Social "Science"

It is clear that the defense would like the supreme court to adopt the proportionality review methods used by the Supreme Court of New Jersey, which led to that court's recent rebuke by the New Jersey Legislature. A single example of this type of review suffices to illustrate the true nature of what the defense proposes. It consists of a single public document

from the State of New Jersey: the proportionality review instrument in just one case, State v. Harris.

State v. Harris exemplifies the type of review the defense wishes the supreme court to use. Indeed, the New Jersey Supreme Court's study is headed by the same Professor Baldus that is conducting the Philadelphia Defender Association's own privately commissioned-publicly financed study. The Harris study, with appendices, is approximately three inches thick. Each page is awash with incomprehensible social-science cant and statistical jargon. This impenetrable mass of technical speech is used to "quantify" an almost infinite series of value judgments made by the social science "experts."

Even the most cursory examination of this document reveals a great deal. For example, Appendix A presents "A four-level typology of strength-of-evidence concerning death-eligibility." In other words, social science "experts" purport to measure and quantify the weight of the case in which the defendant was convicted. The "typology" is broken down into four categories: "overwhelming," "strong," "clearly defensible," and "clearly insufficient" (the last apparently meaning "insufficient" from the "expert" viewpoint, not that the evidence was insufficient for conviction in the eyes of a court). The "typology" distinguishes a "strong" case from one that is "overwhelming" with a series of examples. The example of a "full confession with rich detail on all elements of capital murder" fits into the "overwhelming" category, but a case with "multiple eyewitnesses to the killing without credibility problems" is merely "strong."

Appendix E explains how "salient factors" in homicide cases are measured. For instance, where the aggravating factor is a prior murder conviction, "[c]ases with this factor have no distinctive factual patterns." (Apart, one supposes, from the fact that the defendant has a habit of

murdering people). "Their aggravation level is therefore primarily measured by the number of other statutory aggravating and mitigating circumstances and the level of violence and terror." Consequently, a defendant who commits a second, relatively "non-violent" murder (although the study does not explain how to measure "levels of violence" among murders) by surprising his victim rather than terrifying him, without other aggravating factors, is fortunate indeed under this study. But why he should be so fortunate is unexplained.

Appendix F purports to predict the "probability" of a death sentence in "death-eligible" cases by "salient factor subcategor[ies]." What makes a factor "salient," and how it can be used to predict the "probability" of an outcome that has already occurred, is not explained.

Harris includes a copy of the "data collection instrument" (review form) used by the New Jersey court. It is 33 pages long, and asks the respondent to code such matters as where the defendant lived (nine categories); his primary and secondary occupational skills (forty-two categories, including "Drifter" and "Sporadic odd jobs, no particular skill" and "Chronically unemployed"); and his employment status and history (eighteen categories). There is a plethora of categories and sub-categories concerned with the defendant's drug or alcohol abuse (did he use drugs within 24 hours of the murder; specify which one, up to three types; was he affected "substantially," "moderately," "slightly" or "unknown"; indicate if he was a "heavy" user "around" the time of the offense). Was defendant abused or neglected as a child? Did he have "problems in school?" (Perhaps there are those who went to school and had no problems).

Section VII of the form asks the respondent to quantify the defendant's "mens rea." Section VIII calls for quantification of his "motive(s)." There are 34 categories for the scene of the crime. Section IX F breaks down the aggravating circumstance of torture into physical and

mental categories, subcategorized by "number of sufferers" and "strength of evidence." Subsection F asks the respondent to state whether the homicide was "planned for more than 5 minutes" (with subcategories for 5 minutes to an hour, 1 to 24 hours, 1 to 10 days, 10 days to a month, one month or more, "detailed plan, unknown how long," and "unknown").

Technical Appendix 9 describes the methodology used, and it is highly instructive. A representative quote from the first page of this nine-page document follows:

> Logistic regression, the preferred technique, we quickly discovered was out of the question. Logistic analyses run in SAS would not converge. To deal with this problem we used discriminant analysis, which is capable of estimating regression coefficients with the same properties as logistic regression coefficients. Most importantly, discriminant analysis can handle a much larger number of independent variables.

Clearly, no matter how many levels of "analysis" are used, and no matter how complex the statistical methods, this kind of "social science study" is ultimately dependent on value judgments made by "social scientists." These judgments, despite their rainment of multiple layers of techno-jargon, are as subjective as they are incomprehensible. In the final analysis, any notion that such methods can explain or quantify the findings of juries is nothing more than socio-scientific hubris. The fallacious social science of the defense bar should be given no place in appellate review capital cases.