

ABSTRACT

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THE MARYLAND
PROPORTIONALITY REVIEW
PROJECT

Rachel B. Philofsky, Master of Arts,
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Directed By:

Professor Ray Paternoster, Department of
Criminology

Prior research demonstrated that the death penalty is administered in a discriminatory fashion. This is a problem both legally and morally. There is a precautionary measure called a proportionality review included in several state death penalty statutes which compares death sentence cases with similar cases to determine if the sentence is proportional to the crime based on other crimes with similar characteristics. From 1978–1992, the Maryland State Supreme Court was statutorily mandated to identify and eliminate disproportionate death sentences. Yet, they have not vacated even one disproportionate death sentence. This project evaluates the court's attempt to measure comparative excessiveness among Maryland death sentences. Results support the notion that the proportionality review conducted by the court does not single out and eliminate disproportionate cases as it was intended to do. Conclusions are based on an independent proportionality review of Maryland death sentences in comparison with the findings of the court.

THE MARYLAND PROPORTIONALITY REVIEW PROJECT

By

Rachel B. Philofsky

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Advisory Committee:
Professor Ray Paternoster, Chair
Professor Denise Gottfredson
Professor Laure Brooks

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Dedication

I dedicate this project to the following individuals: Tyrone D. Gilliam, Vernon Evans, Anthony Grandison, Wesley E. Baker, Jody L. Miles, and Steven H. Oken.

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Chapter 1: Capital Punishment in the Early Period (1600's – early 1930's)

Capital punishment was one of several English customs brought into this country with the establishment of the early American colonies. As the American colonies grew and separated from England and the church, the death penalty evolved too. The range of crimes punishable by death changed. Early executions were frequently carried out in the Northern colonies for religious offenses reflecting the initial influence of the church. The number of crimes punishable by death decreased and evolved to reflect a more secular society. (Paternoster, 1991 p. 5) Capital offenses were also reduced by categorizing crimes with different degrees of seriousness. (Paternoster, 1991 p.6) Degrees of murder allowed juries to convict a defendant of murder without being compelled to inflict death sentences through mandatory death sentence statutes. This was the beginning of a trend to move away from mandatory death sentence statutes and toward discretionary ones.

Despite the narrower definition of a capital crime and wider discretion among capital juries, the number of executions increased throughout the early period. Research done by Schneider and Smykla reports that there were 162 executions in the 1600's, climbing to nearly 1400 in the 1700's, and over 5000 in the 1800's. The first three decades of the 1900's saw roughly 1500 executions. Schneider and Smykla also noted that the death penalty gradually shifted from executions performed under mostly local authority in the early 1600's to executions performed under mostly state authority by the 1900's. (Paternoster, 1991 p.4) The populations being put to death

in the early period consisted of criminals who committed capital offenses as well as those who posed a threat to established authority. This second group was often made up of people identified as witches or blasphemers or minority populations under pre-Civil War Slave Codes and post-Civil War Black Codes. These race-based statutes called for harsher sanctions for those crimes committed by black offenders.

(Paternoster, 1991, p.8)

Capital Punishment in the Pre-Modern Period (1930-1972)

The capital punishment landscape started to change during the pre-modern period. The steady increase in executions seen in the early period continued through the 1930's before waning over the next three decades. By the 1960's the United States execution rate had slowed to an average of 20 executions a year. There were nearly 4,000 executions performed in the United States from 1930 – 1970. The distribution of executions over this period was geographically uneven with 60% of these executions occurred in the South (Paternoster, 1991 p.14). The unevenness of executions didn't stop there. The racial makeup of the death row inmates executed during this period was imbalanced. Nearly half of all executions for murder and 90 percent for rape were comprised of black offenders despite the fact the black population never topped 12% of America's overall population during that time period. (Gibson and Jung, 2002).

Executions stopped in 1967, not to be resumed for nearly a decade.

According to Paternoster (1991, p. 18) this 10 year gap in executions “was probably due to two related factors: (1) a de jure moratorium on capital punishment while the

United States Supreme Court examined the constitutionality of state death penalty statutes, and (2) declining public approval for the death penalty.”

McGautha v. California

In 1971 the Supreme Court decided *McGautha v. California* which addressed the constitutionality of standardless juries and single-jury verdicts. The complaint in *McGautha* was that the jury used to determine guilt did so without instructions as to “which factors should be most determinative and the amount of weight given to them was left entirely in the hands of the jury.” (Paternoster, 1991 p. 46). The *McGautha* court concluded that standardless juries and single-jury verdicts as they were used in 1971 were constitutional, upholding the death penalty.

Furman v. Georgia

One year after *McGautha*, the Supreme Court heard *Furman v. Georgia*. The complaint in *Furman* was that “discretion provided to capital juries under existing [death penalty] statutes produced a pattern of death sentences that lacked logic or rationality,” (Paternoster 1991, pp. 67). The complaint further argued that these illogical or irrational death sentences were “cruel and unusual”, in violation of the 8th Amendment. In a surprising turn from the *McGautha* decision, the *Furman* court examined the same sentencing schemes scrutinized the previous year, and changed their minds declaring the death penalty unconstitutional. The *Furman* decision is often viewed as the most famous death penalty case to date. Aside from concluding that the death penalty was unconstitutional, *Furman* was unique in two other ways. This 5-4 opinion was over 200 pages in length—the longest decision handed down by

the Supreme Court at that point in history and that “all five justices in the majority and all four dissenters filed individual opinions.” (Paternoster, 1991 p.53)

The majority of the justices agreed that the death penalty was unconstitutional, but disagreed on which parts were the problem. Some of the justices found the unguided discretion provided to capital juries produced “a pattern of aberrant sentences” which violates the 8th Amendment’s prohibition against cruel and unusual punishment. (Paternoster, 1991 p. 53). Justice Douglas “concluded that there is an equal protection element in the Eighth Amendment that makes a punishment ‘cruel and unusual’ if it is not inflicted in an even-handed manner.” (Paternoster, 1991, p. 53). Justice Stewart noted that the “principle flaw of standardless juries is that they produce a pattern of capital sentencing that cannot be explained by any rational process.” (Paternoster, 1991 p. 55). Justice Brennan explained that the death penalty is cruel and unusual “no matter what procedures or protections are in place” and is “an affront to basic human dignity” (Paternoster, 1991 p. 56). Similar to Brennan, Justice Marshall agreed that the death penalty is “cruel and unusual” no matter how it is administered. Marshall continued and said that the death penalty is “cruel and unusual” because it is “excessive or because contemporary society finds it offensive.” (Paternoster, 1991 p. 57). Marshall addresses the public support found in opinion polls of the early 1970’s by contending that the value of these opinion polls are limited to the extent that the public holds an uninformed opinion on the death penalty. Justice Stewart declared that “death sentences are unusual in the same way that being struck by lightning is cruel and unusual.” He further noted that:

For, all the people convicted of rapes and murders in the 1967 and 1968, many just as reprehensible as these, the petitioners are among a

capriciously selected random handful upon whom the sentence of death has in fact been imposed...the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed.

Furman concluded that the death penalty as it was administered prior to 1972 was unconstitutional for a variety of reasons. “Approximately 600 occupants of death rows across the United States in 1972 would not be executed.” (Paternoster, 1991 pp. 58). Although the varied opinions in *Furman* made it clear that death penalty statutes as they had been administered were unconstitutional, there could be little found in the decision regarding suggestions to modify death penalty statutes so that they could pass constitutional muster in the future. In a rare effort to guide legislatures in the future, the *Furman* court cited the 1967 recommendations of a presidential commission in this area. The commission’s report offered the following (*Furman*, on or about p. 463):

The question whether capital punishment is an appropriate sanction is a policy decision to be made by each State. Where it is retained, the types of offenses for which it is available should be strictly limited, and the law should be enforced in an evenhanded and nondiscriminatory manner, with procedures for review of death sentences that are fair and expeditious. When a State finds that it cannot administer the penalty in such a manner, or that the death penalty is being imposed but not carried into effect, the penalty should be abandoned.

Chief Justice Burger provided a little more guidance on the matter in his dissent:

“Either state legislatures attempted to eliminate the problem of jury discretion altogether by drafting mandatory death penalty statutes or they attempted to provide sentencing discretion through so-called guided discretion statutes.” (Paternoster, 1991 p. 58).

Modern Period (1972 – present day)

The states' response to Furman

Several states immediately went to work revising their death penalty statutes in response to *Furman*. Within a few months new capital statutes were being pushed through the legislatures. Florida was the first of thirty-five states to ratify new death penalty statutes over the four years following *Furman*. The revisions were based on very loose guidance found in *Furman*. Since the main issues in *Furman* were standardless and single-verdict juries violating the Eighth Amendment's "cruel and unusual punishment" clause, most of these revisions focused on reducing or eliminating discretion in capital juries. These new statutes fell into two main categories: mandatory death penalty statutes and guided discretion statutes.

Mandatory death penalty statutes eliminated the discretion in capital juries by defining specified crimes, such as murder in the first degree, as punishable by an automatic death sentence. North Carolina, among other states, crafted a mandatory death penalty statute. The North Carolina statute stated that:

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary, or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison. [N.C. Gen. Statute Sec. 14-17 (Cum. Supp. 1975)]

-cited from Paternoster (1991) pp. 57-58

In the case of a mandatory death penalty statute, once a person was found guilty of first degree murder the job of the jury was complete because this person received a death sentence automatically. Several other states chose to revise their death penalty statutes using non-mandatory means. This other option evolved into a guided discretion statute. The guided discretion statutes do not take the discretion entirely out of the capital jurors' hands. Instead they provide additional guidance for the capital jurors in three ways: bifurcated capital hearings—hearings at which the guilt phase is separate from the sentencing phase; sentencing guidance with lists of aggravating and mitigating factors; and an automatic appellate review process. Most of the revised statutes consisted of a combination of these elements, if not all of them.

Aggravating factors are specified in the state death penalty statute, often under the definition of first degree murder. These aggravating factors often include the murder of a peace officer or the murder of a person in combination with another violent felony such as rape or murder. They describe crimes that are much worse than a straight murder in a relative sense. This list of aggravators is used by a capital jury when determining guilt. In the case of Georgia's revised statute, the capital jury must find at least one of the aggravating factors is present beyond a reasonable doubt before the jury may consider imposing a sentence of death (Paternoster, 1991 p. 60).

In an automatic appellate review, a court with statewide jurisdiction reviews each death sentence on appeal to determine if it is "warranted by the facts and is not inconsistent with the penalty imposed in other cases." (Paternoster, 1991 p. 62). The automatic appellate reviews aim to measure whether a death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime

and the defendant.” [Ga. Code Ann. Sec. 27-2537 (Supp. 1975)] from (Paternoster, 1991 p. 63).

Gregg v. Georgia

Four years after *Furman*, thirty-five states had revised their death penalty statutes and the death row population was starting to grow. In the summer of 1976 the Supreme Court handed down five death penalty cases in *Gregg v. Georgia* and its companion cases (referred to *Gregg* from here on). These cases tested the constitutionality of revised death penalty statutes from Georgia, Florida, Texas, North Carolina, and Louisiana. The revised statutes for Georgia, Florida, and Texas were guided discretion statutes while North Carolina’s and Louisiana’s statutes were mandatory death penalty statutes. The Court decided that the death penalty in general did not violate the Eighth Amendment. Justice Stewart offered the strong legislative response to *Furman* as evidence that the public supported the death penalty. Given that the death penalty was constitutional on a broad level, the Court then examined whether the revisions in the statutes corrected the problems brought up in *Furman*. They decided that the guided discretion statutes from Georgia, Florida, and Texas were constitutionally admissible; however, in deciding that the mandatory death penalty statutes from North Carolina and Louisiana were unconstitutional, they struck them down.

The justification for striking down the mandatory death penalty statutes rested in the logic that mandatory death penalty statutes simply moved the discretion—it did not address the problem. Juries still had the ability to remove the sentence of death by refusing to convict those defendants they deemed not deserving of the death

penalty, and it removed the ability of the jury to “consider the unique characteristics of the defendant.” (Paternoster, 1991 p.65).

Although the *Gregg* decision lacked a majority opinion, the Court clearly approved of several aspects of the guided discretion statute. In finding the guided discretion statutes constitutional, Justice Stewart highlighted three desirable elements: bifurcated sentencing proceedings, statutory factors (aggravators and mitigators) to guide the jury in its decision making, and appellate review of all death sentences. The purpose of these new guidelines was to “ensure consistency and proportionality” (Paternoster, 1991 p. 65) among death sentences. The *Gregg* Court further explained how the automatic appellate review process guards against problems highlighted in

Furman:

[The Georgia statute] provides for automatic appeal of all death sentences to the State’s Supreme Court. That court is required by statute to review each sentence of death and determine whether . . . the sentence is disproportionate compared to those sentences imposed in similar cases.

Moreover, to guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similar situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of *Furman*. No longer should there be “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”

---*Gregg v. Georgia*, p. 198 - 199

The opinions in *Gregg* predicting the value of the constitutionally acceptable revisions were speculation because “the statutes under review were so recent that there was no real experience with the pattern of sentences produced by guided discretion schemes.” (Paternoster, 1991 p. 65). While the court clearly approved of

certain aspects of the guided discretion statutes, the Court said nothing about what was constitutionally “required.” (Paternoster, 1991 p. 104).

Gregg had changed the capital punishment landscape in two ways. First, the death penalty was a constitutionally admissible punishment once again. Secondly, although *Gregg* did not provide a list of constitutional requirements for death penalty statutes, the approval of the Georgia statute offered a model for other states to copy in order to ensure a constitutionally admissible death penalty statute in their state. In response to *Gregg*, many states modified their death penalty statutes to reflect the changes noted in the constitutionally approved Georgia statute.

Death row populations grew with application of the newly revised statutes. The first execution in nearly a decade occurred in 1977. Over the next few years death rows grew and the number of execution went up. The increase in death sentences was accompanied by additional questions regarding the constitutionality of various aspects of the death penalty.

The Court addressed these issues in several cases over the next few decades, further defining the constitutional requirements of the death penalty. In *Lockett v. Ohio* (1978), the Court affirmed the right of the defense to offer mitigating evidence to the sentencer to support a sentence less than death (Paternoster, 1991 p. 104). *Booth v. Maryland* disallowed the use of “victim impact statements” during the penalty phase of a capital trial. (Paternoster, 1991 p.84). *South Carolina v. Gathers* held that “prosecutors’ comments concerning the personal characteristics of the victim were invalid sentencing considerations.” (Paternoster, 1991 p. 84). *Zant v. Stephens* held that the prosecution had the same right to offer aggravating evidence to

the sentencer as the defense does to offer mitigating evidence. (Paternoster, 1991 p. 78).

Pulley v. Harris

The Court addressed the constitutional necessity of proportionality reviews in *Pulley v. Harris*. The defendant in *Pulley* appealed his death sentence on the grounds that the California death penalty statute lacked a provision for proportionality review. The statute required an automatic appeal, but failed to require the California Supreme Court to compare respondent's sentence with sentences imposed in similar capital cases, and thereby to determine whether they were proportionate. Justice White's majority opinion in *Pulley* recognized that the Georgia and Florida statutes determined to be constitutionally admissible in *Gregg* included a proportionality review component. However, Justice Stewart pointed out that the Texas death penalty statute was approved sans a proportionality review component in *Jurek v. Texas* (1976), one of the companion cases in the *Gregg* decision. As long as a death penalty statute provides for a means to "narrow the range of cases eligible for the death penalty" (Paternoster, 1991 p.82), then a proportionality review is not constitutionally required. *Pulley* (p. 44-54) held that:

The Eighth Amendment does not require, as an invariable rule in every case, that a state appellate court, before it affirms a death sentence, compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner.

White also reiterates: "In the view of *Jurek*, we are quite sure that at that juncture the Court had not mandated comparative proportionality review whenever a death sentence was imposed," and then cites a footnote in Justice Rehnquist's dissent from

Woodson v. North Carolina: “If the States wish to undertake such an effort [*i.e.*, proportionality review], they are undoubtedly free to do so, but surely it is not required by the United States Constitution.”

The *Pulley* court distinguished between a “traditional” proportionality review in which the court examines whether the sentence is disproportionate to the crime, and a comparative proportionality review in which the court compares the sentence imposed to sentences of others convicted of the same crime. (White, 1999). *Pulley* maintained traditional proportionality review, albeit with a narrower application. The comparative proportionality review was deemed unnecessary. (Bruce, 2002).

Since *Pulley*, some states have preserved the comparative proportionality review element in their death penalty statute while other states have not. David Baldus and his colleagues noted a small trend after *Pulley* whereby a few states repealed the statutory requirement of comparative proportionality review (Baldus, 1990 p. 280).

McCleskey v. Kemp

Three years after the Court decided *Pulley v. Harris*, additional Eighth and Fourteenth Amendment claims were raised in *McCleskey v. Kemp*. The defendant asserted that his death sentence was unconstitutional because it was disproportionate to his sentence and his sentence was influenced by race, an extralegal factor. The defendant presented an empirical study conducted by David Baldus (1990) and his colleagues showing the imposition of the death penalty in Georgia depended to some extent on the race of the victim and the accused. This study was deemed “the most sophisticated and careful study of criminal sentencing yet conducted” (Paternoster,

1991 p.155) and concluded that, “even after taking account of numerous nonracial variables, defendants charged with killing whites were 4.3 times as likely to receive a death sentence in Georgia as defendants charged with killing blacks, and that black defendants were 1.1 times as likely to receive a death sentence as other defendants” (*McCleskey v. Kemp* on or about p.1).

The *McCleskey* Court weighed the accused’s claims and concluded that the statistical evidence presented in Baldus’s study was not clear enough to prove discrimination in any one case. They also noted that the accused did not offer evidence of racial bias specific to his own case. The study was insufficient to prove that Georgia’s capital punishment system was arbitrary and capricious in application and excessive in violation of the Eighth or Fourteenth Amendment.

The Role of Proportionality Review

Over the last three decades the role of the proportionality review has changed. In 1976, the *Gregg* Court took note of several revisions in Georgia’s new guided discretion statute, including the portion assessing “whether the death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” (*Gregg v. Georgia*, on or about p. 1). The *Gregg* Court approved of the provision for appellate review in the Georgia capital-sentencing system because it “served as a check against the random or arbitrary imposition of the death penalty.” Specifically, the proportionality review component “substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury,” thereby eliminating many problems noted in *Furman*. The Court viewed the reforms presented in *Gregg* as worthy tools to improve the

administration of the death penalty. The appellate review component could be used as a barometer of public opinion. Justice Stewart further discussed this in his opinion (on or about p. 206):

In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

Gregg put the death penalty back on the books and the proportionality review played a seemingly important role in Georgia's statute passing constitutional muster. The impact of the *Gregg* decision was far-reaching. Shortly after the decision came out, several states modeled their revised death penalty statutes after Georgia's, and included a proportionality review component.

Eight years after *Gregg*, the Court reversed itself with *Pulley v. Harris* when they declared that the proportionality review was not a constitutional necessity. Justice Stewart found support for this decision in *Jurek v. Texas*, a companion case to *Gregg*. Stewart noted that Texas's guided discretion statute was approved sans the proportionality review component at the same time Georgia's statute was approved. The Texas statute narrowed its definition of capital murder by requiring "at least one aggravating circumstance in a first-degree murder case before a death sentence may even be considered" (*Pulley*, on or about p. 49). To the *Pulley* Court, this requirement was enough for the Texas statute to pass constitutional muster.

Pulley acknowledged that although *Gregg* "made much of the statutorily required comparative proportionality review...this was considered an additional safeguard against arbitrary or capricious sentencing." It was further noted that while

the opinion of Justices Stewart, Powell, and Stevens in *Gregg* “suggested that some form of meaningful appellate review is required, those Justices did not declare that comparative review was so critical that without it the Georgia statute would not have passed constitutional muster.” (*Pulley v. Harris* on or about p.46).

Recent Research

Several quantitative studies examining the death penalty have been published. These studies provide answers to previously unanswered questions and document growing trends across the capital punishment landscape. Specifically, these studies have shed light on the factors which influence the administration of the death penalty and changes in public support for the death penalty.

Several studies explored the extralegal factors which influence the administration of the death penalty. These factors include race of the victim (Bowers et al., 2004; Brewer, 2004; Holcomb et al., 2004; Paternoster et al., 2004; Gonzalez-Perez, 2002; Baldus et al., 1994; Baldus et al., 1990; Baldus et al., 1998; Paternoster, 1983;) geographic location of the crime (Paternoster et al., 2004; Paternoster, 1983), or even the presence of expert testimony describing the defendant as psychopathic (Edens et al., 2005), or an approaching judicial election (Brooks and Raphael, 2002). None of these factors are legally relevant.

Yet more changes have taken place since *Pulley* was handed down in 1984. Public opinion polls, which once offered evidence of growing public support for the death penalty, show a new trend supporting the sentence of life without parole in place of death sentences (Roberts, 2005; Unnever et al., 2005b; Vogel, 2003) as well

as a decrease in public support for the death penalty overall (Barkan and Cohn, 2005; Unnever et al., 2005a; Vollum et al., 2004).

This research is a relatively new addition to the death penalty discussion. Very few studies, if any, were available to the Court during the time of *Furman*, and *Gregg*. In *Furman*, the Court clearly stated the problem: the death penalty was being imposed in a capricious and arbitrary manner and required additional safeguards to pass constitutional muster. The response in *Gregg* and its companion cases offered guided discretion statutes which seemingly addressed the problems in *Furman*. These revised death penalty statutes included bifurcated proceedings, and a list of agreed upon aggravators and mitigators meant to narrow and focus the death sentences, and the proportionality review and mandatory appellate review process—a means by which courts can measure the efficacy of the revised death sentencing system. At the time of *Gregg*, there was a lack of research examining the effectiveness of the newly revised statutes. By the time the Court heard *Pulley*, there was more research, but it was largely ignored by the majority. In his dissenting opinion, Justice Brennan took note of this research:

Although research methods and techniques often differ, the conclusions being reached are relatively clear: factors crucial, yet without doubt impermissibly applied, to the imposition of the death penalty are the race of the defendant and the race of the victim.

-*Pulley v. Harris*, on or about p. 67.

Yet, three years later when *McCleskey* put the Baldus study, a major piece of research at the forefront of their argument, the majority again largely ignored the relevance of this research. The majority held that this study did not support the discrimination claim in this case because it did not prove discrimination in any one

case, or the case of the defendant. The *McCleskey* Court concluded that research proving system-wide discrimination was not strong enough to show discrimination in one particular case.

Here we are nearly two decades after *McCleskey*. The legal landscape has changed. The Court held that death sentences are unconstitutional for all defendants who committed their crime under the age of 18 (*Roper v. Simmons*) and all defendants who are mentally retarded (*Atkins v. Virginia*). The trend narrowing field of people eligible to receive the death sentences reflects the decreasing public support for the death penalty and research showing the death penalty is administered in an uneven fashion. In Justice Douglas's opinion on *Furman*, he stated that the Eighth Amendment's "cruel and unusual" punishment clause requires "legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups." Douglas further describes this matter:

A law that stated that anyone making more than \$ 50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than \$ 3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.

-Justice Douglas's opinion in *Furman* on or about p. 257.

The proportionality reviews conducted by state courts have resulted in very few reversals or vacated sentences due to disproportionate treatment. Yet, research has consistently shown that the death penalty is administered in an uneven manner with an unbalanced reliance on extra-legal factors such as race of defendant, race of

victim, and geography of the crime. The proportionality review process should have corrected for these unbalanced sentences. What accounts for this discrepancy? My hypothesis is that the proportionality review conducted by the Maryland State Supreme Court does not single out and eliminate disproportionate cases as it was intended to do.

There are methodological problems with the way in which the state courts have carried out their proportionality reviews. The statutory requirements rarely included guidelines on how to conduct a proportionality review. Given the latitude, most states limited their universe of cases to only those in which a death sentence was handed down. This is a problem because an accurate comparison requires a larger universe of cases, including every case which was eligible for a death sentence based on the legal elements of the crime.

The U.S. Supreme Court never intended for the administration of the death penalty to selectively apply to some groups more than others. They have called for reforms to address the problem and ensure equal justice. Additional research and the evolution of public opinion since the 1970's provided a vehicle for change over the death penalty landscape. The questions concerning unequal death sentences raised in *Furman*, *Gregg*, and *Pulley* need to be more fully addressed. The question of proportionality is still an important one. Using data collected by Ray Paternoster, I plan to conduct a proportionality review to determine if the death penalty in Maryland is being administered in a proportionate and equal fashion. This project will include both a traditional and a comparative proportionality review. In conducting a comparative proportionality review, the traditional proportionality review questions

will also be addressed. The universe of cases in my proportionality review will consist of all death eligible cases.¹ If the Maryland State Supreme Court has conducted an effective proportionality review, then the results of my proportionality review will yield results similar to theirs.

¹ “Death eligible” is defined as cases in which (a) the state’s attorney filed a notice of an intention to seek a death sentence, even if that notice was later withdrawn unilaterally or in exchange for a plea, or (b) the facts of the case clearly establish that a first-degree murder was committed, the defendant was the principal in the first degree (or met the principal in the second-degree exception), the defendant was eligible by age at the time of the offense, the defendant was not mentally retarded at the time of the offense, and the murder included at least one statutory aggravating circumstance.

Chapter 2: Literature Review of Previous Proportionality Reviews

Over the past three decades several proportionality reviews have been conducted both by state supreme courts and independent researchers in an effort to measure the comparative excessiveness of death sentences in some of the states who have chosen to impose the death penalty. The methods and results of these proportionality reviews have differed. Proportionality reviews in Georgia and South Carolina are reviewed below.

The Georgia Proportionality Review

Georgia was one of the first states to include a proportionality review in their post-*Furman* capital statute. After the *Gregg* Court approved their statute, many states followed Georgia's example and included proportionality reviews in their revised capital statutes. In 1983, Baldus and colleagues (1983; 1990) examined Georgia's proportionality review by conducting an empirically-based comparative review of post-*Furman* death sentences in Georgia. The Georgia statute lacked guidelines regarding its proportionality review element. It was not clear what methodology the Georgia Supreme Court would use in conducting its proportionality review. By the time Baldus and his colleagues conducted their proportionality review in 1983, it was clear that the frequency with which the Georgia Supreme Court

invalidated a death sentence due to comparative excessiveness was low.² Baldus and his colleagues (1983 pp.679) sought to “evaluate the effectiveness of the Georgia Supreme Court’s system of comparative sentence review.” More specifically, they wanted to determine the extent to which the actual operation of Georgia’s proportionality review process has ensured that no person ‘sentenced to die by the action of an aberrant jury’ had been put to death, as it was assumed in *Gregg* (Baldus et al., 1983).

Georgia had been conducting a proportionality reviews as was required by their state death penalty statute; however, Baldus and his colleagues (1990, pp. 404) report that the Georgia Supreme Court had rarely vacated a death sentence “because of the infrequency with which death sentences occur in other similar cases.” This supported the notion that Georgia showed a clear bias “in favor of findings that death sentences are not excessive or disproportionate.” In an effort to determine how Georgia arrived at their answer to the question of excessiveness in death sentences, Baldus first reviewed the methodology behind the proportionality review process.

Three Methodological Approaches to Proportionality Review

In this review, Baldus described Georgia’s three methodological approaches to proportionality review and explained their limitations. In the first method, termed the “reasonableness” approach, the court weighs the aggravators and mitigators of the case under review and makes its determination of proportionality based on the values and experiences of State Supreme Court justices as well as their general familiarity

² At the time of Baldus’ study, the Georgia State Supreme Court had conducted 120 proportionality reviews. They had vacated 2/120 of these death sentences due to comparative excessiveness. (Baldus et al., 1983 pp. 711)

with prior cases. In other words, the Court made a subjective argument that the sentence under review was “reasonable” given the known the facts of the case. The second method is slightly more formal. In the “precedent-seeking” approach, the court declares a case appropriately proportionate “if they are able to cite one or more ‘similar’ cases that also resulted in death sentences.” (Baldus et al., 1983). For example, if the Court is reviewing a case involving an armed robbery and murder as it is able to identify another armed robbery-murder that resulted in a sentence of death, then it is able to conclude that death sentence in the case under review is not disproportionate because it has a precedent. Both of these approaches are extremely subjective and lack an empirical basis. Neither the “reasonableness” approach nor the “precedent-seeking” approach possesses the ability to determine whether or not cases are proportionate in an even and consistent manner.

The “frequency” approach is more objective than previous two approaches. It calls for a survey of the sentencing results in all prior cases deemed to be similar to the case under review. From that universe of cases, the frequency with which death and life sentences result determines whether the death sentence under appeal is excessive or evenhanded. There are three steps in the “frequency” approach. First, the reviewing body must determine the characteristics of the universe of cases. This would ideally include “all capital homicides that resulted in a conviction, and were therefore, *death-eligible*” (Paternoster and Kazyaka, 1990 pp.486). Second, they select a sub-group from the universe of cases which are similar in some defined way to the case under review. Third, they determine the proportion of cases in this sub-group that resulted in a death sentence. If the proportion of cases in the sub-group

that resulted in a death sentence is high, then it is reasonable to declare the death sentence in the case under review is proportionate. However, if the proportion of death sentences in similar cases is low, then a death sentence in the case under review should be declared disproportionate. The only way for the court to see the whole picture is to use a “frequency” approach.

For example, think of a case where the defendant and two codefendants were convicted of robbing a gas station and killing the gas station attendant, but the defendant in the case under review wasn’t the triggerman. The “reasonableness” approach or the “precedent-seeking” approach may identify one or two other cases on death row with similar circumstances to conclude that the case under review is proportionate. However, neither of these approaches would reveal that there might be 100 other cases with similar characteristics where the defendant received a sentence less than death. A “frequency” approach would show that a death sentence is imposed in similar cases only 2% of the time. The court would then conclude that a death sentence in this instance is disproportionate—an outcome far different than those resulting from a “reasonableness” approach or “precedent-seeking” approach. In order to adequately address the question of comparative excessiveness, it is imperative to conduct a true empirical proportionality review utilizing a “frequency” approach.

After reviewing the methodology used by the Georgia court, and noting that they primarily used the “reasonableness” approach and “precedent-seeking” approach, Baldus also noted the value of the “frequency” approach. In addition to exploring the Georgia court’s proportionality review methods, Baldus sought to

examine the overall question of excessiveness. Furthermore, he was interested in comparing pre- and post-*Furman* death sentence patterns to determine whether the reforms brought about by *Furman* had reduced the level of arbitrariness and discrimination after the revised statute, approved in *Gregg* was in place. Guidance on which methodology was used to identify comparable cases was absent both in the courts and relevant literature, Baldus identified several methods for identifying similar cases for the purposes of proportionality review. He employed several of these methods while taking into account their limitations in order to “cross-check the results of each.” (Baldus et al., 1983 pp. 681)

Case Specific Measures of Comparative Excessiveness

These measures fell into the two categories of “case specific” measures of comparative excessiveness and “system wide” measures of comparative excessiveness. Baldus identified three case-specific methods of conducting a comparative proportionality review—the salient factors method, the main determinants method, and the index method.

The Salient Factors Method

In the first method, similar cases are chosen based on “salient factors”, or “those features of the case which seem most likely to have affected the jury’s decision.” (Baldus et al., 1983 pp.681) This is the method that the Georgia Supreme Court claims to use when conducting their proportionality reviews. The problem with this method is that each homicide is unique and the pool of cases is sometimes too small for enough cases to be matched on enough factors with high enough reliability

to accurately select a large enough group of comparable cases. For example, if the case under review involves a gas station robbery where a hostage was taken and killed, then there are several salient factors on which this case can be matched. If there is only one other case in which a hostage was taken and killed during the course of a gas station robbery, but several others that include only one matching element such as a gas station robbery or a hostage being killed, then it becomes difficult to decide what to include in the comparison group. Large comparisons groups are necessary to obtain a reliable proportion. The larger the group of comparison cases, the lower the number of matching salient factors in that group. Given the unique nature of homicide, it is very rare for homicides to share a large number of salient factors. This is a limitation of the salient factors method.

The Main Determinants Method

The “main determinants” method uses a multiple regression analysis to define similarity in terms of those factual characteristics which have the strongest influence on the sentencing decision. This method relies strongly on statistical analysis instead of subjectivity to determine similarity. Once a multiple regression analysis shows which factors most significantly influenced the sentencing decisions, these significant factors are used to divide the group of death-eligible cases into sub-groups of similar cases. The sub-groups are then ranked by seriousness according to the number of significant factors present. Next, Baldus calculated the death sentence frequencies within each subgroup. The frequency across groups should theoretically increase as the number of significant factors increased. One limitation of this method is that a regression analysis “can only estimate for any given factual characteristic the average

impact in all cases.” (Baldus, 1983 pp. 689) For a specific case it is not possible to estimate the extent to which specific factors influenced the jury’s decision to impose a death sentence.

The Index Method

The “index method” relies on the probability in each case that the defendant will receive a death sentence. This method identifies the significant factors and weighs the relative importance of each of these factors. Based on this number, a “propensity score” is computed and the cases are ranked according to the score. The score represents the probability that the defendant receives a death sentence. The sub-groups are composed of cases with similar scores. The aggregate frequency is calculated for the cases in the sub-group. The aggregated score represents the entire sub-group. One limitation of this method is that “factual differences may exist between cases ranked as similar in terms of their respective index scores.” (Baldus, 1983 pp.692)

Systemwide Measures of Comparative Excessiveness

Baldus identifies two main types of systemwide measures of comparative excessiveness—one based on legislatively prescribed criteria and another, termed “regression-based scales,” based on “factual characteristics which best explain the actual death-sentencing decisions in a multiple regression analysis.” (Baldus et al., 1983 pp. 693)

Legislative Criteria Measures

Georgia's post-*Furman* revised death penalty statute³ lists several factors whose presence defines the case as death eligible. This list includes factors such as (1) the defendant had a prior record of conviction for murder, rape, armed robbery, or kidnapping with bodily injury; (2) the victim was an on-duty police, corrections, or fire person; and (3) the murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." (Baldus et al., 1983 pp. 693) This method selects as similar cases in which the same statutory aggravating factors are present or cases in which an equal number of statutory aggravating factors is present. One limitation of this method is its failure to account for other aggravating factors or mitigating factors that influence the sentencing decision.

Regression-based Scales

This method utilizes a regression-based scale to calculate a predicted sentence index using all death-eligible cases. The cases are then divided into groups according to the "predicted likelihood that a defendant would receive a death sentence". (Baldus et al., 1983 pp. 694) Regression-based measures select comparative cases based on all significant aggravating and mitigating circumstances included in the model. One limitation to using regression-based measures is the danger of "overfitting". This is to say that "extraneous non-causal variables" may be included in the regression equation through chance correlation. This may cause the results of

³ GA Code Ann. § 27-2534-1 (1983)

the regression analysis to “exaggerate” the apparent consistency of the system which produced the data set used to estimate the model.” (Baldus et al., 1983 pp. 695)

Evaluating excessiveness levels

Once the universe of cases is determined, the sub-groups formed based on similar cases, and the proportion of cases resulting in a death and life sentence is calculated, a decision must be made as to what proportion of death sentences is necessary in order for a death sentence to be deemed “excessive”. At the time of Baldus’ study, the Georgia State Supreme Court had conducted 120 proportionality reviews since 1973. In only two of these 120 cases had the court vacated a death sentence due to comparative excessiveness. While there is no Georgia court opinion that provides an empirical number by which to measure comparative excessiveness, Baldus referenced *Coley v. State*, a 1974 non-fatal rape case in Georgia where the death sentence was vacated as comparatively excessive “based on the results of twelve other cases involving fourteen defendants, of whom only 36% received death sentences.” (Baldus, 1983 pp. 696) Although this case pre-dated the revised Georgia death penalty statute, it suggests that the Georgia State Supreme Court had previously considered death sentences to be comparatively excessive where the death sentencing rate in comparison cases was lower than .36. Similarly, if a death sentence was imposed in more than 80% of similar cases, then Baldus classified that sentence as “presumptively evenhanded.” The instances in which a death sentence was imposed in similar cases between 35% and 80% of the time, it is more difficult to determine whether or not the sentence is disproportionate.

The Georgia Proportionality Review Results

Baldus and his colleagues conducted their proportionality review of two Georgia data sets⁴ using different methods. These methods included overall aggravation regression based approaches and non-empirical fact specific approaches. The results of the death-sentencing frequencies varied depending on the measure used.

Results of Systemwide Measures: Legislative Criteria Measures

Baldus reports that of all death-eligible defendants who were convicted, because of the presence of at least one statutory aggravator, .22 were sentenced to death. There were two statutory categories that accounted for the majority of the death sentences—case with an “enumerated contemporaneous offense” and cases where the murder was “vile, horrible, or inhuman.” In each of these cases the death sentencing rates were .34 and .29, respectively, and still well below any rate which could reasonably be considered evenhanded.

When cases were grouped by the number of statutory aggravating factors present, 21 cases with only one or two statutory aggravating factors present received death sentences when the death sentence rate for comparable cases fell far below the .35 death sentencing rate. Using *Coley v. State [of Georgia]* as a guide, these 21 cases would have been vacated due to comparative excessiveness. The highest death sentencing rate of all categories was .62 for the group with five statutory aggravating

⁴ The first dataset consisted of 130 pre-*Furman* murder defendants tried and sentenced between January 1, 1970 and September 29, 1972. 20/130 received a death sentence. The second data set consisted of 594 post-*Furman* defendants. There was a penalty trial in 190 of these cases. 103/594 death sentences were imposed.

factors present. In other words, cases with five statutory aggravating factors present, only 62% of the cases received death sentences. Using this method, none of the cases receiving death sentences would be considered evenhanded using the standard that the death sentencing frequency among similar cases needs to be .80 or more (see reproduction of Table 2).

Reproduction of Table 2: Death Sentencing Rates and Frequencies in Georgia	
I. Death Sentencing Rates Controlling for the Number of Georgia Statutory Aggravating Factors Present ^a	
A. Number of Statutory Aggravating Factors Present ^b	B. Death Sentence Rate
0	.0 (0/132)
1	.03 (5/150)
2	.12 (16/136)
3	.37 (37/99)
4	.53 (33/62)
5	.62 (8/13)
6	.50 (1/2)
II. Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases was:	
Less than .35	.21 (21/100)
.80 or more	.0 (0/100)
^a This measure refers to the number of statutory aggravating factors in the case regardless of whether they were found by the jury or even whether there was a penalty trial in the case.	
^b The correlation coefficient between the death sentencing rate and the number of statutory aggravating factors in the case is .49.	

Source: Baldus, D.C., G.G. Woodworth, and C.A. Pulaski. 1983. "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *Journal of Criminal Law and Criminology* Issue 774 pp. 661-753. Table 2 reproduced from p. 700.

Regression-based Scales

In an analysis of post-*Furman* data using regression-based scales, 26 cases received death sentences when the death sentence rate for comparable cases was less than .35. Using a logistic regression analysis, predicted death sentencing rates from the post-*Furman* data were calculated. Results from this model predicted one death sentence in cases with only one or two statutory aggravating factors present—twenty-

five less than actual number of death sentences. This model predicts that for 37 cases, the death sentencing frequency among similar cases would be .80 or more. (Baldus et al., 1983 pp. 701-702)

Results of Case Specific Measures

Baldus considered the salient factors method to be most relevant because it “most closely approximates how the Georgia court purports to review death sentences.” (Baldus et al., 1983, pp.703) They reviewed sixty-eight cases which had previously been reviewed by the Georgia court.⁵ Comparable cases were selected based on salient factors and death sentencing rates were calculated for each group. Using the salient factors method, 25% (7/68) of the cases would have been deemed comparatively excessive because the death sentencing rate in comparable cases was less than .35. In only 10% (7/68) of the cases, did the death sentencing rate in comparable cases exceed .80.

The index method appeared to yield the most evenhanded results. Half of the death sentences (34/68) qualified as evenhanded in that the death sentencing rate in comparable cases exceeded .80. Furthermore, only 13% (9/68) of the death sentences would be comparatively excessive based on a death sentencing rate in comparable cases of less than .35. (Baldus et al., 1983 pp. 704)

The results from the main determinants method were less impressive. The death sentencing rate for comparable cases was .80 or more in only thirty percent (19/64) of the death sentences. Twenty-two percent (14/64) of the cases qualified as

⁵ For each case under review Baldus and his colleagues identified a group of similar cases based on an average of 3.6 salient factors. (Baldus et al., 1983 pp. 703)

presumptively excessive as the death sentencing rate for comparable cases was less than .35.

Baldus ultimately concluded that Georgia continued to impose death sentences which a variety of measures identified as presumptively excessive. Furthermore, Georgia had rarely vacated a death sentence on the grounds that it was excessive or disproportionate due to the infrequency of death sentences in similar cases. However, the Georgia State Supreme Court had vacated cases on procedural grounds at a higher rate in cases where the death sentences may have been excessive; however, he went on to note that “this form of *de facto* comparative sentence review is not sufficient to overcome the discrepancy between the court’s sentence review decisions and the results of [Baldus’s] analysis.” (Baldus, 1983 pp. 728).

When the Georgia State Supreme Court did conduct a proportionality review, the comparison cases they chose were nearly always death sentence cases as opposed to life sentence cases. In this “precedent-seeking” approach, the court fails to identify a full universe of cases that are similar to the death sentence under review. Baldus reasons that this may be due to the fact that the precedent-seeking approach “more closely resembles the methodology of conventional legal research and analysis and seems more comfortable to the law-trained mind.” (Baldus et al., 1983 pp. 720) Recommendations for the future include making use of “systematic, empirically-based procedures” as well as quantitative computer-assisted methods. Baldus cautions against relying too heavily on computers to determine comparability, noting that “it only serves as point of departure.” (Baldus et al., 1983 pp. 732) By following

these recommendations, Baldus believes the reviewing court can increase the accuracy with which they conduct proportionality reviews.

The South Carolina Proportionality Review

In 1990, Paternoster and Kazyaka examined the theory and practice of the comparative sentence review conducted by the South Carolina Supreme Court. They analyzed South Carolina death penalty data from June 8, 1977 to December 31, 1981. Their study specifically targets a group of twenty-six cases in which the South Carolina Supreme Court reviewed and affirmed their death sentences. They compared the sentences of the twenty-six affirmed cases with comparable cases⁶ from the same time period.

Determining Case Comparability

Paternoster and Kazyaka (1990, pp. 489) note that the South Carolina Supreme Court opinions provide “almost no insight as to the rationale for the sentence and the ‘meaningful’ differences between this defendant and those not sentenced to death.” Paternoster and Kazyaka relied in part on previous literature, specifically Baldus et al. (1983) as guidance on which methodology to use to identify comparable cases. In order to examine comparative excessiveness in South Carolina’s death sentencing patterns, they used several methods to identify similar cases, while taking into account the limitations of each method. Paternoster and Kazyaka separate methods of case comparability into two general areas: the fact specific approach in which homicides maybe similar based on specific features of the

⁶ Comparable cases included 135 cases in which the defendant was convicted of capital murder, and eligible for the death penalty, whether or not it resulted in a sentence of death.

offense and offender or the overall aggravation approach in which cases are similar based on similar levels of overall aggravation.⁷

The Fact-Specific Frequency Method

The fact-specific frequency method is similar to the “salient factors” approach employed by Baldus et al. (1983) in that it relies on factors which appear to have been particularly relevant in the jury’s decision to impose the death sentence. In order to determine which factors were relevant, Paternoster and Kazyaka reviewed the reviewing court’s discussion regarding the proportionality of the sentence. If a member of the court mentioned a particular aspect of the case as seeming to justify the death sentence, it was classified as a relevant factor. These relevant factors were then the basis for selecting similar cases. Paternoster and Kazyaka note that there are limitations to this method. It is difficult to identify which factors are the most relevant. Even after identifying these factors, it is difficult to match enough comparable cases with a high number of the same similar factors. Indeed, as the number of such specific factors grows, it becomes increasingly difficult to identify a sufficient number of cases with which to make an adequate comparative review. (Paternoster and Kazyaka, 1983 pp. 489)

The Overall Aggravation Methods

Paternoster and Kazyaka also employ an overall aggravation frequency method in which the measure of comparability is based on the total number of aggravation factors present, as identified by the logistic regression equation.

⁷ Levels of overall aggravation incorporate all aggravating and mitigating factors present in the specific case.

Aggravation factors are not limited to statutory aggravators, and may include mitigators, if present in the case. Each aggravation factors carries the same weight for the purposes of this method.

In addition to the overall aggravation frequency method, Paternoster and Kazyaka also employ a second overall aggravation method, termed the “propensity score” approach. It is similar to Baldus’ main determinants method in that it utilizes the logistic regression analysis to identify significant factors that affect the outcome of the dependent variable (death sentence). This method was initially developed by Rosenbaum and Rubin (1983; 1985). The propensity score can be understood as “the estimated conditional probability of the defendant being sentenced to death.” (Paternoster and Kazyaka, 1990 pp. 491) Each significant independent variable is assigned a different weight based on its predictive importance. A propensity score is then created for each case from the combination of significant independent variables found in the case. This propensity score represents the likelihood of a death sentence in each specific case. Comparable cases are matched on the basis of their propensity score.

Evaluating Excessiveness Levels

Once cases are grouped according to their propensity score (propensity score method), similar numbers of significant aggravation factors (overall aggravation frequency method) or sub-grouped according to similar specific features of the offense (fact-specific frequency method), a decision must be made as to what proportion of death sentences is necessary in order for a death sentence to be deemed “excessive”. Since the South Carolina Supreme Court offers no guidance on

determining excessiveness levels, Paternoster and Kazyaka noted that the Georgia and South Carolina death penalty statutes were very similar and chose to adopt the .35 or less standard used by Baldus and his colleagues in the Georgia proportionality review. Generally speaking, excessive death sentences are those in which similar cases result in a death sentence a low percentage of the time (.35 or less). Paternoster and Kazyaka (1990, pp. 493) reason that the “only way to determine if a particular death sentence is disproportionate in an absolute sense is to determine if juries in the state regularly sentence such defendants to death.”

The South Carolina Proportionality Review Results

Paternoster and Kazyaka compared twenty-six affirmed death sentence cases in South Carolina to comparable cases in an effort to identify comparatively excessive death sentences. They used three different methods, one fact-specific approach measure and two overall aggravation measures of comparability. Results varied depending on the method used.

Results of the Fact-Specific Frequency Method

In the fact-specific frequency method, the results are presented separately for each case. The individual results are accompanied by a summary analysis of the number and proportion of affirmed death sentences at different levels of death sentence frequency. (Paternoster and Kazyaka, 1983 pp. 496) A determination of proportionality is made in a fact-specific frequency analysis if the affirmed capital cases fall into categories where death is the regularly applied sentence. Conversely, if affirmed capital cases fall into categories where life sentences are more frequently

applied than death sentences, it can be concluded that death sentences are being imposed in a disproportionate manner. The fact-specific frequency analysis reveals that there is “considerable variation in the proportionality of the death sentences.” (Paternoster and Kazyaka, 1983 pp. 498) The researchers identify ten cases in which the death sentencing rate for comparable cases is at least .60. They conclude that the imposition of a death sentence is not excessive in these cases. Variation becomes apparent when the rest of the affirmed cases are examined. Paternoster and Kazyaka classify a larger proportion of the affirmed cases as comparatively excessive because the death sentencing rates are much lower—in some cases only .07 or .11. The large number of these comparatively excessive death sentences supports the notion that the South Carolina Supreme Court is not conducting proportionality reviews which effectively identify disproportionate sentences.

Paternoster and Kazyaka’s fact-specific frequency analysis results from South Carolina were similar to Baldus and his colleagues’ results from Georgia. The percentage of comparatively excessive death sentences in South Carolina was 35%, whereas Baldus found 25% of all cases were comparatively excessive.⁸ Paternoster and Kazyaka also found that the death sentencing rate was greater than .50 in 38% of the South Carolina cases. Baldus found that 40% of the Georgia cases reviewed had a death sentencing rate of .50 or more.

⁸ Cases were deemed comparatively excessive when a group of similar cases had death sentencing rates of less than .35. This definition is used by both Paternoster and Kazyaka (1990) and Baldus et al. (1983).

Results of Two Overall Aggravation Analyses

The two overall aggravation methods rely on a logistic regression analysis which identified significant factors that affect the outcome of the dependent variable (death sentence). Results of the logistic regression analysis identify the following legally relevant factors that significantly affect the imposition of the death penalty: (1) the number of offenders; (2) presence of mitigating circumstances; (3) the use of a handgun in the killing; (4) the brutality of the homicide; and (5) the number of felony offenses committed by the defendant during the murder. Paternoster and Kazyaka (1990 pp. 503) report that the estimated logistic regression equation is a good fit, and that the equation “improves the prediction of the outcome event over chance (based on marginal distributions) by over 70%.”

The Overall Aggravation Frequency Method

The overall aggravation frequency method uses the results of the logistic regression analysis to identify which factors significantly affect the imposition of the death sentence. Each capital murder case is assigned a score measuring the overall aggravation based on the number of significant factors present from one to five.⁹ Cases were classified as comparable if they possess the same number of significant aggravating factors. Results from this method will be discussed below with the results of the propensity score method.

⁹ Paternoster and Kazyaka (1990 pp. 503) note that the absence of a mitigating factor was scored as one.

The Overall Aggravation Propensity Score Method

Next, the overall aggravation propensity score method also utilized the results of the logistic regression analysis. A separate propensity score for each case was obtained “by summing the value of the logistic coefficients (plus the constant) for each aggravation factor that was present.” (Paternoster and Kazyaka, 1990 pp. 504)

Unlike the overall aggravation frequency method, each case in the propensity score method was assigned a unique weighted average (or propensity score) based on the unique significant factors present in that specific case. Comparable cases are identified as cases with identical or very similar propensity scores. A reproduction of Table 5 from Paternoster and Kazyaka (1990 pp. 504-505) illustrates the results of both overall aggravation methods.

Reproduction of Table 5: Proportion of Defendant Receiving a Death Sentence Within Subgroups of Comparable Cases Where Comparable Cases are Defined in Terms of Overall Propensity Score (Column 1) and Number of Aggravation Factors (Column 2)		
A. Case Analysis	(1)	(2)
Case	Overall Propensity Score	Number of Aggravation Factors
<i>State v. Shaw</i>	9/11 (.818)	13/16 (.813)
<i>State v. Hyman</i>	1/12 (.083)	3/32 (.094)
<i>State v. Gilbert</i>	1/7 (.143)	6/31 (.194)
<i>State v. Thompson</i>	1/7 (.143)	4/51 (.078)
<i>State v. Butler</i>	1/19 (.053)	4/51 (.078)
<i>State v. Copeland</i>	9/11 (.818)	13/16 (.813)
<i>State v. Woomeer</i>	9/11 (.818)	13/16 (.813)
<i>State v. Yates</i>	1/19 (.053)	4/51 (.078)
<i>State v. Adams</i>	1/5 (.200)	6/31 (.194)
<i>State v. Spann</i>	1/5 (.200)	6/31 (.194)
<i>State v. Plath</i>	9/11 (.818)	13/16 (.813)
<i>State v. Koon</i>	1/12 (.083)	3/32 (.094)
<i>State v. Patterson</i>	4/11 (.364)	4/51 (.078)
<i>State v. Truesdale</i>	7/9 (.778)	13/16 (.813)
<i>State v. Chaffee</i>	9/11 (.818)	13/16 (.813)
<i>State v. Gaskins</i>	1/18 (.056)	3/32 (.094)
<i>State v. Lucas</i>	1/10 (.100)	6/31 (.194)
<i>State v. Singleton</i>	4/11 (.364)	6/31 (.194)
<i>State v. Skipper</i>	1/18 (.056)	3/32 (.094)
<i>State v. Damon</i>	1/5 (.200)	4/51 (.078)
<i>State v. Elmore</i>	8/12 (.667)	13/16 (.813)
<i>State v. Plemmons</i>	1/10 (.100)	3/32 (.094)

<i>State v. South</i>	3/17 (.176)	3/32 (.094)
<i>State v. Jones</i>	4/11 (.364)	6/31 (.194)
<i>State v. Smith</i>	1/5 (.200)	6/31 (.194)
<i>State v. Kornahrens</i>	2/11 (.182)	4/51 (.078)
B. Overall Propensity Summary: Proportion of Death Sentences Within Groups of Comparables cases by Overall Propensity: Affirmed Cases Only		
Probability of Death Sentence for Comparable Cases	Number of Affirmed Death Cases in this Category	Percent of Affirmed Death Cases
Less than .35	16	62%
.36 - .50	3	12%
.51 - .75	1	4%
.76 - 1.00	6	23%
C. Number of Aggravation Factors Summary: Proportion of Death Sentence Within Groups of Comparable Cases by Number of Aggravation Factors: Affirmed Death Cases Only		
Probability of Death Sentence for Comparable Cases	Number of Affirmed Death Cases in this Category	Percent of Affirmed Death Cases
Less than .35	19	73%
.36 - .50		
.51 - .75		
.76 - 1.00	7	27%

Source: Paternoster, R. and A.M. Kazyaka. 1990. "An Examination of Comparatively Excessive Death Sentences in South Carolina 1979-1987," Review of Law and Social Change Issue 17 pp. 475-533. Table 5 was reproduced from pp. 504-505 with the author's permission.

The overall aggravation propensity score method and the overall aggravation frequency method yielded similar results in that the proportion of cases resulting in a death sentence in the pool most similar to the one being reviewed is approximately the same using both methods, though this is most likely due to the fact that they were based on the same regression results. Generally speaking, defendants in cases that are extremely violent are consistently given death sentences while defendants in the less-brutal capital crimes rarely receive death sentences.

The results of the two overall aggravation measures differ most from the fact-specific method in cases at the middle-range of aggravation, where the overall aggravation analyses more often lead to the conclusion that death sentences were comparatively excessive. As a result, the propensity scoring method and the overall aggravation frequency method suggest that "over 60% of the twenty-six affirmed

death cases should be characterized as comparatively excessive, while only 35% of the cases were deemed disproportionate by the fact-specific method.” (Paternoster and Kazyaka, 1983 pp. 506)

When the South Carolina Supreme Court reviewed the same twenty-six death sentences for proportionality, they concluded that every single sentence was proportionate. Paternoster and Kazyaka explore the reasons for this discrepancy by examining the theory and method of proportionality review used by the South Carolina Supreme Court. The researchers make note of the limitations of the court’s methods, specifically where the South Carolina court excludes life sentences from the universe of comparable cases. This makes it impossible for the court to accurately determine whether a death sentence is regularly imposed in comparable cases. Paternoster and Kazyaka (1990, pp. 526) recommend that the South Carolina Supreme Court ensure proportionality through a more empirical comparative review process.

Additional Research

As the Georgia and South Carolina proportionality reviews made clear, much of the success in identifying disproportionate death sentences lies in defining an appropriate universe of comparable cases. Once the universe is expanded to include life sentences in addition to death sentences, the picture becomes much clearer and adds objectivity to the decision of disproportionality. South Carolina and Georgia were two of several states that construct their universe of only death sentences; however, there are some states that include life sentences in their comparison cases for the purpose of proportionality reviews. Research reveals that states who limit

their universe of cases to death sentences have a much lower rate of vacating excessive cases than those states that include life sentences in their universe of case (Sprenger, 1988). Despite this, some states have minimized the importance of including life sentences in the universe of cases (Wallace and Sorensen, 1998; Bienen, 1996). States may forgo thorough comparative proportionality reviews and claim that finding comparable cases is too difficult (White, 1999; Latzer, 2001; Mandery, 2002). However, White (1999) points out that this is no more difficult than determining punitive damages awards in civil cases. Furthermore, several researchers have demonstrated that the proportionality of death sentence application can be effectively evaluated with an empirical proportionality review (Paternoster and Kazyaka, 1990; Baldus et al., 1983; Wallace and Sorensen, 1998). While previous research has revealed some important information concerning proportionality review, the next step in evaluating the effectiveness of the Maryland State Supreme Court's proportionality review is to understand the role of proportionality review in the history of capital punishment in Maryland.

The History of Capital Punishment in Maryland

Prior to 1972, Maryland's capital punishment statute was similar to other state statutes at the time in that it lacked guidelines to steer the sentencing body in determining appropriate penalties. Additionally, the Maryland statute stated that for defendants found guilty of rape and murder, the sentence would be death unless the jury who determined guilt specifically stated that the death penalty was not an option. The *Furman* decision invalidated standardless capital punishment statutes, including Maryland's. In response to *Furman*, Maryland, along with several other states,

revised their capital punishment statute in an effort to include standards for the sentencing body in capital cases. Specifically, Maryland limited the crimes in which a death sentence could be imposed to those in which a jury consider determines that one or more of the following aggravating circumstances exist beyond a reasonable doubt:

- Aggravator 1: One or more persons committed the murder of a law enforcement officer while the officer was performing the officer's duties.
- Aggravator 2: The defendant committed the murder while confined in a correctional facility.
- Aggravator 3: The defendant committed the murder in furtherance of an escape from, an attempt to escape from, or an attempt to evade lawful arrest, custody, or detention by (a) a guard or officer of a correctional facility; or (b) a law enforcement officer.
- Aggravator 4: The victim was taken or attempted to be taken in the course of an abduction, kidnapping, or an attempt to abduct or kidnap.
- Aggravator 5: The victim was an abducted child.
- Aggravator 6: The defendant committed the murder under an agreement or contract for remuneration or promise of remuneration to commit the murder.
- Aggravator 7: The defendant employed or engaged another to commit the murder and the murder was committed under an agreement or contract for remuneration or promise of remuneration.
- Aggravator 8: The defendant committed the murder while under a sentence of death or imprisonment for life.
- Aggravator 9: The defendant committed more than one murder in the first degree arising out of the same incident.
- Aggravator 10: The defendant committed the murder while committing, or attempting to commit: (a) arson in the first degree; (b) carjacking or armed carjacking; (c) rape in the first degree; (d) robbery under § 3-402 or § 3-403 of this article; or (e) sexual offense in the first degree.

If the court or jury does not find that one or more of the aggravating circumstances exist beyond a reasonable doubt, it shall state that conclusion in writing and a death sentence may not be imposed. If the court or jury finds beyond a reasonable doubt that one or more of the aggravating circumstances listed above, it then shall consider whether any of the following mitigating circumstances exists based on a preponderance of the evidence:

- Mitigator 1: The defendant previously has not been found guilty of a crime of violence.
- Mitigator 2: The defendant previous entered a guilty plea or a plea of nolo contendere to a charge of a crime of violence.
- Mitigator 3: The defendant previously received probation before judgment for a crime of violence.
- Mitigator 4: The victim was a participant in the conduct of the defendant or consented to the act that caused the victim's death.
- Mitigator 5: The defendant acted under substantial duress, domination, or provocation of another, but not so substantial as to constitute a complete defense to the prosecution.
- Mitigator 6: The murder was committed while the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired due to emotional disturbance, mental disorder, or mental incapacity.
- Mitigator 7: The defendant was of a youthful age at the time of the murder.
- Mitigator 8: The act of the defendant was not the sole proximate cause of the victim's death.
- Mitigator 9: It is unlikely that the defendant will engage in further criminal activity that would be a continuing threat to society.
- Mitigator 10: Any other fact that the court or jury specifically sets forth in writing as a mitigating circumstance in the case.

If the court or jury finds that one or more of the mitigating circumstances listed above exist, it determines whether the aggravating circumstances outweigh the mitigating circumstances by a preponderance of evidence. If the court or jury finds that the aggravating circumstances outweigh the mitigating circumstances, a death sentence shall be imposed. If the court or jury finds that the aggravating circumstances do not outweigh the mitigating circumstances, a death sentence may not be imposed. If the determination is by a jury, a decision to impose a death sentence must be unanimous and shall be signed by the jury foreperson. A court or jury shall put its determination in writing and specifically state (i) each aggravating circumstance found; (ii) each mitigating circumstance found; (iii) whether any aggravating circumstances found outweigh the mitigating circumstances found;

(iv) whether the aggravating circumstances found do not outweigh the mitigating circumstances found; and (v) the sentence.

This list of aggravators and mitigators provided to guide the sentencing body through their sentencing decision was Maryland's answer to the issues raised in *Furman*. When *Gregg* and its progeny were decided in 1976, the Maryland legislature revised their capital statute for the second time that decade, eliminating the requirement of a mandatory death sentence¹⁰ for specific crimes, and adding further provisions similar to those in the Georgia capital punishment statute which passed constitutional muster. Maryland was not alone in following Georgia's example. Many states patterned their revised statutes after Georgia's guided discretion statute. One of the elements Maryland imitated was the section requiring a proportionality review. Specifically, the revised Maryland death penalty statute, section 414(e)(4) states in full:

- (e) Considerations by Court of Appeals. In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:
 - (4) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

As noted in *Tichnell I* (287 Md. At 738-39), the proportionality review provisions in the Maryland statute reflected those in the Georgia statute. In this way, Maryland's legislated guidelines for conducting a proportionality review were

¹⁰ The elimination of the mandatory element was reaffirmed in *Mills v. State*, which stated that the Maryland capital punishment statute does not require the death sentence if the jury believes death to be inappropriate and it is not a mandatory death penalty statute. *Mills v. State*, 310 Md. 33, 527 A.2d 3 (1987), vacated and remanded, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988).

meager. When discussing the purpose of the proportionality review, one State Supreme Court Justice cited the following passage from the *Gregg* decision:

[The proportionality review] substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

–*Gregg v. Georgia* on or about
pp.206

It was clear that a proportionality review was a requirement; however, it was unclear how the court should determine proportionality. Since the Maryland death penalty statute was ambiguous regarding the proper manner in which to conduct a proportionality review, it was not surprising that this became an issue on appeal. In the 1982 case of *Tichnell v. State*¹¹, one appellant objected to the state's method of picking the universe of cases from which the comparison cases were selected. The appellant argued that the universe of cases should include all death-eligible cases, not just those in which a death sentence was imposed. The Maryland State Supreme Court considered the issue and thought otherwise. In the *Tichnell (IV)* opinion, the state addressed this ambiguity and stated that it was unnecessary, and in fact, improper to use every first degree murder case as a basis for comparison. They further asserted that cases in which the death penalty was not sought, despite the

¹¹ *Tichnell v. State [of Maryland]* 297 Md. 432; 468 A.2d 1 (1982). This case is referred to as *Tichnell IV*.

presence of a qualifying aggravating factor are not comparable because the sentencing authority never considered whether death should be imposed.¹²

In the 1984 case of *Pulley v. Harris* the U.S. Supreme Court decided that the proportionality review was not a constitutional necessity. Since *Pulley*, some states have preserved the comparative proportionality review element in their death penalty statute while other states have not. David Baldus and his colleagues noted a small trend after *Pulley* whereby a few states repealed the statutory requirement of comparative proportionality review (Baldus, 1990 p. 280). In 1992, Maryland joined the states that chose to repeal the proportionality review provision in their death penalty statute. Chapter 331 of the Acts of 1992, effective October 1, 1992, deleted subsection (e)(4) of § 414. Consequently, the Maryland State Supreme Court no longer needed to determine "Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." From October 1, 1992 until the present, proportionality reviews have not been constitutionally mandated; thus, the Maryland State Supreme Court ceased to include them in the overall appellate review process for capital cases.

¹² Even after *Tichnell (IV)*, the Maryland State Supreme Court chose to include some death eligible cases which had not received a death sentence in their proportionality reviews.

Chapter 3: The Methods

This proportionality review project utilizes a non-experimental research design. There are two general types of approaches used to conduct proportionality reviews—the fact-specific approach and the overall aggravation approach. The fact-specific approach is non-empirical and generally relies on the subjectivity of the members of the State Supreme Court. The overall aggravation approach relies on empirical methods, specifically logistic regression analysis to select comparison cases. There are several different variations of both approaches. Previous proportionality reviews have employed one or both methods to varying degrees. State Supreme Courts mainly utilize fact-specific approaches while independent researchers often choose the overall aggravation approaches, or types. This project utilizes the fact-specific “salient factors” method and the overall aggravation “propensity score” method to analyze the data and determine if any death sentences are disproportionate.

The Sample

The dataset used for this proportionality review analysis includes detailed information on the death eligible murders in Maryland from 1978-1999. These data were collected and analyzed for a previous study of capital sentencing in Maryland (See Paternoster et al., 2004 and Paternoster and Brame, 2003). The data were collected from a variety of sources in Maryland. These sources included Maryland Division of Corrections (MDOC) files, which contained an in-depth description of the offense, crime scene, and criminal history. MDOC files frequently included a pre-

sentence investigation report (PSI) on the defendant's educational, social, mental health, and educational history. The PSI also frequently contained similar information for the victim's history and demographic information. Maryland State's Attorneys offices files and police reports confirmed and added details regarding demographic information for victims and defendants or background details for the crime. Details of the evidence presented at trial were collected from court transcripts and trial judge reports on file with the Clerk of the Maryland Court of Appeals. Homicide victim information was obtained from the Maryland Office of Public Health. With information from these different data sources, a fairly comprehensive picture of each homicide was created. (For a full description, see Paternoster et al., 2004, pp. 16-17.)

Defining "death eligible" cases

Using the information obtained from the data sources described above, a "death eligible" determination was made based on criteria listed in the state's death penalty statute, without regard to the state's attorneys' decision to pursue a death sentence. Paternoster and Brame (2003) note that "in one sense the only true way to categorize a murder as eligible for the death penalty is if the state's attorney determines that the case meets all of the eligibility requirements as listed in the state statute." They list the following requirements:

- The defendant was a principal in the first degree and the state could prove this beyond a reasonable doubt,
- The defendant was not mentally retarded at the time of the offense (after May of 1989) and the state could prove this with a preponderance of the evidence,
- The defendant was not less than 18 years old at the time of the offense (after June of 1987),

- The murder also included at least one statutory aggravating circumstance and the state could prove this beyond a reasonable doubt,
- The state's attorney files a notice 30 days prior to trial of the state's intention to seek a death sentence and then a notification to seek a sentence of death is filed.

A case may meet the first four requirements above; however, due to the needs and resources of the state's attorneys' office in a given jurisdiction, the state may forgo the chance to pursue a death sentence. The state's attorney holds a great deal of discretion in prosecutorial decision making. Several factors independent of the homicide may influence the decision to seek a death sentence. Consequently, it is possible for a case to meet all of the statutory criteria to be death eligible, without a death sentence being pursued. Paternoster and Brame (2003, p.15) were interested in "examining the factors that explain the state's attorneys' decision to seek death in some death eligible cases but not others" so they used a definition of death eligible which did not include the filing of a formal notice to seek death. They defined cases as death eligible if:

The state's attorney filed a notice of an intention to seek a death sentence, even if that notice was later withdrawn unilaterally or in exchange for a plea.

The facts of the case clearly established that a first degree murder was committed, the defendant was the principal in the first degree, the defendant was eligible by age at the time of the offense, the defendant was not mentally retarded at the time of the offense, and the murder included at least one statutory aggravating circumstance.

Progression of Cases through the Maryland Death Penalty System

From 1978, the year in which Maryland's current death penalty statute took effect to the point when data collection for the initial study began in the fall of 1999,

there was an initial pool of approximately 6,000 homicides in the state of Maryland.

Paternoster et al. (2004, p.3) examined the influence of race and geography at five stages in the Maryland's capital punishment system:

- The point at which a case is deemed death eligible by the two criteria defined by Paternoster et al. (2004);
- The decision of the state's attorney to file a formal notification to seek a death sentence;
- The decision of the state's attorney to not withdraw a death notification once filed, in other words, the decision to make the death notification "stick" to the offender;
- The decision of the state's attorney to advance a death-eligible offense to a penalty trial upon a conviction for first-degree murder; and
- The decision of the jury or judge to sentence a defendant to death.

The universe of death eligible cases (stage 1) was trimmed down by clearly defining the terms of a "death eligible" case. For the purpose of their research, Paternoster et al., (2004) defined a case to be death eligible if it fit one of two criteria: (1) The state's attorney filed a notice of an intention to seek a death sentence, even if that notice was later withdrawn unilaterally or in exchange for a plea; or, (2) the facts of the case clearly established that a first-degree murder was committed, the defendant was the principal in the first degree (or met the principle in the second-degree exception), the defendant was eligible by age at the time of the offense, the defendant was not mentally retarded at the time of the offense, and the murder included at least one statutory aggravating circumstance.

The universe of death eligible cases (stage 1) was trimmed down from approximately 6,000 homicides from July 1, 1978 thru December 31, 1999 to 1,311 homicides. Initially included in the universe of 6,000 homicides was a pool of approximately 300 homicide cases where the state's attorney did not file a notification to seek a death sentence and the issue of death eligibility based upon the available

facts of the case was unclear. Specifically for these cases, it was not clear if the defendant was the principal in the first degree in the killing, or if there was a statutory aggravating circumstance present to make the homicide death eligible. Paternoster et al., (2004) dealt with the ambiguity by employing the assistance of experts to determine death eligibility in these cases. Each of these cases were submitted to a panel of attorneys who had experience in death penalty cases for review. This panel consisted of a roughly equal number of state's attorneys, public defenders, and private lawyers who have handled death penalty cases as former prosecutors, public defenders or as private defense counsel (Paternoster et al., 2004). The panel rated each case independently as to whether it was death eligible. If a majority of the panel members rated a case as death eligible, and stated that they were moderately confident in their decision, the case was added to the body of death eligible cases. Of the three hundred questionable cases, fewer than fifty were ultimately classified as death eligible and included in the group of 1,311.

Of these 1,311 death eligible cases, the state's attorney filed a formal notification to seek a death sentence (stage 2) in only 353 of these cases. Of the 353 cases where a formal notification was filed, the prosecutor did not retract it (stage 3) in 213 cases. Of the 213 cases in which the prosecutor did not retract the notice to seek the death penalty, 180 advanced to a penalty trial (stage 4). Of the 180 that advanced to a penalty trial, 76 received a death sentence (stage 5). The conditional and unconditional probabilities for the five stages are shown in Table 1.

Stages	Number of cases	Conditional Probability	Unconditional Probability
Stage 1: case defined as death eligible	1,311	---	---
Stage 2: prosecutor files notice of intent to seek death	353	0.27 (353/1311)	0.27 (353/1311)
Stage 3: notice of intent is not retracted	215	0.61 (215/353)	0.16 (215/1311)
Stage 4: death-noticed cases advance to penalty trial	180	0.84 (180/215)	0.14 (180/1311)
Stage 5: penalty trial cases receiving death sentences	76	0.42 (76/180)	0.058 (76/1311)

The probability that a prosecutor seeks a death sentence, given that a case is death eligible is .27 (353/1311). This means that a formal notice of intent to seek the death penalty is filed in less than 1/3 of all death eligible cases. The conditional probability that this notice is not retracted is .61 (215/353). In other words, of the notice to seek the death penalty “stuck” in roughly 60% of the cases where the notice was initially filed. The conditional probability of a death-noticed case advancing to penalty trial was .84 (180/253). This is to say that nearly 85% of all death-noticed cases advanced to penalty trial. The conditional probability of a case resulting in a death sentence, given that that it advanced to penalty trial was .42 (76/180).

The unconditional probabilities show a slightly different picture. The probability that a prosecutor does not retract the notice of intent to seek the death penalty in a death eligible case is .16(215/1311). The probability that a death eligible case advances to penalty trial is .14(180/1311). Finally, the probability that a death eligible case receives a death sentence is .058(76/1311). Indeed, of all the homicide cases that were eligible for the death penalty in Maryland from 1978-1999, the defendant received a death sentence less than 6% of the time.

Analytic Strategy of the Current Research

The Maryland death penalty statute included a proportionality review element from 1978 to 1992. During this time, the Maryland State Supreme Court was constitutionally mandated to evaluate comparative excessiveness among death sentences and vacate any sentences they deemed to be disproportionate. Yet the Maryland State Supreme Court has not vacated even one death sentence due to disproportionality. If the Maryland State Supreme Court conducted proportionality reviews effectively, then it is reasonable to assume that the death sentences affirmed from 1978 to 1992 are consistently more violent than the death eligible cases that received a sentence less than death. However, if the Maryland State Supreme Court failed in their efforts to identify and vacate comparatively excessive death sentences, then the 76 death sentences affirmed by the Maryland State Supreme Court may not be the “worst of the worst.” The purpose of the current research is to determine whether or not the Maryland State Supreme Court identified and affirmed only the “worst of the worst” homicides. In order to determine how Maryland arrived at their answer to the question of excessiveness, it is important to review the methodology behind Maryland’s proportionality review process.

The Fact-specific “Salient Factors” Method

Several state courts including Maryland, commonly utilize non-empirical fact-specific approaches whereby they compare the case under review to previous cases they recall to be similar. In one such method, termed the “salient factors” approach, similar cases are chosen for comparison based on “salient factors”, or “those features

of the case which seem most likely to have affected the jury's decision." (Baldus et al., 1983 pp.681).

Language from several Maryland State Supreme Court opinions demonstrates the use of the fact-specific "salient factors" method. For example, in *Thomas v. State [of Maryland]*, the justices note:

We have carefully reviewed the relevant inventory of capital sentencing cases and have selected a number which we deem similar to that of the appellant, bearing in mind, of course, that simply because dissimilarities exist between cases does not mean that the Court is powerless to complete the comparative review process contemplated by § 414(e)(4).

They go on to summarize the elements of the similar cases. They offer no justification for selecting comparison cases, nor is there a distinct commonality apparent in the summaries. Some of the defendants in the comparison cases were sentenced to death and some were sentenced to life. Despite the finding in *Tichnell (IV)*, which found that proportionality reviews need only utilize a universe of cases consisting of other death sentences, the Maryland State Supreme Court continued to include both life sentences and death sentences in its group of comparison cases. However, the selection method of comparison cases and weight given to salient factors appears arbitrary. That is to say, the Maryland State Supreme Court offers no explanation of how or why they select comparison cases to measure comparative excessiveness.

The language in *Thomas* is generally consistent with every other proportionality review section of the Maryland death sentence cases; therefore, the method by which the Maryland State Supreme Court conducts their proportionality review can best be described as the salient factors method.

There are two problems with this approach. First, this method is entirely subjective, relying solely on the values and experiences of the members of the State Supreme Court. Regardless of how similar an older case may be, it will not be included in the group of comparison cases if members of the State Supreme Court do not remember it. The second problem with this method is that each homicide is unique and the pool of cases is sometimes too small for enough cases to be matched on a sufficient number of factors with high enough reliability to accurately select a large enough group of comparable cases. Given the unique nature of homicide, it is very rare for homicides to share a large number of salient factors.

For the first part of this proportionality review project, I use the fact-specific “salient factors” method in an effort to replicate the results of the Maryland State Supreme Court. Factors which appear to be relevant in the court’s opinion are considered “salient.” Comparison cases are matched based on the salient factors and drawn from the universe of cases consisting of the 1,311 homicides previously identified as death eligible. If the probability of receiving a death sentence among comparable cases is less than .35, then the case under review will be comparatively excessive.

As previous research has shown, there are several ways to conduct proportionality reviews (Baldus et al., 1983; 1990; Paternoster and Kazyaka, 1990; Wallace and Sorensen, 1998). In addition to the “salient factors” method, I conducted an overall aggravation “propensity score” method to further evaluate the comparative excessiveness among Maryland death sentences.

The Overall Aggravation “Propensity Score” Method

Previously used by Paternoster and Kazyaka in their proportionality review of South Carolina death sentences, the propensity score method is an empirically based method of selecting comparison cases. First, I constructed a logistic regression equation using explanatory variables and death sentence as the outcome variable. I will be able to discuss the variables included in the logistic regression model after I have identified which are significant. These significant factors include the aspects such as the presence of multiple victims or the presence of prior violent convictions in the defendant’s criminal history. Each significant independent variable was assigned a different weight based on its predictive importance. In other words, a propensity score was calculated by “summing the value of the logistic coefficients (plus the constant) for each aggravation factor that was present.” (Paternoster and Kazyaka, 1990 pp. 504). This propensity score represents the likelihood of a death sentence in each specific case. The propensity score can also be understood as “the estimated conditional probability of the defendant being sentenced to death.” (Paternoster and Kazyaka, 1990 pp. 491) Comparable cases were matched based on their propensity score. Each death eligible case was ranked by propensity score and then divided into groups of comparable cases based on the propensity score.

After the cases are divided into groups, the probability of receiving a death sentence was calculated for each group. Ideally, the death sentences are generally consistent within each group of comparable cases so that groups with a high propensity score which are the most egregious would predictably have a high proportion of death sentences. Conversely, groups with low propensity scores are

more likely to have a low proportion of death sentences, if any at all. In theory, there should be a positive relationship between propensity score and probability of death sentence. As the seriousness between groups increases, so should the proportion of the cases in which the defendant receives a death sentence.

Defining Comparative Excessiveness

After ranking the sentences and grouping them with comparable cases according to propensity score, I examined each group to check for deviations from the predicted positive relationship. If there is a group where the probability of death sentences is lower than .35, then I considered the death sentences in that group comparatively excessive because 65% of cases with similar propensity scores did not also receive a death sentence. Adopting .35 as the cutoff for identifying comparatively excessive death sentences is consistent with Paternoster and Kazyaka's (1990) proportionality review in South Carolina and the Georgia proportionality review conducted by Baldus et al., (1983). Initially used by Baldus and his colleagues, .35 was based on *Coley v. State [of Georgia]*, a 1974 non-fatal rape case in which the Georgia State Supreme Court vacated the death sentence due to comparative excessiveness because 36% of similar defendants received a death sentence. Paternoster and Kazyaka justified using the same measure of comparative excessiveness (.35) because South Carolina case law and statutory guidelines are silent when it comes to defining comparative excessiveness and Georgia and South Carolina's death penalty statutes were remarkably similar. Resembling South Carolina, Maryland's death penalty statute and court opinions lack a definition of comparative excessiveness. Additionally, Maryland's death penalty statute is

modeled after Georgia's statute and similar to South Carolina's statute. On these grounds, it is reasonable to assume that comparative excessiveness as it was measured in Georgia is an appropriate gauge for measuring comparative excessiveness in Maryland.

Similarly, Baldus and his colleagues (1983) have identified death sentences that were not comparatively excessive as those which the death sentencing rate for similar cases was greater than or equal to .80. This is to say that at least 80% of similar cases also received a death sentence. Paternoster and Kazyaka (1990) chose a benchmark of .6 or more to signify proportionate sentences. I adopted a more conservative measure of .8 to identify cases which are not comparatively excessive. Ideally, the 5.8% of death eligible cases in Maryland that received a death sentence are the "worst of the worst" and have a death sentencing rate among comparable cases of .80 or higher.

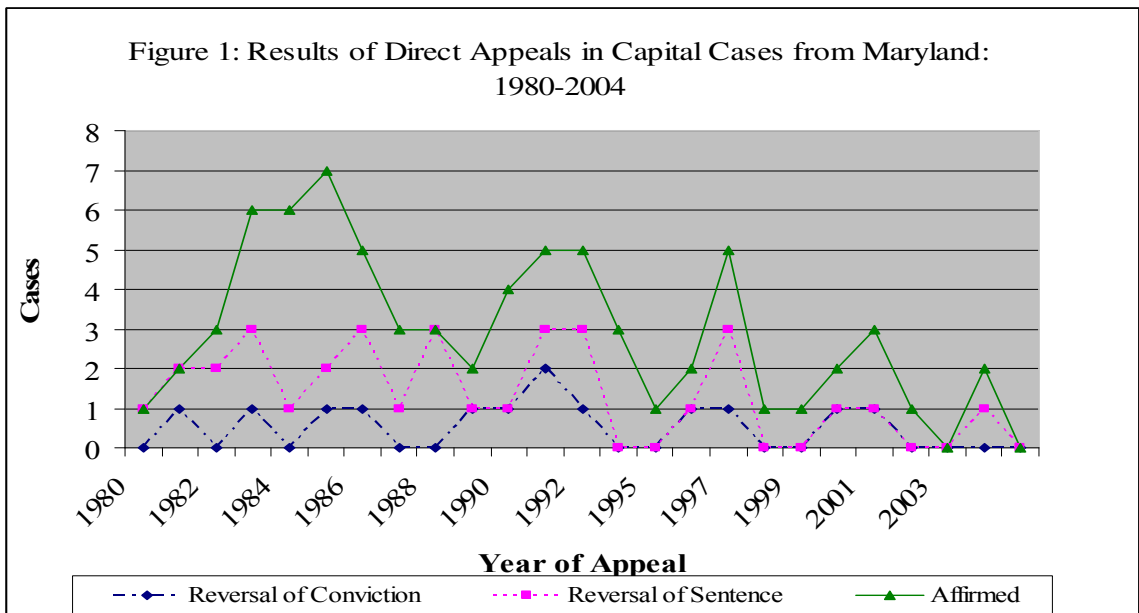
Admittedly, defining comparative excessiveness is a tricky endeavor. Since the courts have not presented a clear classification of proportionality, several different preferences exist. Although defining comparative excessiveness is extremely subjective, a reasonableness standard is sufficient in determining proportionality at the margins. For instance, if 1 out of 100 similar cases receive a death sentence, it is reasonable to classify that sentence as excessive. Along the same lines, if 95 or 99 out of 100 similar cases received a death sentence, it is fair to say that a death sentence is imposed regularly and thus proportionate in this instance. Disagreement arises when the probability is closer to the middle of the range. If around half of all similar cases received a death sentence, is the case under review excessive, or

proportionate? Currently, there is no method available to adequately assess the proportionality of cases which fall in this middle range. For this reason, I will assess the proportionality of cases closer to the margins. If the proportion of similar cases receiving a death sentence is lower than .35, I classify the case under review as comparatively excessive because it is reasonable by the standards of previous researchers. I selected .8 as the benchmark for determining proportionate cases for the same reasons.

Chapter 4: Analysis

Trends in the Direct Appeal Process in Maryland 1979-1999

The capital cases sentenced between 1979 and 1999 in Maryland were reversed on direct appeal a little less than half of the time. Table 2 and Figure 1 provide a breakdown of the results of the direct appeals for these death sentences. The reversal of a conviction is the least common result, with only slightly more appeals resulting in a reversal of sentence, judgment otherwise affirmed. Figure 1 depicts the overall trend of affirmed death sentences as decreasing from the mid 1980's to 2003.



This decrease could be due to fewer overall death sentences. The decline of affirmed death sentences over the last two decades of the twentieth century could also reflect diminished public support for capital punishment or the increasing number of U.S. Supreme Court decisions limiting the use of the death penalty in specific

situations. For example, in the 1977 case of *Coker v. Georgia*, the U.S. Supreme Court held that the death penalty is unconstitutional for the rape of an adult woman when the victim was not killed. In 1986, the Court banned the execution of insane persons in *Ford v. Wainwright*. In the 1988 case of *Thompson v. Oklahoma*, the Court held that the execution of offenders fifteen years of age or younger was unconstitutional. Over the past few decades, the population eligible to receive a death sentence has decreased considerably.

Year	Reversal of Conviction	Reversal of Sentence	Affirmed	Total
1980	0	1	0	1
1981	1	1	0	2
1982	0	2	1	3
1983	1	2	3	6
1984	0	1	5	6
1985	1	1	5	7
1986	1	2	2	5
1987	0	1	2	3
1988	0	3	0	3
1989	1	0	1	2
1990	1	0	3	4
1991	2	1	2	5
1992	1	2	2	5
1993	0	0	3	3
1995	0	0	1	1
1996	1	0	1	2
1997	1	2	2	5
1998	0	0	1	1
1999	0	0	1	1
2000	1	0	1	2
2001	1	0	2	3
2002	0	0	1	1
2003	0	0	0	0
2004	0	1	1	2
Total	13	20	40	73
Percent	18%	28%	54%	100%

Convictions:	Number	Percent
Reversed	13	18%
Affirmed	60	82%
Total	73	100%

Sentences:	Number	Percent
Reversed on Procedural Grounds	20	33%
Reversed on Substantive Grounds	0	0%
Affirmed	40	67%
Total	60	100%

Table 2, part B shows that forty cases were affirmed outright, and in twenty cases the death sentence was vacated, with the judgment otherwise affirmed. In the

¹³ Appeals from 1980-2004 correspond to original convictions from 1979-1999.

other thirteen cases presented to the court on direct appeal, the conviction was reversed and remanded for a new trial. Each of these reversals was based on procedural errors—with not a single death sentence being reversed on substantive grounds in the twenty-four years the Maryland State Supreme Court reviewed these death sentences. As previously stated, the Maryland State Supreme Court has not vacated even one single death sentence due to comparative excessiveness. The post-*Gregg* revisions of Maryland’s death penalty statute included a proportionality review section which required the Court of Appeals to review each death sentence and determine “whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” In the fall of 1992, the Maryland State Legislature repealed the proportionality review element in subsection § 414(e)(4) of the death penalty statute. Thus, the Maryland State Supreme Court theoretically conducted a proportionality review of each death sentence handed down from the fall of 1978 to the fall of 1992. None of these proportionality reviews yielded even one comparatively excessive death sentence. In an effort to understand whether their conclusions were the result of proportionate sentences, or simply an ineffective proportionality review, I turn first to the fact-specific frequency analysis—which most closely resembles the methodology used by the Maryland State Supreme Court.

Results of the Fact-Specific Salient Factors Analysis

The fact-specific salient factor method relies on characteristics of the case deemed important in the eyes of the Maryland State Supreme Court. In order to determine which factors were most important, I reviewed the court’s discussion

regarding the proportionality of the sentence. In the event that the opinion lacked a proportionality review, a close examination of the rest of the opinion provided insight into the factors which the court found most significant. Once the salient factors of a case were identified, any other death eligible cases which were sentenced prior to the direct appeal of the case in question were included in the group of similar cases. Each case was matched on up to three salient factors, or until the group was narrowed down to less than two cases. After the groups of similar cases were selected, the proportion of similar cases receiving a death sentence was calculated. If, in the group of similar cases, the number also receiving a death sentence was high—.75 or above—then the case under review was deemed proportionate. However, if the proportion of similar cases receiving a death sentence was low—less than .35—then the case under review was deemed disproportionate.

Table 3 provides the results of a proportionality review of Maryland death sentences affirmed during the time period in which the Maryland State Supreme Court was required to detect and remove disproportionate sentences.

Table 3: Proportion of Defendants Receiving a Death Sentence Within Subgroups of Comparable Cases Defined by Fact Specific Approach: Affirmed Cases Prior to October 1, 1992 Only			
A. Cases Analysis	Number of Specific Facts Matched in Comparison Group:		
Case	One	Two	Three
<i>Tichnell v. State (I)</i>	3/5 (.60)	1/2 (.50)	1/2 (.50)
<i>Calhoun v. State</i>	2/18 (.11)		
<i>Colvin v. State(I)</i>	12/67 (.18)	3/11 (.27)	2/7 (.29)
<i>Stebbing v. State</i>	4/16 (.25)	2/3 (.67)	1/2 (.50)
<i>Trimble v. State</i>	4/16 (.25)	2/7 (.29)	

<i>Harris v. State</i>	16/86 (.19)	1/20 (.05)	1/12 (.08)
<i>Foster v. State</i>	17/89 (.19)	6/12 (.50)	1/2 (.50)
<i>Huffington v. State</i>	9/32 (.28)	5/13 (.38)	5/8 (.63)
<i>Mills v. State</i>	0/0 (0)		
<i>Jones v. State</i>	9/39 (.23)	3/18 (.17)	0/1 (0)
<i>Collins v. State</i>	24/139 (.17)	11/62 (.18)	1/10 (.10)
<i>Hunt v. State</i>	5/9 (.55)	4/7 (.57)	
<i>Henry v. State</i>	12/88 (.14)	7/31 (.23)	7/14 (.50)
<i>Wiggins v. State</i>	27/164 (.16)	11/29 (.38)	7/18 (.39)
<i>Clermont v. State</i>	10/57 (.18)	3/19 (.16)	2/6 (.33)
<i>Evans v. State (I)</i>	½ (.50)		
<i>Johnson v. State</i>	16/83 (.19)	7/17 (.41)	
<i>Evans v. State (II)</i>	0/1 (0)		
<i>Grandison v. State (I)</i>	½ (.50)	½ (.50)	½ (.50)
<i>Booth v. State (I)</i>	18/95 (.19)	2/5 (.40)	
<i>Bowers v. State (I)</i>	6/19 (.32)	2/4 (.50)	
<i>Booth v. State (II)</i>	22/131 (.17)	3/10 (.30)	2/3 (.67)
<i>Gilliam v. State</i>	26/148 (.18)	1/3 (.33)	
<i>Booth v. State (III)</i>	29/176 (.16)	5/17 (.29)	3/4 (.75)
<i>Grandison v. State (II)</i>	0/1 (0)		
<i>Colvin v. State (II)</i>	30/207 (.14)	12/34 (.35)	9/25 (.36)

Table 3 B. Summary: Proportion of Death Sentences Within Groups of Comparable Cases by Salient Factors: Affirmed Cases Prior to October 1, 1992 Only

Probability of Death Sentence for Comparable Cases	Number of Affirmed Death Cases in This Category	Percent of Affirmed Death Cases
Less than .35	11/26	42%
.35 - .50	11/26	42%
.51 - .75	4/26	15%
.76 - 1.00	0/26	0%

Table 3 Part A does not reveal a death sentence which would not be considered disproportionate using a benchmark of .8.¹⁴ These cases include *Booth v. State (II)*,¹⁵ *Booth v. State (III)*,¹⁶ and *Huffington v. State*.¹⁷ Some of the salient factors these cases share include robbing and killing multiple victims in the same incident, killing children or minors, or shooting victims execution-style. For each of these cases, at least six out of ten cases with similar characteristics also received a death sentence. The seriousness of the salient factors as well as the consistency with which death sentences are imposed in these cases support the notion that these death sentences were affirmed in a manner consistent with the proportionality review requirement.

However, when the rest of the affirmed cases are also considered, the picture is a little different. Table 3 Part B shows that eleven of the twenty-six cases are considered disproportionate or comparatively excessive, using the standard of .35 or less. That is to say, less than 35% of similar cases receive death sentences for 42% of all affirmed death sentences affirmed prior to 1992. As the number of similar cases with death sentences gets even lower, the comparative excessiveness of the sentence becomes even more apparent.

For example, in *Gilliam v. State*,¹⁸ the defendant kidnapped a female victim and took her to a remote location. He robbed the victim, acquiring approximately three dollars. Then the defendant shot the victim in the face with a sawed off shotgun because “she saw his face.” The victim died as a result of the gunshot wound she

¹⁴ A benchmark for proportionate cases of .8 indicates that at least 80% of similar cases also received a death sentence.

¹⁵ 316 Md. 363; 558 A.2d 1205; 1989.

¹⁶ 327 Md. 142; 608 A.2d 162; 1992.

¹⁷ 304 Md. 559; 500 A.2d 272; 1985.

¹⁸ 320 Md. 637; 579 A.2d 744; 1990

sustained to her face. The crime occurred on December 2, 1988. The case made its way to the Maryland State Supreme Court for direct appeal and was affirmed on September 25, 1990. Since the crime and direct appeal occurred prior to the abrogation of the proportionality review element in 1992, the court was legally obligated to conduct a proportionality review in this case. When they considered this case on direct appeal, they explained their decision to affirm the death sentence with regard to proportionality:

Our analysis indicates that death penalty sentences have been imposed in a significant number of cases where the aggravating circumstances involved a murder in the course of a robbery and/or kidnapping. Considering both this defendant and the brutal nature of his crime, we conclude that the death sentence was neither excessive nor disproportionate to the penalty imposed in similar cases.

-*Gilliam v. State*¹⁹ on or about p. 53.

They identify two salient factors: (1) murder in the course of kidnapping and (2) murder in the case of robbery. The first group matched on one salient factor is comprised of cases where the defendant murdered their victim in the course of kidnapping them. Prior to the direct appeal in *Gilliam*, twelve other defendants had kidnapped and killed their victim in a death eligible case. Of these twelve similar cases, six also received a death sentence. Thus, when matched on one salient factor (kidnapping), similar cases received a death sentence exactly half of the time. When matched on two salient factors, murder in the course of kidnapping and murder in the course of robbery, the group of comparable cases shrinks to three. Of these three similar cases, only one had received a death sentence; therefore, cases matched on two salient factors receive a death sentence approximately 33% of the time.

¹⁹ *Gilliam v. State* 320 Md. 637; 579 A.2d 744; 1990

Since the court does not specify which of the two salient factors is most important, it may be the case that the analysis they conducted, which found that “a significant number” of similar cases were also sentenced to death, reversed the order of the salient factors thereby changing the results to find a larger proportion of similar cases receiving death sentences. If the initial group of comparison cases was matched only on robbery, instead of kidnapping, then perhaps Gilliam’s death sentence would be among a significant number of other death sentences, and accordingly proportionate. A count reveals one hundred forty-eight other defendants had murdered a victim in the course of a robbery prior to the direct appeal in *Gilliam*. Of the one hundred forty-eight cases, death sentences were handed down twenty-six times. Thus, slightly less than 18% of similar cases matched on robbery were sentenced to death.

Based on the language in *Gilliam*, the court used one of these three combinations to determine that “death penalty sentences have been imposed in a significant number of cases where the aggravating circumstances involved a murder in the course of a robbery and/or kidnapping.” Even the best case scenario—encompassing all cases in which the victim was murdered in the case of kidnapping—allows for the death penalty to be imposed no more than half of the time. The other two possible combinations effectively classify death sentences as proportionate when similar cases receive the death penalty 17% or 33% of the time. In effect, Gilliam’s death sentence was classified as proportionate because similar cases received the death penalty 17% of the time, 33% of the time, or at most 50% of the time. Tyrone Delano Gilliam was executed on November 16, 1998.

Proportionate sentences after *Pulley v. Harris*

In 1984, *Pulley* held that proportionality review was not “...so critical that without it the Georgia statute would not have passed constitutional muster.”²⁰ Eight years after *Pulley*, Maryland repealed the proportionality review component in their death penalty statute. However, this did not mean that Maryland’s sentences after 1992 were free to be disproportionate and excessive. Indeed, *Pulley* simply presented states with more discretion in their task of handing down constitutional sentences. It was the opinion of Justices Stewart, Powell, and Stevens in *Gregg* that, “...some form of meaningful appellate review is still required.”²¹ The purpose of this review remained to serve as a check against the random or arbitrary imposition of the death penalty. In this sense, sentencing free from prejudice and comparative excessiveness was still a common objective held by the 8th Amendment, the 14th Amendment, *Furman*, *Gregg*, and even *Pulley*. The *Pulley* court trusted that the states could attain this shared goal without the legal requirement of proportionality review. In this sense, all capital cases in Maryland after 1992 should still have been free from arbitrary and capricious judgments, ergo not comparatively excessive. A proportionality review can assess the comparative excessiveness of cases after 1992. Had the court conducted a proportionality review after 1992, this is what they would have found.

Table 4 provides the results of a proportionality review utilizing the salient factor method for affirmed death sentences after October 1, 1992. In five of the thirteen cases, a death sentence was handed down in similar cases 51% - 75% of the

²⁰ *Pulley v. Harris* on or about p.46

²¹ As noted in *Pulley v. Harris* on or about p.46.

time. In the remaining eight cases affirmed during this time period, less than 35% of similar cases received death sentences. Using the benchmark of .35²² to denote comparative excessiveness, eight out of thirteen cases, or 62% of all death sentences affirmed after 1992 were classified as comparatively excessive. These include *White v. State*,²³ *Ball v. State*,²⁴ *Conyers v. State*,²⁵ *Ware v. State*,²⁶ *Miles v. State*,²⁷ *Baker v. State*,²⁸ *Oken v. State*,²⁹ and *Thanos v State (II)*.³⁰

²² The benchmark of .35 was employed by Baldus et al. (1983; 1990) in their proportionality review of Georgia death sentences and the proportionality review of South Carolina death sentences carried out by Paternoster and Kazyaka (1990) to denote disproportionate sentences.

²³ 322 Md. 738; 589 A.2d 969; 1991

²⁴ 347 Md. 156; 699 A.2d 1170; 1997

²⁵ 354 Md. 132; 729 A.2d 910; 1999

²⁶ 300 Md. 719; 481 A.2d 201; 1984

²⁷ 365 Md. 488; 781 A.2d 787; 2001

²⁸ 367 Md. 648; 790 A.2d 629; 2002

²⁹ 381 Md. 580; 851 A.2d 538; 2004

³⁰ 330 Md. 576; 625 A.2d 932; 1993

Table 4: Proportion of Defendants Receiving a Death Sentence Within Subgroups of Comparable Cases Defined by Fact Specific Approach: Affirmed Cases After October 1, 1992 Only			
A. Cases Analysis	Number of Specific Facts Matched in Comparison Group:		
Case	One	Two	Three
<i>White v. State</i>	15/73 (.21)	10/47 (.21)	6/25 (.24)
<i>Bruce v. State</i>	17/90 (.19)	9/37 (.24)	9/17 (.53)
<i>Perry v. State</i>	2/3 (.67)		
<i>Burch v. State</i>	37/256 (.14)	7/21 (.33)	4/7 (.57)
<i>Ball v. State</i>	24/268 (.09)	16/96 (.17)	2/22 (.09)
<i>Conyers v. State</i>	27/296 (.09)	18/105 (.17)	3/24 (.13)
<i>Ware v. State</i>	25/158 (.16)	13/69 (.19)	
<i>Miles v. State</i>	41/290 (.14)	17/135 (.13)	
<i>Baker v. State</i>	41/291 (.14)	17/135 (.13)	7/60 (.12)
<i>Oken v. State</i>	6/21 (.29)	1/3 (.33)	
<i>Thanos v. State (II)</i>	30/194 (.15)	6/18 (.33)	4/6 (.67)
<i>Borchardt v. State</i>	40/291 (.44)	8/29 (.28)	6/9 (.67)
<i>Thanos v. State (II)</i>	30/191 (.16)	3/25 (.12)	
Table 4 Part B. Summary: Proportion of Death Sentences Within Groups of Comparable Cases by Salient Factors: Affirmed Cases Only			
Probability of Death Sentence for Comparable Cases	Number of Affirmed Death Cases in This Category	Percent of Affirmed Death Cases	
Less than .35	8/13	62%	
.36 - .50	0/13	0%	
.51 - .75	5/13	38%	
.76 - 1.00	0/13	0%	

For a more detailed example, consider the case of *Baker v. State*.³¹ The defendant shot and killed one female victim in a mall parking lot while attempting to rob her in front of witnesses who were not also committing the crime. The salient factors in this case are (1) robbery while committing first degree murder, (2) using handgun in the commission of a felony, and (3) victim killed in front of witnesses. Prior to the direct appeal in this case, 291 other defendants committed robbery in addition to first degree murder. Of these 291 other cases matched on one salient factor, a death sentence was handed down in 41 cases. This means that approximately 14% of other cases matching on one salient factor received a death sentence. Taking it a step further, cases are matched on two characteristics: (1) robbery while committing first degree murder and (2) use of a handgun in commission of a felony. The number of similar cases matched on these two characteristics fall to 135 cases—17 of which also receive a death sentence. When compared to cases sharing these two salient factors, approximately 13% of similar cases receive a death sentence. When the group is narrowed down even further to include the third salient factor—victim killed in front of witnesses—the number of similar cases drops to 60. Of this group of similar cases matched on these three salient factors, 7 received a death sentence. After comparing *Baker* to other cases which share three salient factors, a death sentence was imposed in only 12% of the similar cases. When only twelve out of one hundred similar cases would receive a death sentence, that death sentence would be considered comparatively excessive by common standards. Wesley Eugene Baker was executed on December 5, 2005.

³¹ 367 Md. 648; 790 A.2d 629; 2002

The proportionality reviews conducted by the court routinely excluded many cases which shared the factor(s) they determined to be most salient in the case under review. For example, in the 1981 case of *White v. State*³² the facts of the case state that two defendants were driving around looking for someone to rob. Defendant White spotted a man on a moped and followed him. They attempted to get the driver of the moped to pull over, but that failed. When Defendant White saw that the moped was not pulling over, he shot the driver once and killed him. The defendants fled the scene, leaving the moped and victim on the side of the road. The case made its way to the Maryland State Supreme Court on direct appeal in 1984. The court's review of the case included a proportionality review section in which they note the following:

There seems to be no other case in the inventory in which the killer by pure chance passed by the victim on a public street in broad daylight, decided that the victim had some property which the killer coveted and then, without warning, demand, or resistance by the victim, simply killed the victim in cold blood.

-*White v. State* on or about p.33

The facts of the case as well as the description provided by the court above reasonably permit the case to include the following salient factors: (1) murder in the course of robbery, (2) offender and victim were strangers who had not previously been acquainted, and (3) use of a handgun in the commission of a felony. If the case under review was matched with the three salient factors listed above, the group holding the first salient factor in common would consist of seventy-three cases, fifteen of which received death sentences. If the group of similar cases shares the first and second salient factor listed above, then forty-seven cases would share this

³² 300 Md. 719; 481 A.2d 201; 1984

commonality, ten of which received death sentences. If all three salient factors were matched, then twenty-five similar cases remain for comparison. Six of these twenty-five received a death sentence.

The court notes several other small details which make this case unique—the incident took place on a public street in broad daylight, and the crime occurred “without warning, demand or resistance by the victim.” It is always possible to include so many small details so as to make any homicide completely unique, thereby creating a deficiency of comparable cases. Previous proportionality reviews conducted by the court show that they were frequently very general in their description of the case under review, simplifying the process of selecting comparable cases.³³ In the proportionality reviews where the case description is very specific and the accompanying list of salient factors sparse, many suitable comparison cases are overlooked. If the court in *White* had classified the case in more general terms, there would have been ample comparison cases available to make the determination of proportionality—instead of declaring that this case was alone in the inventory. Furthermore, had the court characterized the case as a robbery-homicide in which there was no relationship between the victim and offender and a handgun was used in the commission of this felony, they may have also found that less than one quarter of all comparison cases received a death sentence.

This subjectivity allows inconsistent standards, producing inconsistent results. This is a major flaw in the fact-specific salient factor method. This method most closely resembles the proportionality review methodology of the Maryland State

³³ In the example case of *Gilliam v State* the court described the case as “the aggravating circumstances involved a murder in the course of a robbery and/or kidnapping.” Using (1) robbery and (2) kidnapping as salient factors provides a plethora of cases from which to select a comparison group.

Supreme Court. Previous researchers have offered the overall aggravation propensity score method as an alternative way of measuring comparative excessiveness among death sentences and a way to check the reliability of the salient factor method.

Results of the Overall Aggravation Propensity Score Analysis

The overall aggravation propensity score method estimates the conditional probability of a defendant being sentenced to death based on significant independent variables assigned a weight based on their predictive importance. The independent variables are estimated in a logistic regression equation with the sentence—death or less than death—as the outcome variable. There are nine independent variables used in this equation to best explain whether or not the defendant received a death sentence. The variables are:

1. The defendant expressed pleasure for the killing
2. Multiple victims were killed.
3. There was evidence that the defendant had an adult criminal record.
4. The defendant is alleged to have committed additional crimes in the time period immediately before or after the homicide.
5. The victim suffered multiple trauma (shot and stabbed, stabbed and choked)
6. The victim and offender were not acquainted prior to the homicide, they were strangers.
7. Total number of aggravating circumstances.
8. The defendant maintains his/her innocence.
9. The crime occurred in the home of the victim or the home of the victim's family.
10. Race of victim.³⁴
11. Race of offender.³⁵
12. The crime occurred in Baltimore County.³⁶

³⁴ The race variable is initially included in the estimation of the equation, and taken out before the propensity scores are calculated. It is initially included to “purge the non-race variables of any effect racial bias might have...” (Paternoster and Kazyaka, 1990).

³⁵ Ibid.

³⁶ Previous research has shown that a capital crime in Baltimore County significantly increases the odds of receiving a death sentence. (Paternoster et al., 2004).

Table 5: Logistic Regression for the Decision to Sentence Convicted Capital Defendants to Death (N=1,311)		
Variable:	Logit Coefficient	Odds Multiplier
The defendant expressed pleasure for the killing	2.432	11.376*
Multiple victims were killed.	.192	1.211*
There was evidence that the defendant had an adult criminal record.	.208	1.232*
The defendant is alleged to have committed additional crimes in the time period immediately before or after the homicide.	.680	1.973*
The victim suffered multiple trauma (shot and stabbed, stabbed and choked)	-0.94	.911
The victim and offender were not acquainted prior to the homicide, they were strangers.	.227	1.255
Total number of aggravating circumstances.	1.021	2.776*
The defendant maintains his/her innocence.	.321	1.378
The crime occurred in the home of the victim or the home of the victim's family.	.277	1.319
Race of victim.	1.754	5.776*
Race of offender.	-.849	.428*
Crime occurred in Baltimore County, Maryland.	1.880	6.555*
Constant	-6.421	.002
-2LogLikelihood	400.842	
Degrees of Freedom	20	

* $p < .05$

Table 6: Classification Table				
		Predicted Outcome		
		Sentence less than death	Death	Totals
Actual Outcome	Sentence less than death	1119	11	1130
	Death	62	14	76
		1181	25	1206
Percent correctly predicted by the model: 99.0%				
Percent correctly predicted by chance: 18.4%				
Percent reduction in error relative to chance: 93.9%				

After trying several equations, this was the most parsimonious model. The analysis reveals twelve independent factors that influence whether or not a defendant

was sentenced to death. These factors are: (1) The defendant expressed pleasure for the killing; (2) Multiple victims were killed; (3) There was evidence that the defendant had an adult criminal record; (4) The defendant is alleged to have committed additional crimes in the time period immediately before or after the homicide; (5) The victim suffered multiple trauma (shot and stabbed, stabbed and choked); (6) The victim and offender were not acquainted prior to the homicide, they were strangers; (7) Total number of aggravating circumstances; (8) The defendant maintains his/her innocence; (9) The crime occurred in the home of the victim or the home of the victim's family.

The odds multiplier is listed in the right-hand column in Table 5. The odds multiplier corresponds to the odds ratio for a unit increase in the explanatory variable. According to Table 5, the odds multiplier for the "defendant expressed pleasure for the killing" variable is 11.376. In other words, the odds of receiving a death sentence are increased by a factor of 11.376 in cases where the defendant expressed pleasure for the killing.

Using the logit model estimated above, a propensity score was calculated for each case by summing the value of the logistic coefficients and the constant for each factor present. This propensity score represents the likelihood of a death sentence in each specific case. In theory, the higher the propensity score, the greater the seriousness of the case, and the more likely it is that a case receives a death sentence. To test this, comparable cases were matched on the basis of their propensity score to determine whether they received similar sentences to the case under review. Table 7 provides the results of the propensity score method, where groups are created by

comparing the fifteen cases above and fifteen cases below the case under review when cases are ranked by propensity score (predicted probability based on the logit model). When similar cases were grouped by propensity score, sensitivity tests demonstrated that findings were consistent when arranging similar cases by equal groups of different sizes. See Appendix B for additional analyses using the five groups above and five groups below the case under review.

The propensity score analysis reveals thirty-three comparatively excessive death sentences have been affirmed by the Maryland State Supreme Court. The list of these disproportionate cases is denoted by an asterisk in Table 7 Part A and includes: *Perry v. State*,³⁷ *Hunt v State*,³⁸ *Jones v. State*,³⁹ *Calhoun v. State*,⁴⁰ *Colvin (I) v. State*,⁴¹ *Harris v. State*,⁴² *Baker v. State*,⁴³ *Booth (II) v. State*,⁴⁴ *Collins v. State*,⁴⁵ *Foster v. State*,⁴⁶ *Booth (I) v. State*,⁴⁷ *Booth (III) v. State*,⁴⁸ *Bowers v. State*,⁴⁹ *Miles v. State*,⁵⁰ *Ware v. State*,⁵¹ *Henry v. State*,⁵² *Stebbing v. State*,⁵³ *Conyers v. State*,⁵⁴ *Gilliam v. State*,⁵⁵ *Huffington v. State*,⁵⁶ *White v. State*,⁵⁷ *Mills v. State*,⁵⁸ *Evans (I) v.*

³⁷ 344 Md. 204; 686 A.2d 274; 1996

³⁸ 312 Md. 494; 540 A.2d 1125; 1988

³⁹ 310 Md. 569; 530 A.2d 743; 1987

⁴⁰ 297 Md. 563; 468 A.2d 45; 1983

⁴¹ 299 Md. 88; 472 A.2d 953; 1984

⁴² 303 Md. 685; 496 A.2d 1074; 1985

⁴³ 367 Md. 648; 790 A.2d 629; 2002

⁴⁴ 316 Md. 363; 558 A.2d 1205; 1989

⁴⁵ *Ibid.*

⁴⁶ 304 Md. 439; 499 A.2d 1236; 1985

⁴⁷ 306 Md. 172; 507 A.2d 1098; 1986

⁴⁸ 327 Md. 142; 608 A.2d 162; 1992

⁴⁹ 298 Md. 115; 468 A.2d 101; 1983

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² 324 Md. 204; 596 A.2d 1024; 1991

⁵³ 299 Md. 331; 473 A.2d 903; 1984

⁵⁴ 354 Md. 132; 729 A.2d 910; 1999

⁵⁵ *Ibid.*

⁵⁶ 304 Md. 559; 500 A.2d 272; 1985

⁵⁷ *Ibid.*

State,⁵⁹ *Ball v. State*,⁶⁰ *Evans (II) v. State*,⁶¹ *Grandison (I) v. State*,⁶² *Grandison (II) v. State*,⁶³ *Clermont v. State*,⁶⁴ *Burch v. State*,⁶⁵ *Colvin (II) v. State*,⁶⁶ *Oken v. State*,⁶⁷ *Wiggins v. State*,⁶⁸ and *Borchardt v. State*.⁶⁹

⁵⁸ 310 Md. 33; 527 A.2d 3; 1987

⁵⁹ 301 Md. 45; 481 A.2d 1135; 1984

⁶⁰ *Ibid.*

⁶¹ 304 Md. 487; 499 A.2d 1261; 1985

⁶² 305 Md. 685; 506 A.2d 580; 1986

⁶³ 341 Md. 175; 670 A.2d 398; 1995

⁶⁴ 348 Md. 419; 704 A.2d 880; 1998

⁶⁵ 346 Md. 253; 696 A.2d 443; 1997

⁶⁶ 332 Md. 144; 630 A.2d 725; 1993

⁶⁷ *Ibid.*

⁶⁸ 324 Md. 551; 597 A.2d 1359; 1991

⁶⁹ 367 Md. 91; 786 A.2d 631; 2001

Table7: Proportion of Affirmed Death Sentences for Defendants
 Within Subgroups of Comparable Cases Where
 Comparable Cases are Defined in Terms of Overall Propensity Score

Case	Propensity Score
<i>Perry v. State</i>	10/30 (.33)*
<i>Hunt v. State</i>	3/30 (.10)*
<i>Jones v. State</i>	4/30 (.13)*
<i>Calhoun v. State</i>	7/30 (.23)*
<i>Colvin v. State</i>	5/30 (.17)*
<i>Harris v. State</i>	2/30 (.06)*
<i>Tichnell v. State (III)</i>	7/15 (.47)
<i>Baker v. State</i>	1/30 (.03)*
<i>Booth v. State (II b)</i>	3/30 (.10)*
<i>Collins v. State</i>	1/30 (.03)*
<i>Foster v. State</i>	0/30 (0)*
<i>Booth v. State (II a)</i>	1/30 (.03)*
<i>Booth v. State (II c)</i>	2/30 (.06)*
<i>Bowers v. State</i>	4/30 (.13)*
<i>Miles v. State</i>	2/30 (.06)*
<i>Ware v. State</i>	1/30 (.03)*
<i>Henry v. State</i>	4/30 (.13)*
<i>Stebbing v. State</i>	0/30 (0)*
<i>Conyers v. State</i>	4/30 (.13)*
<i>Johnson (L.) v. State</i>	12/25 (.48)
<i>Gilliam v. State</i>	4/30 (.13)*
<i>Huffington v. State</i>	4/30 (.13)*
<i>White v. State</i>	4/30 (.13)*
<i>Mills v. State</i>	6/30 (.20)*
<i>Trimble v. State</i>	14/30 (.47)
<i>Evans v. State</i>	6/30 (.20)*
<i>Thanos v. State</i>	10/21 (.48)
<i>Ball v. State</i>	1/30 (.03)*
<i>Evans v. State</i>	5/30 (.17)*
<i>Grandison v. State</i>	5/30 (.17)*
<i>Grandison v. State</i>	4/30 (.13)*

<i>Bruce v. State</i>	12/23 (.52)
<i>Colvin v. State</i>	5/30 (.17)*
<i>Clermont v. State</i>	4/30 (.13)*
<i>Burch v. State</i>	6/30 (.20)*
<i>Oken v. State</i>	6/30 (.20)*
<i>Thanos v. State</i>	10/21 (.48)
<i>Wiggins v. State</i>	6/30 (.20)*
<i>Borchardt v. State</i>	6/30 (.20)*
*denotes cases in which less than 35% of similar cases received a death sentence	

Table 7: Part B		
Summary: Proportion of Affirmed Death Sentences for Defendants Within Subgroups of Comparable Cases Where Comparable Cases are Defined in Terms of Overall Propensity Score		
Probability of Death Sentence for Comparable Cases	Number of Affirmed Death Cases in This Category	Percent of Affirmed Death Cases
Less than .35	33/39	84.5%
.35 - .50	5/39	12.5%
.51 - .75	1/39	3%
.76 - 1.00	0/39	0%

Table 7 Part B summarizes the overall findings of this method; 33/39 cases, roughly 85% of all death sentences affirmed by the Maryland State Supreme Court from 1980-2004 were comparatively excessive. The probability of receiving a death sentence in cases similar to the remaining six affirmed death sentences ranged from .47 - .52. In sum, each time the Maryland State Supreme Court affirmed a death sentence, no more than 52% of similar cases had also received the death penalty.

Consistently Disproportionate Death Sentences

A comparison of the results from the salient factors method and the propensity score method reveal eleven affirmed death sentences which are consistently disproportionate regardless of the method of analysis. The consistently

disproportionate cases affirmed prior to October 1, 1992 include: *Calhoun v. State*, *Harris v. State*, *Collins v. State*, *Foster v. State*, *Bowers v. State*, *Gilliam v. State*, *Mills v. State*, *Evans (II) v. State*, *Grandison (II) v. State*, *Clermont v. State*, and *Colvin v. State*.

After the proportionality review element had been repealed, seven cases were affirmed that are regarded as disproportionate given the low number of similar cases also receiving a death sentences. These cases include: *Baker v. State*, *Miles v. State*, *Ware v. State*, *Conyers v. State*, *White v. State*, *Ball v. State*, and *Oken v. State*.

Commonalities Among Disproportionate Cases

Given that eighteen disproportionate death sentences in total have been affirmed since 1978, it is important to recognize any common factors these cases share. Previous research has suggested that death sentences are more likely to be handed down in cases where the victim is white and the offender is black and in homicides committed in Baltimore County, Maryland (Paternoster et al., 2004). A cursory check reveals that in nine of the eighteen disproportionate cases, the victim was white and the offender was black, consistent with the research. In comparison, 20.7% of all death eligible cases fit the same criteria where the victim was white and the offender was black. Furthermore, nine of the eighteen disproportionate cases originate from Baltimore County. This is also much higher than the 11.6% of all death eligible that fell into this geographical category. This gross imbalance is a particularly disturbing trend because both race and geography are extralegal factors which should bear no weight on the sentencing process.

Chapter 5: Discussion

This project assessed the proportionality review practices of the Maryland State Supreme Court from 1979-1992, during which time a proportionality review was legally required for each death sentence presented to the court on direct appeal. This project also examined the proportionality of death sentences affirmed after October 1, 1992—the point when the court was no longer required to assess the comparative excessiveness of death sentences. A reproduction of the method closely resembling the proportionality review conducted by the court revealed a considerable number of inconsistencies in the court’s methods and conclusions. The court often failed to consider several relevant cases when selecting cases for a comparison group. Had they included all the relevant cases in their review of comparison cases, they likely would have vacated eleven death sentences, judgment otherwise affirmed on the grounds that the sentence was comparatively excessive. Instead, the court found no disproportionate sentences, often concluding instead that there were a “significant number of similar cases also sentenced to death.” A thorough review would have revealed that this number was far lower than expected. An analysis of death sentences after October 1, 1992 showed no change in the court’s practice of consistently affirming comparatively excessive death sentences.

The propensity score analysis, a more empirical method of proportionality review offered support for the general conclusions of the salient factor method. The propensity score method relied on a logistic regression analysis and offered an alternative way to assess proportionality. The propensity score method also concluded that several sentences were comparatively excessive. Analyses from both

methods revealed eleven common cases in which comparatively excessive death sentences affirmed from 1978 – 1992. The agreement among the two methods supports the notion that the Maryland State Supreme Court did not detect and eliminate disproportionate death sentences as they were legally required to do.

The *Gregg* Court stated the purpose of proportionality reviews, noting the procedure “compares each death sentence with the sentences imposed on similar situated defendants to ensure that the sentence of death in a particular case is not disproportionate.”⁷⁰ The importance of the proportionality review was emphasized by the court: “On their face these procedures seem to satisfy the concerns of *Furman*. No longer should there be ‘no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.’”⁷¹

The strong presence of racial and geographical factors shared by the disproportionate sentences identified above brings us alarmingly close to the problems highlighted in *Furman*. Indeed, Justice Stewart’s concurring opinion in *Furman* addressed this matter:

My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race... But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

-*Furman v. Georgia*, on or about p. 310

Over three decades ago the *Furman* court clearly stated that the death penalty was not to be imposed “so wantonly and so freakishly” and that race-based death

⁷⁰ *Gregg v. Georgia* on or about p. 198 or p. 199.

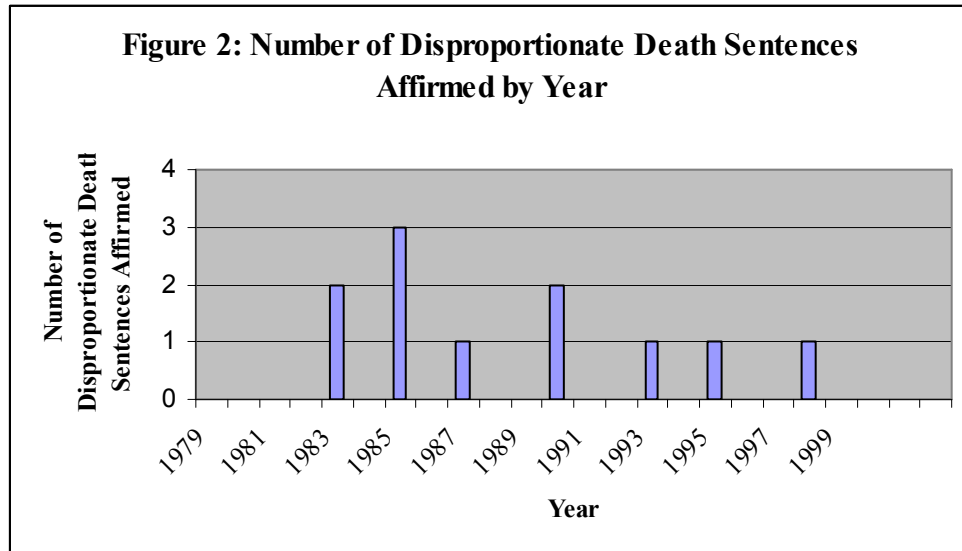
⁷¹ *Ibid.*

sentences were “constitutionally impermissible.” In 1976, the *Gregg* court evaluated the states’ legislative response to *Furman* and approved the revised statutes, presuming the newly incorporated guidelines would eliminate arbitrary death sentences. Eight years later the *Pulley* court clarified their words in *Gregg* and stated that constitutional capital statutes need not be an exact replica of the originally approved Georgia statute. For a capital statute to pass constitutional muster, it simply needed some form of safeguard to ensure that death sentences were imposed in an evenhanded manner. The court gave the states freedom to choose which measures to include in their capital statutes.

It is with this discretion that Maryland decided to include a provision for proportionality review until 1992, at which time they chose to repeal it. Presumably, Maryland believed that their capital statute sans proportionality review would be sufficient in preventing arbitrary and capricious death sentences. However, data from 1978 – 1992 establish that the initial post-*Gregg* capital statute did not identify and eliminate disproportionate or arbitrary death sentences as it was intended to do. Additional analysis of data from 1992 - 1999 shows that disproportionate capital sentencing continued for the seven years after the proportionality review element was repealed.⁷² Figure 2 illustrates the consistent pattern of death sentences affirmed on direct appeal from 1979 – 1999. In the thirteen years preceding the abrogation of the proportionality review element, the court failed to vacate eight disproportionate death sentences on direct appeal. For the seven years after proportionality reviews were no

⁷² Data for the years after 1999 was not available so no conclusions were made for death sentences affirmed after 1999.

longer required in Maryland, three disproportionate death sentences were affirmed on direct appeal.



Since the strongest commonalities held by affirmed death sentences in Maryland are extralegal factors instead of the legally permissible aggravators and mitigators, it is clear that the guidelines called for in *Gregg* were not effective in eliminating arbitrary and capricious death sentences. Indeed, Maryland never stopped handing down disproportionate death sentences—not during the time they conducted proportionality reviews, and certainly not after 1992 when they were no longer required to do one.

Chapter 6: Conclusions

The states still have the discretion to select necessary safeguards to prevent arbitrary capital sentencing. The Eighth and Fourteenth Amendments remain in tact, and it is still the responsibility of the states to ensure that death sentences are imposed in a fair and equitable manner. The results of this proportionality review identified eleven death sentences affirmed on direct appeal that were comparatively excessive. This is evidence that Maryland's attempt to remedy the issues highlighted in *Furman* and eliminate the arbitrary nature of capital sentencing failed miserably.

It is time for Maryland to take responsibility for the derisory nature of its capital statute. New guidelines need to be established to effectively uphold the standards set forth 30 years ago in *Gregg*. The first step is to put precautionary measures in place to identify and eliminate disproportionate death sentences, thereby reducing the arbitrary nature of capital sentencing.

As demonstrated in this paper, one such safeguard is an effective proportionality review. In order for a proportionality review to be effective, it must be systematic and empirically based. No longer can the court subjectively choose cases to satisfy a proportionate conclusion. An objective, empirically based approach leads to objective and consistent conclusions—offering a better chance to eliminate capricious and arbitrary death sentences. The propensity score method utilized in this project is fully capable of identifying and eliminating disproportionate death sentences. Regardless of the method used in the proportionality review, the universe of comparable cases must include every case which was eligible for a death sentence

based on the legal elements of the crime. A broader picture allows for greater certainty in assessing the proportionality of a death sentence.

The second step is to evaluate the proportionality of each death sentence already affirmed on direct appeal. If any death sentences are found to be comparatively excessive, the sentence should be vacated for new sentencing—not because a proportionality review is legally required, but because a disproportionate death sentence is still arbitrary and capricious, and in violation of the Eighth and Fourteenth Amendment.

This look at capital sentencing in Maryland for the two decades following *Gregg* exposed the court's failed attempts to ensure fairness in capital sentencing. By the court's own standards, the death penalty was not reserved for the most serious murderers. It is time to resurrect safeguards such as the proportionality review to ensure that the only death sentences affirmed on direct appeal in Maryland are truly "the worst of the worst."

Appendix A: Case Characteristics for Maryland Death sentences: 1979-1999

Case	Decision	Date of Decision yyymmdd	Case Description
<i>Tichnell v. State</i> 287 Md. 695; 415 A.2d 830; 1980	remanded; death sentence vacated, judgment otherwise affirmed.	19800610	Defendants broke into a store early in the morning to steal some handguns. A silent alarm notified the police and a Sheriff's Deputy went to investigate. In an attempt to flee from the police, Defendant Tichnell shot and killed the Sheriff's Deputy execution-style before steeling the deputy's police cruiser.
<i>Tichnell v. State</i> 290 Md. 43; 427 A.2d 991; 1981	remanded; death sentence vacated, judgment otherwise affirmed.	19810406	Defendants broke into a store early in the morning to steal some handguns. A silent alarm notified the police and a Sheriff's Deputy went to investigate. In an attempt to flee from the police, Defendant Tichnell shot and killed the Sheriff's Deputy execution-style before steeling the deputy's police cruiser.
<i>Poole v. State</i> 290 Md. 114; 428 A.2d 434; 1981	remanded for new trial	19810421	Defendant robbed store and shot and killed store owner with a shotgun.
<i>Johnson v. State</i> 292 Md. 405; 439 A.2d 542; 1982	remanded to Circuit Court of Calvert County for new sentencing	19820107	Defendants kidnapped female victim and drove around in a car with her smoking parsley flakes sprayed with some kind of embalming fluid. They drove the victim to a remote location where two of the defendants (including Johnson) raped the victim in the backseat of the car. The defendants robbed the victim of her belongings. Johnson then shot and killed the victim so she could not report the crime and identify the defendants.
<i>Thomas v. State</i> 294 Md. 625; 451 A.2d 929; 198	remanded for new sentencing	19821110	Defendant Thomas was convicted of felony murder and sentenced to death. A review of the sentence and an appeal were before the Court of Appeals. After the matter was argued before the Court but before disposition, the Court was advised of Thomas' death.
<i>Huffington v. State</i> 295 Md. 1; 452 A.2d 1211	Affirmed	19821206	The defendant murdered a male victim by shooting him five times in the back and head before stealing drugs off the body of the dead victim. The defendant then went to the first victim's mobile home and there murdered a female victim by striking her with a bottle and then stabbing her thirty-three times. He took money and drugs from the home before fleeing.
<i>Poole v. State</i> 295 Md. 167; 453 A.2d 1218; 1983	remanded; death sentence vacated, judgments as to the murder and robbery	19830107	Defendant robbed store and shot and killed store owner with a shotgun.

	convictions otherwise affirmed.		
<i>Foster v. State</i> 297 Md. 191; 464 A.2d 986; 1983	remanded for new trial	19830607	Defendant and Defendant's daughter had been drinking when the Defendant said she wanted to rob a woman. The Defendant said she wanted to rob and kill the manager of the motel the Defendant lived in. The defendant and her daughter lured the manager into an vacant motel room and then the Defendant stabbed the victim with a screwdriver until she died. The Defendant, her daughter, and her husband took valuables from the victim's motel room and then disposed of the body.
<i>Scott v. State</i> 310 Md. 277; 529 A.2d 340	remanded; death sentence vacated	19830919	Defendant robbed a McDonalds restaurant. During the robbery, the defendant shot and killed one male victim, the cashier at the restaurant. Victim was killed in front of witness (who was not a defendant).
<i>Tichnell v. State</i> 297 Md. 432; 468 A.2d 1; 1983	affirmed; death sentence vacated on later appeals	19831103	Defendants broke into a store early in the morning to steal some handguns. A silent alarm notified the police and a Sheriff's Deputy went to investigate. In an attempt to flee from the police, Defendant Tichnell shot and killed the Sheriff's Deputy execution-style before stealing the deputy's police cruiser.
<i>Calhoun v. State</i> 297 Md. 563; 468 A.2d 45; 1983	affirmed; later resentenced to penalty less than death	19831121	Defendant broke into a store while it was closed for the purposes of stealing items of value. When a store employee, a representative from the alarm company, and an off-duty police officer responded to the break-in, the defendant shot and killed the off-duty police officer and the alarm company representative. The defendant shot and wounded the store employee.
<i>Bowers v. State</i> 298 Md. 115; 468 A.2d 101; 1983	affirmed; then later remanded	19831209	Defendant kidnapped, raped, sodomized, and strangled one female victim. He took her money and credit cards before fleeing.
<i>Colvin v. State</i> 299 Md. 88; 472 A.2d 953; 1984	affirmed - later commuted to LIP	19840316	Defendant broke into the home with the intent to rob it. Upon encountering the homeowner's 82 year-old mother who was visiting from Florida, the defendant stabbed her twenty-eight times. The victim died as a result of the stab wounds. Before leaving the home, the defendant stole jewelry and other personal items.
<i>Evans v. State</i> 301 Md. 45; 481 A.2d 1135; 1984	Death	19840404	Defendant Grandison was facing drug charges in an upcoming trial, and wanted two of the witnesses against him killed. Defendant Grandison promised to pay Defendant Evans the sum of \$9,000 for murdering the two witnesses. Defendant Evans went to the victims' place of employment and shot and killed two people with a MAC-11 machine pistol. However, Defendant Evans shot one of the intended targets, but made a mistake and killed the sister of the second intended victim instead of the person he was actually being paid to kill.

<i>Stebbing v. State</i> 299 Md. 331; 473 A.2d 903; 1984	affirmed - modified to LIP by trial judge	19840416	Defendant and her husband took a 19 year-old female victim to a remote location and the defendant held the victim down while her husband raped and sexually assaulted her. While her husband was raping the victim, the defendant strangled the victim. After the victim was dead, the defendant and her husband took some of her personal belongings and dumped the body.
<i>Trimble v. State</i> 300 Md. 387; 478 A.2d 1143; 1984	affirmed- later resentenced to life	19840807	Defendants had been drinking and doing drugs. Defendant Trimble held a female victim hostage in a van and forcibly raped and sexually assaulted her. Trimble hit her head and body with a baseball bat and slit her throat. Victim died from blunt trauma to the head.
<i>White v. State</i> 300 Md. 719; 481 A.2d 201; 1984	affirmed – later resentenced to LIP on the third resentencing.	19840913	Defendants needed money so Defendant White took his father's revolver and went with his friend to find someplace to rob. While driving around they spotted a man on a moped. Defendant White wanted to take the moped so they followed the moped and tried to get the driver of the moped to pull over. When Defendant White saw that the moped was not pulling over, he shot the driver once and killed him. The defendants fled the scene, leaving the moped and victim on the side of the road.
<i>Maziarz v. State</i> 302 Md. 1; 485 A.2d 245; 1984	remanded for new sentencing	19841221	Defendants raped the female victim in her apartment and tied her hands and legs. Then the defendants stole her television and some other personal items and lit the apartment on fire, burning the victim to death.
<i>Lodowski v. State</i> 302 Md. 691; 490 A.2d 1228; 1985	remanded for new trial	19850423	Defendants robbed the manager of a Mini-Mart as he left his store to make a bank deposit. The defendant (Lodowski) shot and killed the manager as well as an off-duty police officer who worked as the Mini-Mart security guard.
<i>Johnson v. State</i> 303 Md. 487; 495 A.2d 1; 1985	death; resentenced to life.	19850717	Defendants broke into a house in search of money to steal. They encountered 78 year-old female who lived in the house. The defendants grabbed the woman and demanded she give them money. She gave them all the money in her billfold (\$10). A search of the house revealed more money. Since the defendants thought she had been uncooperative by not giving them all the money immediately, and since they didn't want any witnesses to the crime, they decided to kill the woman. First they made the victim lie down and jumped on her chest to try to cause a heart attack. When that did not kill her, they tried to beat her to death with a broom. When that didn't work, they found some men's ties in the closet and strangled the victim to death.
<i>Harris v. State</i> 303 Md. 685; 496 A.2d 1074; 1985	affirmed; later death sentence vacated and case remanded for new sentencing	19850909	Defendants robbed a sporting goods store and Defendant Harris shot the sole employee six times. The victim died as a result of the gunshot wounds. On the way out of the store, the defendants ran into a customer and robbed him too.

<i>Evans v. State</i> 304 Md. 487; 499 A.2d 1261; 1985	Death	19851112	Defendant Grandison was facing drug charges in an upcoming trial, and wanted two of the witnesses against him killed. Defendant Grandison promised to pay Defendant Evans the sum of \$9,000 for murdering the two witnesses. Defendant Evans went to the victims' place of employment and shot and killed two people with a MAC-11 machine pistol. However, Defendant Evans shot one of the intended targets, but made a mistake and killed the sister of the second intended victim instead of the person he was actually being paid to kill.
<i>Foster v. State</i> 304 Md. 439; 499 A.2d 1236; 1985	affirmed - sentence later reduced to LWOP by governor	19851112	Defendant and Defendant's daughter had been drinking when the Defendant said she wanted to rob a woman. The Defendant said she wanted to rob and kill the manager of the motel the Defendant lived in. The defendant and her daughter lured the manager into an vacant motel room and then the Defendant stabbed the victim with a screwdriver until she died. The Defendant, her daughter, and her husband took valuables from the victim's motel room and then disposed of the body.
<i>Huffington v. State</i> 304 Md. 559; 500 A.2d 272; 1985	affirmed; state withdrew death notice at retrial, and a life sentence was imposed.	19851113	The defendant murdered a male victim by shooting him five times in the back and head before stealing drugs off the body of the dead victim. The defendant then went to the first victim's mobile home and there murdered a female victim by striking her with a bottle and then stabbing her thirty-three times. He took money and drugs from the home before fleeing.
<i>Reid v. State</i> 305 Md. 9; 501 A.2d 436; 1985	remanded; death sentence vacated	19851217	Defendants robbed and stabbed an elderly couple to death in their home. The defendants were trying to get money to buy heroin. Defendant Reid was the principal for one of the murders.
<i>Grandison v. State</i> 305 Md. 685; 506 A.2d 580; 1986	death	19860401	Defendant Grandison was facing drug charges in an upcoming trial, and wanted two of the witnesses against him killed. Defendant Grandison promised to pay Defendant Evans the sum of \$9,000 for murdering the two witnesses. Defendant Evans went to the victims' place of employment and shot and killed two people with a MAC-11 machine pistol. However, Defendant Evans shot one of the intended targets, but made a mistake and killed the sister of the second intended victim instead of the person he was actually being paid to kill.
<i>Booth v. State</i> 306 Md. 172; 507 A.2d 1098; 1986	death	19860507	Defendants robbed and murdered an elderly couple in their home. The defendants were trying to get money to buy heroin.
<i>Bowers v. State</i> 306 Md. 120; 507 A.2d 1072; 1986	remanded for new sentencing	19860507	Defendant kidnapped, raped, sodomized, and strangled one female victim. He took her money and credit cards before fleeing.
<i>Harris v. State</i> 306 Md. 344, 509 A.2d 120 (1986)	remanded; death sentence vacated	19860523	Defendants robbed a sporting goods store and Defendant Harris shot the sole employee six times. The victim died as a result of the gunshot wounds. On the way out of the store, the defendants ran into a customer and robbed him too.

<i>Bloodworth v. State</i> 307 Md. 164; 512 A.2d 1056; 1986	remanded to Circuit Court of Baltimore County for new trial; 1993: innocence proven by DNA testing, pardoned by Governor Shaeffer.	19860729	Defendant sexually assaulted, raped, and killed a 9 year-old girl in the woods. He killed her by hitting her head with a rock.
<i>Mills v. State</i> 310 Md. 33; 527 A.2d 3; 1987	affirmed; later remanded, death sentence vacated by the U.S. Supreme Court	19870725	Defendant was incarcerated at the Maryland Correctional Institution in Hagerstown, Maryland. During the night, the defendant stabbed his cellmate 39 times in the back and 6 times in the chest with a "shank," or homemade knife.
<i>Scott v. State</i> 310 Md. 277; 529 A.2d 340; 1987	remanded; death sentence vacated	19870805	Defendant robbed a McDonalds restaurant. During the robbery, the defendant shot and killed one male victim, the cashier at the restaurant.
<i>Jones v. State</i> 310 Md. 569; 530 A.2d 743; 1987	affirmed; death sentence vacated on later appeals	19870916	Defendants robbed a house and Defendant Jones shot three of the occupants, some execution-style. One of the three occupants did not die and was only wounded. When she got up and attempted to leave the house to find help, the defendant (Jones) saw her and shot her again. She still did not die and eventually made it out of the house and found help.
<i>Hunt v. State</i> 312 Md. 494; 540 A.2d 1125; 1988	remanded; death sentence vacated	19880331	The defendant was being pursued by a police officer down an alley when the defendant pulled a .357 Magnum and shot the officer twice at close range. The officer died as a result of these injuries.
<i>Harris v. State</i> 312 Md. 225; 539 A.2d 637; 1988	remanded - death sentence vacated	19880405	Defendants robbed a sporting goods store and Defendant Harris shot the sole employee six times. The victim died as a result of the gunshot wounds. On the way out of the store, the defendants ran into a customer and robbed him too.
<i>Doering v. State</i> 313 Md. 384; 545 A.2d 1281; 1988	remanded - conviction affirmed, death sentence vacated	19880825	Defendants broke into victim's home to rob and kill the 89 year-old male victim. Upon finding the home owner, they shot and killed him with a rifle and then took valuables and other personal items from the man's home.
<i>Booth v. State</i> 316 Md. 363; 558 A.2d 1205; 1989	Death	19890615	Defendants robbed and stabbed an elderly couple to death in their home. The defendants were trying to get money to buy heroin. Defendant Booth was the principal for one of the murders.
<i>Bedford v. State</i> 317 Md. 659; 566 A.2d 111; 1989	remanded to Circuit Court of Baltimore County for new trial	19891129	Defendant sexually abused, raped, and murdered a woman in her own home. The defendant then ransacked the house, stole personal items, and stole the victim's car.
<i>Collins v. State</i> 318 Md. 269; 568 A.2d 1; 1990	affirmed; later resentenced to LIP	19900110	Defendant robbed the victim of \$80 out on the street. During the course of the robbery the defendant bludgeoned the victim with the butt of his gun and shot him at close range.

<i>Bruce v. State</i> 318 Md. 706; 569 A.2d 1254; 1990	remanded for new trial	19900207	Defendants knew the victims were in the drug business and believed there was a suitcase full of money in the victim's apartment. The defendants went to the apartment of one of the victims with the intent to rob and kill several of the occupants. Defendants entered the apartment and shot and killed five of the six occupants. The sixth occupant was shot in the head twice, but was still alive. She pretended to be dead until the defendants were gone, then she went to a neighbor's apartment for help.
<i>Gilliam v. State</i> 320 Md. 637; 579 A.2d 744; 1990 Md.	death and executed	19900925	Defendants kidnapped woman and took her to a remote location where Defendant Gilliam robbed her, obtaining a total of \$3.00. Then he shot her in the face with a sawed off shotgun because "she saw his face."
<i>Hunt v. State</i> 321 Md. 387; 583 A.2d 218; 1990	affirmed and executed	19901229	The defendant was being pursued by a police officer down an alley when the defendant pulled a .357 Magnum and shot the officer twice at close range. The officer died as a result of these injuries.
<i>White v. State</i> 322 Md. 738; 589 A.2d 969; 1991	remanded; death sentence vacated	19910514	Defendants needed money so Defendant White took his father's revolver and went with his friend to find someplace to rob. While driving around they spotted a man on a moped. Defendant White wanted to take the moped so they followed the moped and tried to get the driver of the moped to pull over. When Defendant White saw that the moped was not pulling over, he shot the driver once and killed him. The defendants fled the scene, leaving the moped and victim on the side of the road.
<i>Bowie v. State</i> 324 Md. 1; 595 A.2d 448; 1991	remanded for new trial	19910911	Defendants robbed a restaurant. During the robbery defendants shot two employees in the back of the head and one off-duty police officer in the face.
<i>Henry v. State</i> 324 Md. 204; 596 A.2d 1024; 1991	affirmed - sentence later vacated and resentenced to time served, and released.	19911011	Defendants knew the victims were in the drug business and believed there was a suitcase full of money in the victim's apartment. The defendants went to the apartment of one of the victims with the intent to rob and kill several of the occupants. Defendants entered the apartment and shot and killed five of the six occupants. The sixth occupant was shot in the head twice, but was still alive. She pretended to be dead until the defendants were gone, then she went to a neighbor's apartment for help.
<i>Wiggins v. State</i> 324 Md. 551; 597 A.2d 1359; 1991	affirmed; resentenced to LIP	19911108	Defendant drowned elderly victim in her bathtub, then took some of her valuables and her car, and left.

<i>Richardson v. State</i> 324 Md. 611; 598 A.2d 180; 1991	remanded for new trial	19911112	Defendant broke into an apartment inhabited by a couple and their infant daughter. The defendant shot the adult male victim four times, and then repeatedly raped the adult female victim. The defendant took valuables from the woman's purse and left the apartment. The infant daughter was left unharmed.
<i>Thomas v. State</i> 325 Md.160; 599 A.2d 1171; 1992	remanded for new sentencing	19920109	Defendant killed a male victim and a female victim and then held another female victim at knifepoint while he robbed, raped and sexually assaulted her. The second female victim lived.
<i>Woodson v. State</i> 325 Md. 251; 600 A.2d 420; 1992	remanded for new trial	19920124	Police officers responded to reports that someone was doing drugs in the stairwell of an apartment building. They arrived and the defendant tried to flee, but then shot one officer in the head, killing him, and shot another officer, who was not killed because the bullets hit his bulletproof vest instead.
<i>Whittlesey v. State</i> 326 Md. 502; 606 A.2d 225; 1992	remanded; death sentence vacated	19920513	Defendant brutally murdered an acquaintance in the woods, concealed the body, and then took his money and car. Body was not found until several years later. Def. was found guilty of robbery before the body was discovered, and then murder after the body was discovered. The initial robbery conviction served as the aggravator in murder trial.
<i>Booth v. State</i> 327 Md. 142; 608 A.2d 162; 1992	death	19920624	Defendants robbed and stabbed an elderly couple to death in their home. The defendants were trying to get money to buy heroin. Defendant Booth was the principal for one of the murders.
<i>Bruce v. State</i> 328 Md. 594; 616 A.2d 392; 1992	affirmed; later resentenced to LIP	19921210	Defendants knew the victims were in the drug business and believed there was a suitcase full of money in the victim's apartment. The defendants went to the apartment of one of the victims with the intent to rob and kill several of the occupants. Defendants entered the apartment and shot and killed five of the six occupants. The sixth occupant was shot in the head twice, but was still alive. She pretended to be dead until the defendants were gone, then she went to a neighbor's apartment for help.
<i>Thanos v. State</i> 330 Md. 77; 622 A.2d 727; 1993	death	19930405	The 18 year-old male victim picked up the defendant who was hitchhiking. Once in the victim's car, the defendant took a sawed-off rifle out of his duffle bag and forced the victim to drive to a remote location. They got out of the car and the defendant shot the victim in the head three times as he begged for his life. The defendant then fled the scene in the victim's car.
<i>Thanos v. State</i> 330 Md. 576; 625 A.2d 932; 1993	affirmed and executed	19930607	Defendant robbed gas station, killing two gas station employees, ages 14 and 15. Victims were shot in the head with a sawed-off shotgun.

<i>Colvin v. State</i> 332 Md. 144; 630 A.2d 725; 1993	affirmed - then commuted to LIP in 2000	19930916	Defendant broke into the home with the intent to rob it. Upon encountering the homeowner's 82 year-old mother who was visiting from Florida, the defendant stabbed her twenty-eight times. The victim died as a result of the stab wounds. Before leaving the home, the defendant stole jewelry and other personal items.
<i>Grandison v. State</i> 341 Md. 175; 670 A.2d 398; 1995	Death	19951227	Defendant Grandison was facing drug charges in an upcoming trial, and wanted two of the witnesses against him killed. Defendant Grandison promised to pay Defendant Evans the sum of \$9,000 for murdering the two witnesses. Defendant Evans went to the victims' place of employment and shot and killed two people with a MAC-11 machine pistol. However, Defendant Evans shot one of the intended targets, but made a mistake and killed the sister of the second intended victim instead of the person he was actually being paid to kill.
<i>Williams v. State</i> 342 Md. 724; 679 A.2d 1106; 1996	remanded for new trial	19960730	Defendant broke into the home of the two victims and shot them both in the back of the head, killing them. The defendant stole their ATM cards, their car, and other personal items.
<i>Perry v. State</i> 344 Md. 204; 686 A.2d 274; 1996	affirmed - conviction overturned due to counsel's ineffective assistance in failing to make timely objection to patently inadmissible evidence that provided the crucial link between Perry and the offense; retrial affirmed sentence in 2002	19961216	Defendant Perry was hired by Defendant Horn to kill Horn's ex-wife, Horn's disabled son, and the disabled son's nurse so that Horn could collect over \$1 million from a trust for his disabled son. Defendant Perry went to the residence of the ex-wife where he shot her and the nurse in the head, killing them. Defendant Perry suffocated Horn's disabled son, killing him as well.
<i>Conyers v. State</i> 345 Md. 525; 693 A.2d 781; 1997	remanded - death sentence vacated and the conviction of burglary reversed.	19970508	Defendants were broke into a house and were attempting to open a safe in the master bedroom when they were interrupted by a woman knocking on the backdoor. The defendant (Conyers) panicked and shot the woman in the head, and then shot his accomplice so as to eliminate the only witness to initial murder of the woman at the door.
<i>Burch v. State</i> 346 Md. 253; 696 A.2d 443; 1997	affirmed	19970703	Defendant broke into the home of an elderly couple, for the purpose of stealing property that he could eventually sell in order to buy cocaine. When confronted by the couple, he savagely attacked them and then stole some guns, some money, and the truck of the male victim. The victims died as a result of the injuries sustained in the attack.

<i>Ball v. State</i> 347 Md. 156; 699 A.2d 1170; 1997	affirmed - then later overturned on direct appeal	19970910	Defendant planned to burglarize the residence of a former co-worker. He waited all night outside the house, watching for the residents to leave in the morning. When he thought the house was empty, he entered through a basement window. The 19 year-old daughter of the homeowners interrupted the burglary in progress. The defendant shot the woman six times and fled the scene in the victim's car with some of the victim's belongings.
<i>Lovell v. State</i> 347 Md. 623; 702 A.2d 261; 1997	remanded for new sentencing	19971112	Defendants were transporting a large portion of drugs from NYC to NC when they were stopped by a Maryland State Trooper for speeding. When the Trooper noticed that something was suspicious in the vehicle, he called for backup. When the Trooper returned to the driver's side window of the defendant's vehicle, Defendant Lovell shot the trooper in the head and fled the scene. The trooper died instantly from the gunshot wound.
<i>Ware v. State</i> 348 Md. 19; 702 A.2d 699; 1997	remanded for new trial	19971118	Defendant and the first female victim were engaged. During a domestic dispute between the couple, the defendant went to his fiancée's home with a gun. As the dispute continued, the defendant shot and killed his fiancée and a friend who was also at the scene.
<i>Clermont v. State</i> 348 Md. 419; 704 A.2d 880; 1998	affirmed; later overturned and resentenced to LIP	19980120	Defendants followed victim as he drove home, planning to rob him and steal his car when he parked. When the victim arrived at his home and exited the vehicle, the defendants did rob him, but were unhappy with the small amount of money the victim had in his wallet. They forced the victim into the trunk of his car and drove to a remote location where they tried to force the victim to tell them the pin number for his ATM card. The defendant (Clermont) was frustrated and shot a single bullet through the top of the trunk, which killed the victim.
<i>Conyers v. State</i> 354 Md. 132; 729 A.2d 910; 1999	affirmed	19990517	Defendants were broke into a house and were attempting to open a safe in the master bedroom when they were interrupted by a woman knocking on the backdoor. The defendant (Conyers) panicked and shot the woman in the head, and then shot his accomplice so as to eliminate the only witness to initial murder of the woman at the door.
<i>Methany v. State</i> 359 Md. 576; 755 A.2d 1088; 2000	remanded; death sentence vacated, judgment otherwise affirmed.	20000724	Defendant had sex with the female victim/sexually assaulted her in his trailer before strangling her to death and robbing her of anything of value. He buried the victim in a shallow grave.
<i>Ware v. State</i> 360 Md. 650; 759 A.2d 764; 2000	affirmed - then resentenced to LWOP.	20000914	Defendant and the first female victim were engaged. During a domestic dispute between the couple, the defendant went to his fiancé's home with a gun. As the dispute continued, the defendant shot and killed his fiancé and a friend who was also at the scene.

<i>Winder v. State</i> 362 Md. 275; 765 A.2d 97; 2001	remanded to Wicomico County for new trial	20010109	Defendant broke into the house of the three victims, killed them in their own home, and then set fire to the house before leaving.
<i>Miles v. State</i> 365 Md. 488; 781 A.2d 787; 2001	affirmed	20010918	Defendant robbed the male victim and then shot him to death.
<i>Borchardt v. State</i> 367 Md. 91; 786 A.2d 631; 2001	death	20011213	Defendant robbed two victims in their home and then stabbed and killed them before fleeing with money and other personal belongings from their house. Defendant advised he did this to support his drug habit.
<i>Baker v. State</i> 367 Md. 648; 790 A.2d 629; 2002	affirmed and executed	20020202	Defendants shot and killed one female victim in a mall parking lot while attempting to rob her. This crime was witnessed by two members of the victim's family.
<i>Miller v. State</i> 380 Md. 1; 843 A.2d 803; 2004	remanded; death sentence vacated	20040219	Defendant lured the 17 year-old female victim into his apartment and then strangled her with his belt and robbed her. She died as a result of the strangulation. He also attempted to rape her and then sexually assaulted her.
<i>Oken v. State</i> 381 Md. 580; 851 A.2d 538; 2004	affirmed and executed	20040609	Defendant broke into the home of his first victim where he sexually assaulted and shot and killed her. He fled and then raped and killed his sister in law before fleeing to Maine and raping and killing another woman. Defendant was caught and prosecuted on charges in Maine before being returned to Maryland to face charges.

Appendix B: Results of the Propensity Score Method Using 10
Comparison Cases and 30 Comparison Cases

Table 8: Proportion of Affirmed Death Sentences for Defendants Within Subgroups of Comparable Cases Where Comparable Cases are Defined in Terms of Overall Propensity Score		
Case	Propensity Score using 10 comparison cases	Propensity Score using 30 comparison cases
<i>Perry v. State</i>	4/10 (.40)	10/30 (.33)*
<i>Hunt v. State</i>	1/10 (.10)*	3/30 (.10)*
<i>Jones v. State</i>	1/10 (.10)*	4/30 (.13)*
<i>Calhoun v. State</i>	2/10 (.20)*	7/30 (.23)*
<i>Colvin v. State</i>	1/10 (.10)*	5/30 (.17)*
<i>Harris v. State</i>	2/10 (.20)*	2/30 (.06)*
<i>Tichnell v. State (III)</i>	5/8 (.63)	7/15 (.47)
<i>Baker v. State</i>	1/10 (.10)*	1/30 (.03)*
<i>Booth v. State (II b)</i>	3/10 (.30)*	3/30 (.10)*
<i>Collins v. State</i>	1/10 (.10)*	1/30 (.03)*
<i>Foster v. State</i>	1/10 (.10)*	0/30 (0)*
<i>Booth v. State (II a)</i>	4/10 (.40)	1/30 (.03)*
<i>Booth v. State (II c)</i>	4/10 (.40)	2/30 (.06)*
<i>Bowers v. State</i>	4/10 (.40)	4/30 (.13)*
<i>Miles v. State</i>	1/10 (.10)*	2/30 (.06)*
<i>Ware v. State</i>	1/10 (.10)*	1/30 (.03)*
<i>Henry v. State</i>	4/10 (.40)	4/30 (.13)*
<i>Stebbing v. State</i>	0/10 (.00)*	0/30 (0)*
<i>Conyers v. State</i>	3/10 (.30)*	4/30 (.13)*
<i>Johnson (L.) v. State</i>	3/10 (.30)*	12/25 (.48)
<i>Gilliam v. State</i>	0/10 (.00)*	4/30 (.13)*
<i>Huffington v. State</i>	2/10 (.20)*	4/30 (.13)*
<i>White v. State</i>	3/10 (.30)*	4/30 (.13)*
<i>Mills v. State</i>	3/10 (.30)*	6/30 (.20)*
<i>Trimble v. State</i>	4/10 (.40)*	14/30 (.47)
<i>Evans v. State</i>	1/10 (.10)*	6/30 (.20)*

<i>Thanos v. State</i>	1/10 (.10)*	10/21 (.48)
<i>Ball v. State</i>	0/10 (.00)*	1/30 (.03)*
<i>Evans v. State</i>	2/10 (.20)*	5/30 (.17)*
<i>Grandison v. State</i>	2/10 (.20)*	5/30 (.17)*
<i>Grandison v. State</i>	2/10 (.20)*	4/30 (.13)*
<i>Bruce v. State</i>	5/10 (.50)	12/23 (.52)
<i>Colvin v. State</i>	1/10 (.10)*	5/30 (.17)*
<i>Clermont v. State</i>	1/10 (.10)*	4/30 (.13)*
<i>Burch v. State</i>	1/10 (.10)*	6/30 (.20)*
<i>Oken v. State</i>	4/10 (.40)	6/30 (.20)*
<i>Thanos v. State</i>	5/10 (.50)	10/21 (.48)
<i>Wiggins v. State</i>	3/10 (.30)*	6/30 (.20)*
<i>Borchardt v. State</i>	1/10 (.10)*	6/30 (.20)*
*denotes cases in which less than 35% of similar cases received a death sentence		

Table 8: Part B		
Summary: Proportion of Affirmed Death Sentences for Defendants Within Subgroups of Comparable Cases Where Comparable Cases are Defined in Terms of Overall Propensity Score: Comparison Group of 30 Comparable Cases		
Probability of Death Sentence for Comparable Cases	Number of Affirmed Death Cases in This Category	Percent of Affirmed Death Cases
Less than .35	33/39	84.5%
.35 - .50	5/39	12.5%
.51 - .75	1/39	3%
.76 - 1.00	0/39	0%

Table 8: Part C		
Summary: Proportion of Affirmed Death Sentences for Defendants Within Subgroups of Comparable Cases Where Comparable Cases are Defined in Terms of Overall Propensity Score: Comparison Group of 10 Comparable Cases		
Probability of Death Sentence for Comparable Cases	Number of Affirmed Death Cases in This Category	Percent of Affirmed Death Cases
Less than .35	29/39	74%
.35 - .50	9/39	23%
.51 - .75	1/39	3%
.76 - 1.00	/39	0%

Sources Cited:

Baldus, D.C., G.G. Woodworth, and C. A. Pulaski, Jr. Spring 1994. "Symposium on Race and Criminal Justice: Article: Reflections on the 'Impossibility' of its Prevention, Detection, and Correction." *Washington & Lee Law Review* 51:359.

Baldus, D.C., G.G. Woodworth, and C.A. Pulaski. 1990. *Equal Justice and the Death Penalty*. Boston: Northeastern University Press.

Baldus, D.C., G.G. Woodworth, and C.A. Pulaski. 1983. "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *Journal of Criminal Law and Criminology* Issue 774 pp. 661-753.

Baldus, D.C., G. Woodworth, D. Zuckerman, and N.A. Weiner. September 1998. "Symposium: Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia." *Cornell Law Review* 83:1638.

Barkan, S.E. and S.F. Cohn. Feb. 2005. On Reducing White Support for the Death Penalty: A Pessimistic Appraisal 4:1.

Bienen, L.B. 1996. "Criminal Law: The Proportionality Review of Capital Cases by State High Courts after Gregg: 'Only the Appearance of Justice'?" *Journal of Criminal Law and Criminology*. Vol. 87 Issue 130.

Bowers, W.J., M. Sandys, and T. W. Brewer. 2004. "Article: Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White." *DePaul Law Review* 53:1497.

Brewer, T.W. October 2004. "Race and Jurors' Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants', and Victims' Race in Combination." *Law and Human Behavior* 28:5.

Brooks, R.W. and S. Raphael. Spring 2002. "Life terms or death sentences: The uneasy relationship between judicial elections and capital punishment." *Journal of Criminal Law & Criminology* 92:3/4.

Bruce, C. M. 2002. Proportionality Review: Still Inadequate, But Still Necessary. *Capital Defense Journal* 14:265.

Cantrill, C.E., K.L. Grill, R.A. Hein, T. Hoxie and R.A. Monfred. (1985). Survey of Developments in Maryland Law, 1983-1984: Criminal Law. *Maryland Law Review*. Volume 44 Issue 439.

- Edens, J.F., L.H. Colwell, D.M. Desforges and K. Fernandez. Sep/Oct 2005. "The impact of mental health evidence on support for capital punishment: are defendants labeled psychopathic considered more deserving of death?" *Behavioral Sciences & the Law* 23:5.
- Gibson, C. and K. Jung. September 2002. *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For The United States, Regions, Divisions, and States*. Population Division. Working Paper Series No. 56. U. S. Census Bureau. Washington, DC.
- Gonzalez-Perez, M. 2002. "The potential for bias in capital juries." *Justice System Journal* 23:2.
- Holcomb, J.E., M.R. Williams, and S. Demuth. Dec 2004. "White Female Victims and Death Penalty Disparity Research." *Justice Quarterly* 21:4.
- Latzer, B. 2001. "The Failure of Comparative Proportionality Review of Capital Cases (With Lessons From New Jersey)." *Albany Law Review*. Vol. 64 Issue 1161.
- Mandery, E.J. 2002. "In Defense of Specific Proportionality Review." *Albany Law Review*. Vol. 65 Issue 883.
- Paternoster, R. Fall 1983. "Article: Symposium on Current Death Penalty Issues: Race of Victim and Location of Crime: the Decision to Seek the Death Penalty in South Carolina." *Journal of Criminal Law & Criminology* 74:754.
- Paternoster, R. 1991. *Capital Punishment in America*. New York: Lexington Books.
- Paternoster, R. and R. Brame. 2003. "An Empirical Analysis of Maryland's Death Sentence System with Respect to the Influence of Race and Legal Jurisdiction." Department of Criminology, University of Maryland.
- Paternoster, R., R. Brame, S. Bacon, and A. Ditchfield. Spring 2004. "Article: Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999." *University of Maryland School of Law, Margins Law Journal*, 4:1.
- Paternoster, R. and A.M. Kazyaka. 1990. "An Examination of Comparatively Excessive Death Sentences in South Carolina 1979-1987," *Review of Law and Social Change* Issue 17 pp. 475-533.
- Roberts, J.V. Feb 2005. "Capital Punishment, Innocence, and Public Opinion." *Criminology & Public Policy* 4:1.
- Sprenger, S.M. (1988). Note: A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases. *Iowa Law Review*. Volume 73 Issue 719.

Unnever, J.D. and F.T. Cullen. Feb 2005a. "Executing the Innocent and Support for Capital Punishment: Implications for Public Policy." *Criminology & Public Policy* 4:1.

Unnever, J.D., F.T. Cullen, and J.V. Roberts. Spring 2005b. "Not Everyone Strongly Supports the Death Penalty: Assessing Weakly-Held Attitudes about Capital Punishment." *American Journal of Criminal Justice* 29:2.

Vogel, B.L. Spring 2003. "Support for life in prison without the possibility of parole among death penalty proponents." *American Journal of Criminal Justice* 27:2.

Vollum, S., D.R. Longmire, and J. Buffington-Vollum. Sep 2004. "Confidence in the Death Penalty and Support for its use: Exploring the Value-Expressive Dimension of Death Penalty Attitudes." *Justice Quarterly* 21:3.

Wallace, D.H. and J.R. Sorensen. 1998. "A State Supreme Court Review of Comparative Proportionality: Explanations for Three Disproportionate and Executed Death Sentences." *Thomas Jefferson Law Review*. Vol. 20, Issue 207.

White, P.J. Summer 1999. "Can Lightning Strike Twice? Obligations of State Courts After *Pulley v. Harris*." *University of Colorado Law Review* 70:813.

Cases Cited:

Atkins v. Virginia 536 U.S. 304 (2002)
Booth v. Maryland 482 U.S. 496 (1987)
Coker v. Georgia 433 U.S. 584 (1977)
Coley v. State [of Georgia] 231 Ga. 829, 834, 204 S. E. 2d 612, 615 (1974)
Ford v. Wainwright 477 U.S. 399 (1986)
Furman v. Georgia 408 U.S. 238 (1972)
Gregg v. Georgia 428 U.S. 153 (1976)
Jurek v. Texas 428 U.S. 262 (1976)
Lockett v. Ohio 438 U.S. 586 (1978)
Mills v. State, 310 Md. 33, 527 A.2d 3 (1987)
McCleskey v. Kemp 481 U.S. 279 (1987)
McGautha v. California 408 U.S. 183 (1971)
Pulley v. Harris 465 U.S. 37 (1984)
Roper v. Simmons 541 U.S. 1040 (2004)
South Carolina v. Gathers 490 U.S. 805 (1989)
Thomas v. State [of Maryland] 301 Md. 294 (1984)
Tichnell v. State (Tichnell I) 287 Md. 695, 415 A.2d 830 (1980)
Tichnell (III) v. State of Maryland 287 Md. 695; 415 A.2d 830 (1980)
Tichnell v. State (Tichnell IV) 297 Md. 432; 468 A.2d 1 (1982)
Thompson v. Oklahoma 487 U.S. 815 (1988)
Woodson v. North Carolina 428 U.S. 280 (1976)
Zant v. Stephens 462 U.S. 862 (1983)