THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2008-0945

State of New Hampshire

v.

Michael Addison

BRIEF FOR AMICI AMERICAN CIVIL LIBERTIES UNION FOUNDATION (CAPITAL PUNISHMENT PROJECT AND RACIAL JUSTICE PROGRAM) AND NEW HAMPSHIRE CIVIL LIBERTIES UNION

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I. Statement of Interest

The ACLU is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The New Hampshire Civil Liberties Union, one of the ACLU's statewide affiliates with approximately 3500 members, has actively participated in legislative efforts concerning the death penalty. The Capital Punishment Project (CPP) is a national project of the ACLU that engages in public advocacy and litigation, including direct representation of capital defendants across the country. The Racial Justice Program (RJP) of the ACLU aims to preserve and extend constitutionally guaranteed rights to people who historically have been denied their rights on the basis of race. The RJP is committed to addressing the broad spectrum of issues that disproportionately and negatively impact people of color. Given its longstanding commitment to protections of the constitution, due process, and the Eighth Amendment right to be free from cruel and unusual punishment, the implementation of proportionality review procedures in death penalty appeals comporting with these protections is a matter of substantial importance to the ACLU, its members, and its clients.

II. Introduction

This Court must determine for the first time the scope of its obligations under the capital appellate review provisions contained in N.H. Rev. Stat. Ann. 630:5, XI (West 2009). These provisions direct this Court to review all death sentences to determine, *inter alia,* whether the "sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." RSA 630:5, XI (a),(c).

The question how to conduct proportionality review is best answered in light of its history. Its origin can be traced back to *Furman v. Georgia*, 408 U.S. 238 (1972), when the United States Supreme Court held the death penalty unconstitutional because of arbitrariness and discrimination in its administration. 408 U.S. at 309 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."); *id* at 242, (Douglas, J. concurring)("[i]t would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices"). *See also, Beck v. State*, 396 So. 2d 645, 652 n.2 (Ala. 1980) (suggesting that racial discrimination "was at the heart" of the decision in *Furman*).

In response to the Court's concerns about discrimination and arbitrariness, when it rewrote its death penalty statue, Georgia added new appellate review provisions, including comparative proportionality review. *Gregg v. Georgia*, 428 U.S. 153 (1976). Comparative proportionality, as adopted by Georgia and numerous other states, including New Hampshire, is a comparison by state appellate courts of similar cases to determine if there is "a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman*, 408 U.S. at 313 (White, J. concurring); *see generally* Timothy V. Kausfman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 WASH. L. REV. 775, 784-794, 831-32 (2004). In *Gregg v. Georgia*, the Supreme Court upheld Georgia's new scheme in part because of its promise that proportionality review would reduce arbitrariness and eliminate discrimination. 428 U.S. at 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."); *Walker v. Georgia*, 129 S.

Ct. 453 (Oct. 20, 2008) (Stevens, J., statement respecting the denial of certiorari) (explaining that the decision in *Gregg* to uphold the statute "was founded on an understanding that the new procedures the statute prescribed would protect against the imposition of death sentences influenced by impermissible factors such as race," and citing proportionality review as one of those critical procedures).

Proportionality review, then, should be understood as focused on achieving two central goals: the reduction of arbitrariness and the elimination of discrimination in the administration of the death penalty. *Walker*, 129 S. Ct. at 453 (meaningful proportionality review is necessary for Georgia to "take seriously its obligation to safeguard against the imposition of death sentences that are arbitrary or infected by impermissible considerations such as race"); *State v. Cross*, 132 P.3d 80, 103-04 (Wash. 2006) ("The goal [of proportionality review] is to ensure that the sentence, in a particular case, is proportional to sentences given in similar cases, is not freakish wanton or random; and is not based on race or other suspect classifications.").

This brief identifies the minimum steps necessary to ensure that the proportionality review this Court undertakes in this and in any future cases is consistent with these goals. In order to achieve the first goal, avoidance of arbitrariness, meaningful proportionality review must be able to answer whether an individual's sentence of death can be explained when considering the universe of comparable cases. The critical question is how the universe of comparable cases is defined. *Amici* urge this Court to define the universe to include all death-eligible cases. To answer whether the death penalty is reserved for the "worst of the worst" and not arbitrarily imposed, this Court must compare case characteristics of defendants who received sentences of less than death to those who received the death penalty.

To achieve the second goal, the avoidance of discriminatory sentencing, proportionality review must examine whether a defendant's sentence is likely explained by the presence of some discriminatory factor. In order to answer this question, this Court should require that its proportionality review in this and any future cases examine potential racial, economic, gender, and geographic disparities in the administration of the death penalty in New Hampshire.

Any meaningful proportionality review will pose some data collection challenges in New Hampshire. The state has not had a death sentence since the 1950s and thus this Court has never conducted proportionality review or collected proportionality data. Moreover, New Hampshire's relatively small population and low homicide rate will likely produce a limited pool of cases. Given these limitations, *Amici* urge this Court to appoint a special master with the skills and independence to collect and analyze the relevant data necessary for meaningful review. For prospective proportionality reviews, *Amici* recommend that the Court adopt standards requiring trial judge reports in all homicide cases. Finally, because the pool of cases for comparison is likely to be small, *Amici* recommend that the Court permit the special master, if he or she deems it necessary, to broaden the pool of cases to include other death-eligible cases from appropriate states.

III. Argument

A. To avoid arbitrariness, meaningful proportionality review must include comparison of all death-eligible cases.

Proportionality review can provide what New Jersey Proportionality Special Master David Baime referred to as "a bird's eye view of what society views as particularly evil and subject to the highest penalty." James Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment,1963-2006*, 107 COLUM. L. REV. 1, 117 (2007). When meaningfully conducted, comparative proportionality review allows courts the opportunity to determine from

this bird's eye perspective whether an individual death sentence is unacceptable in a particular case because it is disproportionate in light of the sentences of other defendants, given the facts of the crime and defendant. *See, e.g., Pulley v. Harris*, 465 U.S. 37, 42-43 (1984) (defining comparative proportionality review and contrasting it with inherent proportionality review).

The first step in performing comparative proportionality review is the creation of a "pool" or "universe" of eligible comparison cases. *See, e.g.,* Donald Wallace and Jonathan Sorensen, *Comparative Proportionality Review: A Nationwide Examination of Reversed Death Sentences,* 22 AMER. J. CRIM. JUST. 13, 14, 18 (1997). Both parties in this case appear to agree that the pool of comparison cases should include all New Hampshire defendants with capital convictions who received life or death sentences. *See* State's August 20, 2007 Memorandum *Submitting Proposed Rules Governing Death Sentence Review By the Court*, at 8-9; App.'s Br. at 96-97. This is an important element of consensus because only by including both life and death sentences can this court determine whether juries are acting in an arbitrary manner with respect to the cases that proceed to penalty trial. *See* Richard Van Duizend, *Comparative Proportionality Review in Death Sentence Cases, What? How? Why?*, 8 State Court Journal 9, 11 (1984) ("Without examining the life cases, it is impossible to develop the rational distinctions required" because such a limited review "fails to address the question framed by Justice White in *Furman* – how can the few cases in which a death sentence is imposed be 'meaningfully distinguished' from the many apparently similar cases that resulted in a life sentence.")

To meaningfully address whether New Hampshire's death penalty system has resulted in an arbitrary death sentence, however, this Court must cast a wider net and must look to all death-eligible cases. *See Walker,* 129 S. Ct. at 453 ("If the Georgia Supreme Court had expanded its inquiry still further, it would have discovered many similar cases in which the State did not even

seek death ... a [a category of cases] eminently relevant to the question whether a death sentence in a given case is proportionate to the offense.") (internal citations omitted). Such a review is necessary in order to capture any arbitrariness that arises from prosecutorial charging and pleading decisions, particularly in light of prosecutors' "unfettered discretion to choose who will be put in jeopardy of life and who will not." *DeGarmo v. Texas*, 474 U.S. 973, 974-975 (1985) (Brennan, J., dissenting from denial of cert.). *See* Katherine Barnes *et al., Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 313 (2009) ("If this study excluded cases not charged as capital cases, it would risk vastly understating the importance of the prosecutor's charging decisions."); Glenn L. Pierce & Michael L. Radelet, *Race, Region and Death Sentencing in Illinois*, 1988-1997, 81 OR. L. REV. 39 (2002) (explaining that each step of the criminal process introduces another layer of potential bias and that without comparing all death-eligible cases researchers cannot detect potential bias in prosecution practices); Steven M. Sprenger, *Note: A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 IOWA L. REV. 719, 739 (1988) ("In light of its purposes – to enhance fairness by ensuring uniform and consistent application of the death penalty – state supreme courts should, when within the confines of statutory death penalty language, expand their pools of potentially similar case[s] . . . [to] include all cases in which the indictment enumerated a death eligible offense and a court obtained a homicide conviction of any type either by plea or at trial.")

The New Jersey Supreme Court wrestled with this same question of how to define the pool of cases for proportionality analysis in *State v. Marshall,* 613 A.2d 1059, 1069-1079 (N.J. 1992). The court decided to include all death-eligible homicides in order to address arbitrariness and unfairness in prosecutorial discretion. *Marshall*, 613 A.2d at 1073 ("[W]e hold that the

purposes to be achieved by proportionality review require that the universe include clearly death eligible homicides in which the prosecutor elected not to seek the death penalty."). The court explained why a pool of all death-eligible cases is necessary:

> The point may be best illustrated by the ... example of 100 robbery-felony-murder defendants, only one of whom is sentenced to death. Were we to assume that the remaining ninety-nine defendants were prosecuted and convicted of non-capital murder because of prosecutorial decisions not to seek the death penalty, the disproportionality of the single defendant's death sentence would arise not because of a disproportionate jury determination but because the prosecutorial decision to seek the death penalty was unique. That type of disproportionate death sentence could not be identified by a proportionality review process that was limited to capital cases tried to a penalty case; it could be indentified, however, by a universe that included clearly death-eligible homicides that were not prosecuted as capital cases.

Marshall, 613 A.2d at 1071-1072.

The State objects to the inclusion of all death-eligible cases. *See e.g.,* State's August 20, 2007 Memorandum at 10-11. In its earlier pleadings, the State objected to including death-eligible cases that were not charged capitally or that did not result in capital convictions because such an approach "would ... include inherently dissimilar cases." *Id.* The State argued:

> [C]ases which facially may appear to support a charge of capital murder, but the defendant was never charged and convicted of capital murder are not sufficiently similar because there may be evidentiary reasons (including insufficient evidence of the underlying crime, a lack of evidence of any aggravators to render the defendant eligible or evidence obtained in violation of the constitution) why there was no capital murder charge pursued.

Id. at 11.[1] This argument -- that by examining all death-eligible cases this Court might erroneously include cases that should be excluded -- is really an empirical challenge to the ability

[1] The State further argued against a broader pool on the ground that it could include "dissimilar cases" such as murder cases that are not death-eligible. *Id.* at 10-11. This argument is a red herring. To the best of undersigned counsel's knowledge, no legal scholar, state court, or even litigant has advocated expanding capital proportionality review to include comparisons with homicide cases that are not death-eligible. As described *infra, Amici* recommends a thorough and conservative screening of all homicide cases to determine which are death-eligible so that

of reviewers to weigh the strength of the evidence and appropriately determine what constitutes a "death-eligible" case. In other words, the State has not offered any argument for why review of all death-eligible cases is not theoretically preferable, it has merely contested whether such review is feasible.

The experience of other states with proportionality and statistical studies proves that this approach is eminently feasible. Again, the experience of New Jersey is instructive. In *State v. Loftin*, 724 A.2d 129, 139 (N.J. 1999), the New Jersey Supreme Court revisited its prior determination that proportionality review should include all death-eligible homicide cases. In light of feasibility and reliability concerns like those raised by the State in this case, the Court appointed David Baime as Special Master to determine whether the appropriate pool should remain all death-eligible cases. *Id.* Pursuant to this appointment, Special Master Baime conducted an extensive review of the data collection system used, including interviews of administrative staff associated with the collection, review of the data protocols, and an independent review by multiple reviewers of more than 100 files to determine whether different reviewers reached similar decisions about whether individual cases were death-eligible. *In re Proportionality Review Project,* 735 A.2d 528, 534 (N.J. 1999). Based on his research, he concluded that "reasonably consistent and accurate screening decisions can be made" and recommended that New Jersey continue to utilize a pool of all death-eligible cases. *Id* at 536.

Before the state legislature eliminated proportionality review in 1997,[2] the Pennsylvania Supreme Court also reviewed all death-eligible cases. *Commw. v. Frey,* 475 A.2d 700, 707 (Pa. 1984) ("this Court conducts an independent evaluation of all cases of murder of the first degree

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only death-eligible cases may be included in the analysis. The State also argued that this approach was adopted by a number of states.

[2] *See* 1997 Pa. Legis. Serv. 1997-28, S.B. 423 (2009).

convictions which were prosecuted or *could have been* prosecuted [under the capital statute]") (emphasis added). Washington also requires data collection about all first-degree murder cases for proportionality review. *See* Wash. Rev. Code Ann. §§ 10.95.120, 10.95.130(2)(b) (all aggravated first-degree murder cases, regardless of whether capitally prosecuted).

A number of government studies of death sentencing have also conducted thorough reviews of all death-eligible cases. For example, in Maryland, the Governor appointed a commission to study whether discriminatory factors influenced death sentencing in that state. Raymond Paternoster *et al., Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 MARGINS, MD. L. J. RACE, RELIGION, GENDER & CLASS 1, 2 (2004). The researchers sought to examine potential bias as a result of prosecutorial charging and plea decisions as well as judge and juror sentencing. *Id.* at 2-3. They concluded that in order to examine this range of potential sources of bias, the study would have to include all death-eligible cases. *Id.* They reviewed approximately 6000 homicides and determined, based on conservative criteria, that 1311 were death-eligible. *Id.* at 15-19.

Other state and federal government studies similarly examined all death-eligible cases as part of their investigations of potential sources of arbitrariness and unfairness in their systems, and have done so without encountering any insurmountable difficulties. *See* OFFICE OF THE ARIZONA ATTORNEY GENERAL, ATTACHMENT D: CASE STUDY ON STATE AND COUNTY COSTS IN CAPITAL CASE COMMISSION FINAL REPORT (Dec. 2002), *available at*: http://www.azag.gov/CCC/FinalReport.html (Arizona Capital Case Commission conducted a study based on all first-degree murders and found that of 971 first-degree indictments, 143 advanced to penalty trial and 31 resulted in a death sentence); Mary Ziemba-Davis *et al.*, INDIANA CRIMINAL JUSTICE INSTITUTE, INDIANA STATE REPORT: THE SOCIAL ECOLOGY OF

MURDER IN INDIANA, 7 (2004), *available at*: http://www.in.gov/cji/files/The_Social_Ecology_of_Murder_in_Indiana.pdf (study design based on sampling of death-eligible defendants, including defendants sentenced to death, sentenced to life-without-parole, and sentenced to fixed terms of incarceration); David C. Baldus *et al.*, THE DISPOSITION OF NEBRASKA CAPITAL AND NON-CAPITAL HOMICIDE CASES (1973-1999); A LEGAL AND EMPIRICAL ANALYSIS (2001), 6-7, *available at* http: //www.ncc.state.ne.us/documents/other/homicide.htm (in a study ordered by the legislatively created Nebraska Commission on Law Enforcement and Criminal Justice, researchers screened 700 homicide cases between the years 1973 and 1999 and based their analysis on the 177 cases they concluded were death-eligible); JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION OF THE VIRGINIA GENERAL ASSEMBLY, REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT 12-14 (2000), *available at* http://jlarc.virginia.gov/reports/Rpt274.pdf (legislative committee conducting a study of Virginia's death row examined all 970 arrests for murder between 1995 and 1999 and based its analysis on 215 cases it concluded were death-eligible); UNITED STATES DEPARTMENT OF JUSTICE, THE FEDERAL DEATH PENALTY: A STATISTICAL SURVEY (2000) (reviewed 682 death-eligible cases, including all cases in which the death penalty could be imposed based on the charge, regardless of whether the United States Attorney sought authorization for the death penalty).

In addition, numerous research studies have used all death-eligible homicides as the appropriate pool for analysis. *See, e.g.*, John J. Donohue III, CAPITAL PUNISHMENT IN CONNECTICUT, 1973-2007: A COMPREHENSIVE EVALUATION FROM 4600 MURDERS TO ONE EXECUTION (2008) *available at* http://works.bepress.com/john_donohue/55 (analyzing all death-eligible cases in Connecticut); Katherine Barnes *et al.*, *Place Matters (Most): An Empirical*

Study of Prosecutorial Decision-Making in Death-Eligible Cases, 51 ARIZ. L. REV. 305, 309 (2009) (reviewing all first-degree murder, second degree murder, and voluntary manslaughter convictions that resulted in a homicide conviction and finding 24% were not eligible, 71% were death-eligible but the prosecution declined to seek death, and in 5% death was sought); Isaac Unah & Jack Boger, RACE AND THE DEATH PENALTY IN NORTH CAROLINA: AN EMPIRICAL ANALYSIS, 1993-1997 (2001), http://www.unc.edu/~ jcboger/NCDeathPenaltyReport2001.pdf (analysis based on a statistical sampling of 3990 first and second degree homicide cases during a five-year period); David C. Baldus, *et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia,* 83 CORNELL L. REV. 1638, 1669 (1998 (analysis based on a sampling of all 992 Philadelphia death-eligible cases).

In studying all death-eligible cases, courts and researchers have developed methods to address any "close calls" that arise in deciding whether a case should be considered death-eligible. For example, in New Jersey, reviewers coded cases as: (1) clearly death-eligible; (2) clearly not death-eligible; and (3) questionably death-eligible. In order to be considered "clearly death-eligible" the reviewers must have concluded that the evidentiary strength was strong or overwhelming. *Marshall*, 613 A.2d at 1073. The state's Administrative Office of the Courts (AOC) staff sent notice to the parties of the classifications and invited the parties to object and provide additional information from their files. *Loftin*, 724 A.2d at 147. The AOC staff then met with the parties and made a final determination about the classification of cases. *Id.*

Similarly, in the Maryland study, the researchers required that the facts "clearly" establish that first-degree murder was committed and that the case was death-eligible, including that defendant was the principal in the first degree, was 18 years or older and was not mentally

retarded, and that at least one statutory aggravating circumstance was present. *Paternoster et al.*, *supra*, at 18. From approximately 6000 cases, 300 cases were ambiguous. *Id.* at 18-19. The researchers submitted the ambiguous cases to a panel of attorneys with an equal number of state's attorneys, public defenders, and private attorneys with capital experience. *Id.* at 19. In order for a case to be included as "death-eligible," a majority of the panel had to find with at least moderate confidence that the case met the criteria for death-eligibility. *Id.*[3]

Amici urge this Court to follow the approach adopted by New Jersey courts and the Maryland study and: (1) define death-eligible as those cases where the evidence "clearly" establishes death eligibility; and (2) permit the parties to object to the classification of any case and submit authority for this objection. These safeguards should be far more than sufficient to address the State's objections.

The relatively small size of New Hampshire's potential pool of cases also supports reviewing all death-eligible cases instead of merely the few cases that have resulted in capital convictions. According to the Department of Justice Statistics, New Hampshire had 622 homicides between 1976 and 2005 – a relatively small number compared with many other states. *See* Department of Justice, Bureau of Justice Statistics, State by State Homicide SHR Data, *available at* http://bjsdata.ojp.usdoj.gov /dataonline/Search/Homicide/State/RunHom StatebyState.cfm. If this Court limited its proportionality review to only those cases with capital convictions, the tiny pool would yield "a statistically meaningless comparison." Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only*

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[3] Some studies have used somewhat less conservative criteria to define "death-eligibility," such as whether the evidence suggests that the case is "probably" death-eligible. *See, e.g.,* Barnes *et al.*, 51 ARIZ. L. REV. at 313. Other studies leave the determination exclusively to the reviewers. *See, e.g.,* Baldus *et al.*, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 Neb. L. Rev. 486, 543 (2002).

"The Appearance of Justice," 87 J. CRIM. L. & CRIMINOLOGY 130, 174 (1996) (discussing small comparison pools under states that review death-only sentences); *see also, Connecticut v. Teal* 457 U.S. 440, 463 n.7 (1982) ("the probative value of statistical evidence varies with sample size"); *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 849 (1st Cir. 1993) (sample size of five "carries little or no probative force"); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511 (4th Cir. 1994) (sample size of four has no probative value).

Indeed, any feasibility concerns should also be eased by the relatively small population and low homicide rate in New Hampshire. For example, in New Jersey, in order to find all death-eligible homicides the special master initially had to conduct a review of 3200 homicides. *Marshall*, 613 A.2d at 1073. In Maryland, researchers reviewed approximately 6000 cases. Paternoster *et al., supra*, at 18. Given that the number of potentially death-eligible cases will only be in the hundreds, it should be easily manageable for Court staff or, as recommended below, a court-appointed special master to screen these cases.

B. Meaningful comparative proportionality review must assess racial, economic, geographic and other disparities.

An extensive body of research over the last two decades has consistently demonstrated that racial, economic, and geographic disparities are present in the administration of the death penalty, including in non-southern states. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 613, 614-18 (2002) (Breyer, J., concurring) (summarizing the vast body of evidence that "the race of the victim and socio-economic factors seem to matter"); DONOHUE, *supra*, at 6 (finding black defendants received death sentences at three times the rate of white defendants in cases with white victims in Connecticut); *People v. Cahill*, 809 N.E.2d 561, 612 (2003) (Smith, J., concurring) (from 1995 to 2001 in New York, the State sought the death penalty twice as often when the victim was white than when the victim was black); Baldus, *et al., supra*, at 1683-1770

(finding disparities in death sentencing based on race of the defendant and race of the victim in study of Philadelphia); Stephanie Hindson, *et al.*, *Race, Gender, Region and Death Sentencing in Colorado, 1980-1999,* 77 U. COLO. L. REV. 549, 549 (2006) (concluding that the death penalty is "most likely to be sought for homicides with white female victims"); Paternoster *et al.*, *supra,* at 40-41 (study of Maryland capital sentencing in 2004 found that jurisdiction and race of the victim were important predictors of who received the death penalty); Glenn L. Pierce and Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 38 (2005) (study of California found disparities in death sentencing based on race and ethnicity of homicide victims and geography); Glenn Pierce & Michael L. Radelet, RACE, REGION, AND DEATH SENTENCING IN ILLINOIS, 1988-1997, iii (March 2002) ("Holding aggravating factors constant, there is strong evidence that the race of the homicide victim is a significant predictor of who is sentenced to death in Illinois."). In particular, there is strong and consistent evidence of discrimination in many jurisdictions based on the race of the victim. *See generally,* U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990) (concluding that the race of the victim disparities in capital cases "was remarkably consistent across data sets, states, data collection methods, and analytic techniques.").[4]

[4] *See also* Barnes, *et al., supra*, at 306-07 (documenting disparities based on county of prosecution and race of the victim in Missouri); Michael J. Songer and Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina,* 58 S.C. L. REV. 161, 164 (2006) (concluding that race, gender and geographic location may influence capital charging decisions in South Carolina); Scott Phillips, *Racial Disparities in the Capital of Capital Punishment,* 45 HOUS. L. REV. 807, 812 (2008) (in study of Houston death sentences, "death was more likely to be imposed against black defendants than white defendants, and death was more likely to be imposed on behalf of white victims than black victims."); Unah & Boger, *Death Penalty in North Carolina supra.* (documenting race of the victim disparities in capital sentencing in North Carolina); Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991*, 20 Am. J. of Crim. Justice 17, 24-27 (1995)

Comparative proportionality review offers courts the ability to examine whether such disparities exist within the state's administration of the death penalty and to provide a remedy for the disparities. *See State v. Ramseur*, 106 N.J. 123, 327 (1987) (discrimination "cannot be tolerated" in capital sentencing and proportionality review is a vehicle to ensure against this discrimination); Van Duizend, *supra*, at 11 ("[I]f a primary concern is that the death penalty be applied evenhandedly and not in a discriminatory manner, the comparison points [for proportionality review] should include the race, sex, age and other socioeconomic factors concerning the defendant and the victim."); *cf., Furman*, 408 U.S. at 310 (Stewart, J., concurring) ("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.")

After *Furman* and *Gregg,* a number of states undertook serious proportionality review, including investigation of potential racial and economic biases. For example, the Alabama Supreme Court in 1980 collected and surveyed all of the available data of the current and former death row cases by race and income level of the victims and defendants to "determine whether the death penalty may have been imposed in an arbitrary or capricious manner," and in particular "[to] determine[e] whether racial discrimination may have been present." *Beck*, 396 So. 2d at 652-55. That same year, the Massachusetts Supreme Court concluded that the death penalty was

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(Kentucky study of 1976-1991 found that prosecutors sought the death penalty disproportionately often in white victim cases and juries disproportionately imposed the death sentence on African-Americans convicted of killing white victims); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 Fla. L. Rev. 1, 22-28 (1991) (Florida study found that defendants convicted of killing white victims were disproportionately often sentenced to death and that within the universe of cases with white victims, African-American defendants were disproportionately often sentenced to death); Samuel R. Gross & Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing* 66, 68-69 (1989) (Illinois study, same).

unconstitutional, in part based on its conclusion that it was racially biased in its administration. *See District Attorney v. Watson,* 411 N.E.2d 1274, 1286 (Mass. 1980).

This wave of meaningful proportionality review was significantly slowed by the Supreme Court's decisions in *Pulley v. Harris*, 465 U.S. 37 (1984) which held that proportionality is not required in every state,[5] and *McCleskey v. Kemp*, 481 U.S. 279, 296-99 (1987),[6] which held that

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[5] The Supreme Court did acknowledge in *Pulley* the possibility that proportionality might be constitutionally required if the state capital scheme failed to check against the arbitrary imposition of the death penalty. 465 U.S. at 45, 51. Despite the Supreme Court's ruling, the majority of death penalty jurisdictions retained proportionality review in some form. Nineteen of the thirty-five death penalty jurisdictions today retain proportionality review: Alabama, Ala. Code §13A-5-53(b)(3) (enacted 1981); Delaware, Del. Code Ann. Title 11 §4209(g)(2)(a); Florida, by case law, *see, e.g., Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995); Georgia, Ga. Code Ann. §17-10-35(c)(3) (enacted 1973); Kentucky, Ky. Rev. Stat. Ann. §532.075(3)(c) (enacted 1976); Louisiana, La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (enacted 1977); Mississippi, Miss. Code Ann. §99-19-105(3)(c) (enacted 1977); Missouri, Mo. Ann. Stat. §565.035(3)(3) (enacted 1983); Montana, Mont. Code Ann. §46-18-310(1)(c) (enacted 1977); Nebraska, Neb. Rev. Stat. §29-2521.03 (enacted 1978); New Hampshire, N.H. Rev. Stat. Ann. §630:5(XI)(c) (enacted 1986);North Carolina, N.C. Gen. Stat. §15A-2000(d)(2) (enacted 1977); Ohio Rev. Code Ann. §2929.05(A) (enacted 1981); South Carolina, S.C. Code Ann. §16-3-25(C)(3) (enacted 1977); South Dakota, S.D. Codified Laws §23A-27A-12(3) (enacted 1979); Tennessee, Tenn. Code Ann. §39-13-206(c)(1)(D) (enacted 1992); Utah, by case law, *see, e.g., State v. Lafferty*, 20 P.3d 342 (Utah 2001) c*ert. denied sub nom. Lafferty v. Utah*, 129 S. Ct. 43 (2008);Virginia Code § 17.1-313(C)(2) (enacted 1998); Washington, Wash. Rev. Code Ann. §10.95.130(2)(b) (enacted 1981). Of those states that eliminated comparative proportionality review, many retained provisions providing for arbitrariness and discrimination review. *See* Conn. Gen. Stat. Ann. §53a-46b(b); Idaho Code Ann. §19-2827 (c)(1); MD Code Ann., Crim. Law §2-401(d)(2)(iii) (enacted 2002); 42 PA. Cons. Stat. Ann. §9711 (h)(3)(i); Wyo. Stat. Ann §6-2-103 (d)(i) (same).

[6] The Supreme Court's decision in *McCleskey* is not binding on this Court's interpretation of its own cruel and unusual punishment clause nor binding on the level of protection offered by the state proportionality statute. *See, e.g., State v. Loftin*, 724 A.2d 129, 151 (N.J. 1999) (rejecting *McCleskey* under the New Jersey constitution); *Claims of Racial Disparity v. Commissioner of Corr.*,No. CV054000632S, 2008 WL 713763, at *6 (Conn. Super. Ct. Feb. 27, 2008) (holding that petitioner "may seek to demonstrate that the imposition of the death penalty in Connecticut violates the Constitution of the state of Connecticut, even though such a statistical attack might be unavailing on the federal arena [under *McCleskey*]"). *McCleskey* has been roundly condemned as the a "low point" in the quest for equality, comparable to *Dred Scott v. Sanford*, 60 U.S. 393 (1857) and *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See Hi-Voltage Wire Works, Inc. v. City of San Jose,* 12 P.3d 1068, 1073 (Cal. 2000); *see also*, Hugh Dedau, *Someday McCleskey Will Be Death Penalty's Dred Scott*, Los Angeles Times (May 1, 1987). Justice

statistical evidence of discrimination is insufficient to demonstrate an Eighth Amendment violation. *See* Penny J. White, *Can Lightening Strike Twice? Obligations of State Courts After Pulley v. Harris,* 70 U. COLO. L. REV. 813, 841-850 (1999); Bienen, *supra,* at 148-152. There have been some important exceptions to this trend however, including New Jersey, Connecticut, Washington, and New York.

Before New Jersey abolished the death penalty in 2007, its Supreme Court rigorously conducted proportionality review, including data collection and analysis of potential bias. The court rejected the holding of *McCleskey* under its state constitution, announcing instead that "were we to believe that the race of the victim and race of the defendant played a significant part of capital-sentencing decisions in New Jersey, we would seek corrective measures, and if that failed we could not, consistent with our State's policy, tolerate discrimination that threatened the foundation of our system of law." *Marshall,* 613 A.2d at 1109-110. The New Jersey Court recognized that proportionality was an appropriate vehicle for carrying out this commitment. *See Loftin,* 724 A.2d at 142 ("Moreover, proportionality review may be the only mechanism that permits system-wide evaluation of both prosecutorial and jury decision making so as to determine whether there has been racial or other impermissible discrimination.").

In Connecticut, the state Supreme Court recognized that a defendant could challenge his death sentence on the basis of alleged bias under their appellate capital review provisions. The

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Lewis Powell, one of the five justices to vote in the majority, publicly acknowledged after retirement that *McCleskey* stands as the sole case in which he would change his vote. *See* John C. Jeffries, JUSTICE LEWIS F. POWELL, JR. (1994), at 451 (biography of Powell quoting a conversation between the author and Justice Powell). Two states, North Carolina and Kentucky, passed legislation that will permit the trial courts to consider challenges based on statistical evidence at the trial level. Litigation is underway. Ky. Rev. Stat. Ann § 532.300-532.309 (providing for racial discrimination challenge based on statistical evidence by statute); North Carolina Racial Justice Act, 2009 N.C. Sess. Laws 464 (to be codified at N.C. Gen. Stat. § 15A-2010).

Connecticut court held that the presence of discriminatory factors could be challenged under the provision requiring review of whether a sentence of death was "the product of passion, prejudice or any other arbitrary factor," rather than its proportionality review provision. *Connecticut v. Cobb,* 663 A.2d 948, 961-64 (Conn. 1995). After this ruling, the Connecticut Supreme Court consolidated capital defendants' challenges of bias based on statistical evidence and appointed a special master to oversee the litigation. *See Claims of Racial Disparity v. Commissioner of Corr.*, No. CV054000632S, 2008 WL 713763, at *2 (Conn. Super. Ct. Feb. 27, 2008). The state public defender system funded an extensive study of capital cases in Connecticut. This study found evidence of bias, including the fact black defendants received a death sentence at three times the rate of white defendants in cases with white victims. *See* Donohue, *supra,* at 5. A trial court held last year that a capital defendant may use statistical evidence of discrimination to "seek to demonstrate that the imposition of the death penalty in Connecticut violates the Constitution of the state of Connecticut, even though such a statistical attack might be unavailing on the federal arena [under *McCleskey*])." *Claims of Racial Disparity*, 2008 WL 713763 at *6.

The Washington Supreme Court collects data on such factors as race of the victim, race of the defendant, education level of the defendant, and whether counsel was appointed or retained, in addition to data about the aggravating and mitigating factors. *See* Kausfman-Osborn, supra, at 831-32. The Washington Court appointed a task force in 1978 to develop a trial questionnaire to collect data for proportionality review. *Id.* at 808-09. This questionnaire was adopted by the Supreme Court and later codified by the legislature. *Id.* at 812. The Washington Supreme Court has reviewed racial discrimination challenges brought under the proportionality statute. *See Washington v. Gentry*, 888 P.2d 1105, 1154 (Wash. 1995).

New York instituted proportionality review as part of its authorization of the death penalty in 1995.[7] The statute specifies that proportionality review needs to include analysis of potential racial disparities. *See* N.Y. Crim. Proc. Law § 470.30.3(b) (McKinney Supp. 2007) (proportionality review, upon the request of the defendant, will include review of "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases by virtue of the race of the defendant or a victim of the crime for which the defendant was convicted"). This analysis should include consideration of statistical evidence. *See* 1995 N.Y. Sess. Laws ch.1, N.Y. CORRECT. LAW § 650 (2009) (approving consideration of statistical evidence in conducting proportionality review to determine whether race is "having a significant impact upon the imposition of the death penalty").[8]

Even in the states that have abandoned meaningful proportionality review, there has been a growing acknowledgement of the need for statistical review of discrimination in death sentences. A number of states have undertaken government statistical studies of their state death penalty schemes within the last decade. *See* Pierce and Radelet, RACE, REGION, AND DEATH SENTENCING IN ILLINOIS, *1988-1997*, *supra*, at i (the Illinois study commission report included as an attachment a statistical study of capital sentencing that concluded that race of homicide victim is a predictor of death); ALA. SENTENCING COMM'N, RECOMMENDATIONS FOR REFORM OF ALABAMA'S CRIMINAL JUSTICE SYSTEM 27 n.1 (2003), *available at* http://sentencingcommission.alacourt.gov/Publications/ASC%202003%20Final%20Report.pdf

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[7] The New York Court of Appeals later declared the state's death penalty statute unconstitutional, and the Legislature has not corrected the constitutional infirmity. See *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004).

[8] Significantly, New Hampshire, re-enacted the death penalty in 1990, after its statue had been declared unconstitutional. *State v. Johnson,* 595 A.2d 498, 500 (N.H. 1991). The New Hampshire Legislature, like New York, included proportionality review in this statute, even after the Supreme Court's decision in *Pulley.*

(Alabama commission established by the chief justice and attorney general undertook a statistical study of potential disparities based on race and gender in capital sentencing); EXECUTIVE SUMMARY: REPORTS AND RECOMMENDATIONS OF THE FLORIDA SUPREME COURT RACIAL & ETHNIC BIAS COMMISSION, WHERE THE INJURED FLY FOR JUSTICE: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA, THE FLORIDA SUPREME COURT 11, 15 (1990-91), *available at* http://www.flcourts.org/gen_public/pubs/bin/racial.pdf. (Florida study commission appointed by the Chief Justice of the Florida Supreme Court to evaluate whether race affects the operation of the civil and criminal justice systems found application of death penalty was correlated with race of the victim); OFFICE OF THE ATTORNEY GENERAL, STATE OF ARIZONA, CAPITAL CASE COMMISSION FINAL REPORT 26 (Dec. 2002) *available at:* http://www.azag.gov/CCC/FinalReport.html (Arizona capital case commission appointed by Attorney General Janet Napolitano to identify potential racial biases in administration of the death penalty conducted statistical study and found evidence of racial bias); MARYLAND COMMISSION ON CAPITAL PUNISHMENT, FINAL REPORT TO THE GENERAL ASSEMBLY 27 (2008), *available at* http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf (commission appointed by Governor Parris Glendenning completed sophisticated study of death sentencing looking at race of victim, defendant, and aggravating and mitigating factors); VIRGINIA'S GENERAL ASSEMBLY AUDIT AND REVIEW COMMISSION, REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT III (2001) *available at* http://jlarc.virginia.gov/reports/Rpt274.pdf (statistical study of Virginia's death penalty system concluded that "whether a defendant charged with a capital-eligible crime actually faces the death penalty is more related to the location in the State in which the crime was committed than

the actual circumstances of the capital murder"); David C. Baldus and George Woodworth, RECENT EVIDENCE OF RACIAL DISCRIMINATION IN THE ADMINISTRATION OF CAPITAL PUNISHMENT IN THE COMMONWEALTH OF PENNSYLVANIA 13-14 (FEB. 22, 2000) (sophisticated study, submitted to the Judiciary Committee of the Senate of the Commonwealth of Pennsylvania, analyzed all death-eligible capital cases in Philadelphia that found racial and geographic disparities); THE DISPOSITION OF NEBRASKA CAPITAL AND NON-CAPITAL HOMICIDE CASES, *supra*, at 6, 16-22 (Nebraska legislatively created commission ordered sophisticated study of Nebraska death-eligible cases and found geographic disparities and disparities based on socioeconomic status of the victim).

The vast majority of these government studies of racial, economic and geographic biases in the administration of the death penalty are "adjusted" studies, which account for aggravating and mitigating factors that may influence the sentencing decision. *Id.* David Baldus, a well-known expert in this area explains the importance of "adjusted" studies:

> When considering claims of systemic purposeful discrimination in the application of the death penalty, one must distinguish between evidence of 'gross unadjusted' racial disparities and 'adjusted racial disparities.' Adjusted disparities account for the presence of aggravating and mitigating factors that clearly influence the decisions of prosecutors and juries. Adjusted disparities permit one to compare the treatment of offenders who share similar levels of aggravation and mitigation, which, when considered together, determine a defendant's criminal culpability and blameworthiness.

Baldus, *Findings from Philadelphia*, supra, at 1655. In other words, these state commissioned studies of adjusted disparities are essentially comparative proportionality review by another name; they are efforts to gain the birds-eye view to see whether arbitrary or discriminatory factors explain the difference between those who live or die. In fact, for government studies of Philadelphia and Nebraska, Professor Baldus, the lead researcher in those studies, explicitly modeled the state studies after the New Jersey proportionality model. *See id.* at 1663.

As part of its appellate review, this Court should follow the lead of New Jersey, Connecticut, and the numerous state studies, and inquire whether discriminatory factors such as race, geography or economic status, affect capital sentencing in New Hampshire. In order to conduct this analysis, this Court should order the collection of data about socio-economic status, race, geography and gender in the universe of death-eligible cases, along with information about aggravating and mitigating factors.

Adopting standards that require the collection of this data is itself an important step towards ensuring fairness in the administration of capital punishment in New Hampshire. As researchers Glenn Pierce and Michael Radelet explain, data collection in and of itself can be meaningful:

> In some cases, data gathering itself may add an element of fairness in the system. For example, a study that examines charging decisions would most certainly remind prosecutors of their duty to be even-handed.

Pierce and Radelet, DEATH SENTENCING IN ILLINOIS, *supra*, at 23. The Illinois State Study Commission found this point persuasive, and recommended that the state Supreme Court institute data collection procedures, even if it declined to conduct proportionality review, because of the importance of data collection to evaluating claims of fairness in the death penalty. *See* ILLINOIS COMMISSION ON CAPITAL PUNISHMENT, REPORT OF THE FORMER GOVERNOR RYAN'S COMMISSION ON CAPITAL PUNISHMENT 189 (April 2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html (last visited 10/20/2009).

A number of other state and bi-partisan commissions have agreed with Illinois that the need to collect data necessary to study potential bias is a critical priority. The American Bar Association (ABA) has recommended that all death penalty jurisdictions "collect and maintain

data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances and on the nature and strength of evidence for all potential cases (regardless of whether the case is charged, prosecuted or disposed of as a capital case.") *See* ABA, DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES 47 (2001), *available at* http://www.abanet.org/irr/finaljune28.pdf.[9] A death-penalty study committee of the Constitution Project, a non-partisan, non-profit organization, called for states to gather and study data about the role of racial discrimination in capital punishment, a step it described as "the most important" remedial action. *See Mandatory Justice: The Death Penalty Revisited*, 36-37, 39, *available at* http://www.constitutionproject.org/manage/file/30.pdf .[10]

The Connecticut Commission on the Death Penalty recommended that all "agencies involved in capital felony cases . . . collect and maintain comprehensive data concerning all cases qualifying for capital felony prosecution (regardless of whether the case is charged, prosecuted or disposed of as a capital felony case) to examine whether there is disparity … includ[ing] information on the race, ethnicity, gender, religion, sexual orientation, age, and socioeconomic status of the defendants and the victims, and the geographic data[.]" COMMISSION ON THE DEATH PENALTY REPORT 6 (2003), *available at* http://www.cga.ct.gov/olr/Death%20Penalty%20Commission%20Final%20Report.pdf .

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[9] The ABA further recommended that every death penalty jurisdiction "collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and . . . identify and carry out any additional studies that would help determine discriminatory impacts on capital cases." *Id.* at 47.

[10] The Constitution Project Committee also recommended that all death penalty states adopt proportionality procedures "to make sure that the death penalty is being administered in a rational, non-arbitrary, and even-handed fashion, to provide a check on broad prosecutorial discretion, and to prevent discrimination from playing a role in the capital decision-making process." *Id.*

Similarly, the Nebraska study of arbitrariness in its death penalty recommended as a key policy recommendation that the state create a database of all death-eligible cases updated annually to facilitate the "conduct of meaningful comparative proportionality reviews." Baldus *et al.*, *Nebraska Experience*, *supra*, at 686-87.

In California, one of the minority death penalty jurisdictions without any form of proportionality review, the recent report of the California Commission on the Fair Administration of Justice recommended that the legislature require data collection and review of whether racial and geographic variations affect the implementation of the death penalty. *See* California Commission on the Fair Administration of Justice, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 94, 100-01 (June 30, 2008), *available at* http://www.ccjaj.org/documents/reports/dp/official/FINAL%20REPORT%20Death%20Penalty.pdf.

In sum, this Court should include analysis of potential bias as part of its proportionality review. In order to conduct such an analysis in this and in any future cases, this Court should order collection of data about race, socio-economic status, geography and gender for all death-eligible cases.

C. This Court should appoint a special master to collect and study pertinent data needed for meaningful proportionality review and order trial court reports for future cases.

Amici's recommendations to include all death-eligible cases in the universe of comparison cases and to determine whether there is statistical evidence of racial, geographic, gender, or socio-economic disparities apply to the present case as well as any future proportionality review cases. The achievement of either of these recommendations – indeed, the

performance of any form of meaningful proportionality review - will require a large amount of data collection and analysis. Accordingly, *Amici* suggest that this Court appoint a special master to perform the data collection and analysis.

The parties are in agreement that the universe of comparison cases should extend backward to 1976. *See* App. Br. at 96, 98; *State's August 20, 2007 Memorandum Submitting Proposed Rules Governing Death Sentence Review By the Court,* at 11. Accordingly, information must be collected retrospectively. As discussed above, building a pool of all death-eligible cases will entail an initial screening of all homicide cases since 1976 and then detailed fact collection about aggravation, mitigation, race, gender, geography, and socio-economic status in all of the cases ruled death-eligible. *See generally*, Van Duizend, *supra*, at 13 (the National Center for State Courts' model questionnaire for data collection in proportionality cases includes a similar list of pertinent factors).[11]

In order to ensure that this data collection and analysis are thorough and accurate, this Court should follow the example of New Jersey and appoint an independent special master to oversee the case screening, data collection, and data analysis. *In re Proportionality Review Project*, 735 A.2d 528, 536 (N.J. 1999). The Court should empower this individual to have access to a wide range of data files and broad powers of investigation. *See* Bienen, *supra,* at 190 (the New Jersey Supreme Court's order appointing a special master gave him "the authority to collect and analyze data, produce a data base and files on individual homicide cases, invite the

[11] The National Center for State Courts model questionnaire form asks about "important aspects of the case and information concerning the defendant and the victim . . . [including] sections addressing the circumstances surrounding the homicide; the defendant's role in the planning and perpetration of the killing; the statutory aggravating and mitigation circumstances; the strength of the evidence presented; the defendant's race, age, sex, employment status, and prior record; similar background information on the victim and the relationship, if any between the defendant and the victim." *Id.*

participation of interested parties ... conduct hearings, procure expert technical advice, call witnesses, and request public records and any other relevant information"). Access to reliable and accurate data is critical for any proportionality review. *Id.* at 263 (the New Jersey experience "demonstrates the importance of precise and reliable data collection as a predicate to any analysis of a capital case processing system"); Kaufman-Osborn, *supra*, at 263 (stressing the importance of quality of the data for comparative proportionality review). For future cases, the Court should further adopt the New Jersey model of requiring trial judge reports in all homicide cases. *Proportionality Review Project*, 735 A.2d at 536. *See also*, Wash. Rev. Code Ann. § 10.95.130(1) (West 2009) (requiring trial judge reports in all first degree murder cases); La. Sup. Ct. R. 28 and La. Code Crim. Proc. Ann. art. 905.9.1 (2008) (Louisiana Supreme Court rules requiring trial judges to order presentence investigations and issue reports in all capital cases); *Frey,* 475 A.2d at 707-08 (ordering judges to supply the administrative court office with data about past and future cases, including "the facts and circumstances of the crimes, the aggravating and mitigating circumstances arguably presented by the evidence, the gender and race of the defendant and the victim").

As discussed above, *Amici* further urge this Court to ensure that the parties have an opportunity to respond to the cases initially screened as death-eligible by providing additional information before the list of death-eligible cases is finalized. *See* David Baldus *et al.*, *Equal Justice and the Death Penalty* 298-99 (1990) (observing that some courts have "impeded the proportionality-review process by failing to make available to the parties to the litigation the case-file information on the cases considered by the court in its proportionality-review process.").

After gathering this data, the Special Master may conclude that the number of cases is too small to draw definitive conclusions about proportionality. The National Center for State Courts completed a proportionality review project in the early 1980s, intended to assist states with the development of proportionality review under their statutes. Van Duziend, *supra*, at 9. The project addressed this exact problem of how to proceed when a state is conducting its first proportionality review case. *Id.* at 13. The project suggested that the State could wait for additional cases, rely on pre-*Furman* cases, or consider using data from other states with similar demographics and statutes. *Id.* The first two suggestions are of limited utility for New Hampshire given that it has had only one death sentence in fifty years. Accordingly, *Amici* recommend that this Court permit the special master, if he or she decides it is necessary, to expand the pool to include data from other appropriate states. *See also*, *Osborn v. State* 672 P.2d 777, 803 (Wyo. 1983) (analyzing out of state data in early proportionality decisions); Baldus, *Equal Justice*, *supra,* at 300 n.16 (noting that a few states initially consulted out of state cases because they did not yet have a sufficient number of in-state cases for review).

The inclusion of out-of-state data may strengthen the conclusions of New Hampshire's data if that data is too small to produce statistically significant results:

> Sometimes, several experiments or other studies, each having different limitations, all point in the same direction. This is the case, for example, with eight studies indicating that jurors who approve of the death penalty are more likely to convict in a capital case. Such convergent results strongly suggest the validity of the generalization. (internal citations omitted).

David H. Kaye and David A. Freedman, REFERENCE GUIDE ON STATISTICS, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 97 (2d. ed. 2000).

Amici specifically recommend that the Court permit the special master, if he or she deems it necessary, to expand the pool to include case data from Connecticut. There are multiple

advantages to this approach. First, it is the only other New England state which still authorizes the death penalty. Second, the structure of its statute is similar in important respects to New Hampshire's. The Connecticut statute narrows capital murder to eight categories, most of which overlap with New Hampshire's, and then further narrows the death penalty to only those cases with an aggravating factor present. *See* Conn. Gen. Stat. Ann. § 53a-54b (West 2009) and RSA §§ 630:1-a; 630:5(VII) (2009).[12] Researchers in Connecticut have already gathered data about death-eligible cases so inclusion of their data would be logistically feasible. *See* Donohue, *supra.* The special master may also decide that data from other states is also both necessary and appropriate.

CONCLUSION

As the Supreme Court has reiterated, "capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Proportionality review is an important tool for any judicial system that seeks to ensure these goals of fairness and consistency. In order to achieve these goals, however, the review must be meaningful. It must be based on a comparison of all death-eligible cases and include analysis of potentially discriminatory factors. As other states, notably New Jersey and Connecticut have demonstrated, this type of review is possible. *Amici* urge this Court to adopt standards that will ensure that New Hampshire's proportionality review provisions in this and any future cases reduce arbitrariness and the risk of discrimination in its capital sentencing.

[12] The most significant differences in terms of eligibility for capital murder under the two statutes is that Connecticut authorizes the death penalty in cases with two or more victims and in cases where the victim is under 16 years-old. *Id.* The Special Master could easily delete these cases from the pool of comparison cases.

Respectfully submitted,

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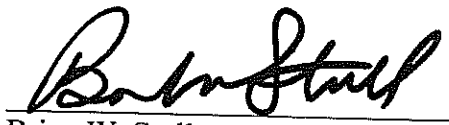

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