Notre Dame Journal of Law, Ethics & Public Policy

Volume 8
Issue 1 *Symposium on Capital Punishment*

Article 5

1-1-2012

Missouri Proportionality Review: An Assessment of a State Supreme Court's Procedures in Capital Cases

Donald H. Wallace

Jonathan R. Sorensen

MISSOURI PROPORTIONALITY REVIEW: AN ASSESSMENT OF A STATE SUPREME COURT'S PROCEDURES IN CAPITAL CASES

DONALD H. WALLACE*
JONATHON R. SORENSEN**

In *Furman v. Georgia*,[1] the United States Supreme Court condemned capital punishment procedures which did not provide for meaningful measures to prevent arbitrary sentencing. Subsequent to *Furman* a statutory mechanism to control arbitrariness has been highlighted by capital punishment jurisdictions. The intent underlying this procedure is to allow consideration by a reviewing court of all relevant information regarding the defendant and the crime in determining whether imposition of the death penalty is in fact appropriate in a particular case when compared to other cases. In such an appeal the state supreme court is usually directed to determine whether the sentence was disproportionate compared to sentences imposed in similar cases.

This type of review, referred to as "proportionality review,"[2] has been adopted as a "check against the random or arbitrary imposition of the death penalty."[3] If properly used, proportionality review procedures are viewed as alleviating the evils condemned in *Furman v. Georgia*[4] which "create[d] a substantial risk that punishment will be inflicted in an arbitrary and capricious

* Professor of Criminal Justice, Central Missouri State University. J.D. University of Nebraska, LL.M. University of Missouri-Kansas City.

** Ph.D. Assistant Professor of Criminal Justice, University of Texas-Pan American. Sam Houston State University.

1. 408 U.S. 238 (1972). A majority of justices ruled that existing death penalty statutes violated the Eighth Amendment. Two justices (Brennan and Marshall) viewed the death penalty as a per se violation of the Eighth Amendment's ban on cruel and unusual punishment. Justices Douglas, Stewart, and White held that existing statutes violated the eighth amendment "because of the sentencing patterns they produced." Raymond Paternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years*, 39 S.C. L. REV. 245, 249 n.9 (1988).

2. Gregg v. Georgia, 428 U.S. 153, 206 (1976).

3. *Id.* The majority of justices agreed to uphold the constitutionality of the death penalty.

4. 408 U.S. 238 (1972).

manner."[5] Proportionality appellate review procedures are seen as allowing a meaningful distinction between those defendants who received death sentences and those others who did not; as has been observed,[6] one can argue that a death sentence is unconstitutional under *Furman* if most other, factually indistinguishable defendants receive only lesser sentences for the same type of crime.

In addition to minimizing the risk of an arbitrary and capricious death sentence, the Court has required that the sentencer be allowed to give consideration of the individualized circumstances of each case, including any mitigating circumstances.[7] *Gregg v. Georgia* requires that capital sentencing procedures illuminate the "personal culpability"[8] of the offender.[9] Consequently, mandatory death penalties have consistently been invalidated by the Court.[10] Thus, while consistent sentencing is required the sentencing must also be individualized. Yet, despite the desire to individualize sentences, the goal of maintaining consistent patterns of sentencing is significant. An examination of the history of a state appellate court's use of proportionality review procedures should reveal consistent patterns of sentencing.

This article will explore the comparative review procedures used by one state supreme court, the Missouri Supreme Court.[11] In part I the concept of proportionality review is discussed. Commentary on procedures used by state courts in proportionality reviews is explored in part II. An examination of reported Missouri Supreme Court cases in part III is considered to determine how this court in its reviews creates the pool of eligible cases, identifies similar cases within this pool, and conducts its method of comparison of similar cases. Part IV of the article presents an empirical analysis of the Missouri Supreme Court's assumptions

5. Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (Stewart, J., plurality opinion).

6. Charles A. Pulaski, Jr., *Capital Sentencing in Arizona: A Critical Evaluation*, 1984 ARIZ. ST. L.J. 1, 8.

7. *Id.*

8. Penry v. Lynaugh, 492 U.S. 302, 312 (1989); *see also* Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S 586 (1978).

9. *See* James R. Acker, *Dual and Unusual: Competing Views of Death Penalty Adjudication*, 26 CRIM. L. BULL. 123 (1990).

10. *See, e.g.*, Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

11. Hereinafter references to "Supreme Court" will indicate Missouri's supreme court. To alleviate confusion the United States Supreme Court will be consistently referred to as the U.S. Supreme Court. *See* Appendix for pertinent Missouri death penalty statutes.

regarding the adequacy of its methods used in proportionality reviews. The conclusion of the analysis presented in this article suggests that the Missouri Supreme Court has not elected to use its available resources for a meaningful proportionality review process.

I. PROPORTIONALITY REVIEW

A second procedure to ensure against arbitrary and capricious capital sentencing is the use of guided discretion sentencing.[12] However, this method has been rendered impotent in Missouri by decisions of the Missouri and U.S. supreme courts.[13]

---

12. The U.S. Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976), approved of a separate sentencing hearing where the sentencer is directed to find a statutorily authorized aggravating factor before it may impose a death sentence. The Court has observed in California v. Ramos, 463 U.S. 992 (1983), that excessively vague sentencing standards might lead to the arbitrary and capricious sentencing patterns condemned in *Furman*.

Other states have adopted guided discretion procedures similar to those used in Georgia. Georgia's sentencing scheme does differ somewhat from Missouri's statute. The Georgia statute provides a listing of the aggravating factors that are to be considered by the sentencer, but no specific mitigating factors are provided. In Missouri, the sentencing procedures list both possible aggravating and mitigating factors for the sentencer to weigh against one another in recommending a sentence.

In Missouri, the sentencer is required to consider any statutory or non-statutory aggravating or mitigating factors or circumstances supported by the evidence as well as all evidence received at trial. MO. REV. STAT. § 565.032.1 (1986). Although instructions may be given regarding specific statutory aggravating and mitigating factors and non-statutory aggravating circumstances, a trial judge is precluded from giving any instructions on nonstatutory mitigating evidence, Missouri Approved Instructions-Criminal 3d at § 313.44, Notes on Use 6 (1989) [hereinafter MAI-CR 3d]. If the sentencer finds that aggravating circumstances are deemed to exist and outweigh mitigating circumstances, it is not required to assess a penalty of death. MO. REV. STAT. § 565.030.4(4) (1986). If mitigating circumstances are found to exist, the sentencer is not allowed to impose the death penalty if it finds these mitigating circumstances outweigh the aggravating circumstances. MO. REV. STAT. § 565.030.4(3) (1986). However, to impose the death penalty there need be no finding beyond a reasonable doubt that the mitigating circumstances do not outweigh the aggravating circumstances. *See* State v. Smith, 649 S.W.2d 417 (Mo. 1983) (en banc); State v. Bolder, 635 S.W.2d 673 (Mo. 1982) (en banc).

13. To impose a death sentence, the sentencer must find at least one aggravating factor to exist beyond a reasonable doubt, MO. REV. STAT. § 565.030.4(1) (1986), although the sentencer is not required to impose a death sentence even if the aggravating factor is found to exist. Missouri follows the threshold-function interpretation approved by the U.S. Supreme Court in Zant v. Stephens, 462 U.S. 862 (1983). *See* State v. Ervin, 835 S.W.2d 905, 926 (Mo. 1992) (en banc). In its consideration of the sentence, if an aggravating factor is found, the sentencer may then consider any non-statutory aggravating circumstances. The finding of a statutory aggravating factor establishes the

Consequently the importance of an appropriately functioning proportionality review process is magnified; whether Missouri's proportionality review process is functioning appropriately is the focus of this article.

In an attempt to avoid inappropriate results in capital sentencing and to ensure consistent application of the death penalty, many states use proportionality review by state supreme courts.[14] Typically proportionality review statutes direct a state supreme court to compare death sentences with similar cases involving similar defendants and similar crimes.[15] This type of review was praised in the plurality opinion of *Gregg*:

---

murders in which the death penalty may permissibly be imposed. Here the case (according to the Georgia Supreme Court) becomes subject to the sentencer's "discretion, in which all the facts and circumstances of the case determine . . . whether . . . the death penalty is imposed." Zant v. Stephens, 297 S.E.2d 1, 4 (1982). The U.S. Supreme Court accepted this view of the limited control of the sentencer's discretion once an aggravating factor is found: "[T]he finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 874 (1983).

Because of the approval of the threshold function of an aggravating factor by the United States and Missouri Supreme Courts, the potential for discriminatory and arbitrary sentencing continues to exist with these provisions for guided discretion sentencing. The statutory aggravating circumstances may narrow the murders eligible for the death penalty. Yet, the range of murders made ineligible is probably narrow, if non-existent. In an examination of the aggravating factors in light of the 1983 legislative changes to the Missouri scheme and broad judicial interpretations of the statutory language, it was concluded that virtually any capital murder could be construed as qualifying a defendant for the death penalty. Ellen Y. Suni, *Recent Developments in Missouri: The Death Penalty*, 54 UMKC L. REV. 553 (1986). Further, by allowing the consideration of any non-statutory aggravating circumstance once the statutory aggravating factor is found, any attempt to control the discretion in the actual imposition of a death sentence has been completely abandoned. *See* Ursula Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH U. L.Q. 573, 579 (1985) (making the same observation for Georgia). As Justice Marshall argued in his dissent in Zant v. Stephens, 462 U.S. 862 (1983), the sentencer is given what was condemned in *Furman*—the absolute and unfettered discretion in choosing who dies.

14. As many as 27 states have included a requirement of proportionality review in their statutes or rules of procedure and at least four other states have conducted some form of proportionality review in at least some cases without an express statutory requirement. Richard Van Duizend, *Comparative Proportionality Review in Death Sentence Cases: What? How? Why?*, 8 STATE CT. J. 9 (1984).

15. Paternoster & Kazyaka, *supra* note 1, at 342; Steven M. Sprenger, Note, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 IOWA L. REV. 719 (1988).

> [P]roportionality 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.[16]

The U.S. Supreme Court has invalidated a death sentence that was considered excessive when compared with sentences in similar cases.[17] In *Godfrey v. Georgia*[18] the Court concluded after reviewing sentences in other domestic slaying cases that the defendant's death sentence for a domestic murder was excessive as it could not be distinguished from the many similar cases where the death penalty was not imposed.

Since *Gregg* the Supreme Court has held in *Pulley v. Harris*[19] that proportionality review is not constitutionally required per se. However, as *Godfrey*[20] indicates, a disproportionate sentence can be found to be unconstitutionally excessive. Further, since the majority of states with statutory authorization for the death penalty have retained proportionality review, proportionality review remains of importance.[21] The Missouri Supreme Court has observed that the requirement of proportionality review is "dictated solely by Missouri statutes and is not constitutionally mandated."[22]

Commentators have suggested that proportionality review in practice is not effective in jurisdictions which conduct it. Frequent observations have been made of the cursory comparison of cases by appellate courts.[23] For example Bentele[24] has protested the perfunctory manner in which the Georgia Supreme Court has performed its proportionality review. A mere listing of cases deemed to be similar is frequently stated by the Georgia court to justify affirmance of the death penalty in the case under review.

---

16. Gregg v. Georgia, 428 U.S. 153, 206 (1976).

17. *See* Paternoster & Kazyaka, *supra* note 1.

18. 446 U.S. 420 (1980).

19. 465 U.S. 37 (1984). The majority held that proportionality review was unnecessary to ensure fairness since the California death penalty procedures provided other adequate safeguards.

20. 446 U.S. 420 (1980).

21. At least two states repealed their statutory provisions for proportionality review (Nevada and Oklahoma) and one other made such review an option for the defendant (New Jersey). Sprenger, *supra* note 15, at 728.

22. State v. Gilmore, 681 S.W.2d 934, 946 (Mo. 1984).

23. *See* Sprenger, *supra* note 15.

24. Benetele, *supra* note 13.

The infrequency of reversals is an indication of the ineffective use of proportionality review. Sprenger[25] reviewed appellate decisions from several states (Tennessee, Alabama, South Carolina, Ohio, and Mississippi) and found that the courts in these jurisdictions identified a death sentence as comparatively excessive in only one case. The Missouri Supreme Court has reversed only one case[26] out of 70[27] reported cases on a proportionality review basis.

Missouri, in authorizing capital punishment,[28] has required a proportionality review to be conducted by the state supreme court, though there is no constitutional imperative. Missouri appears to have followed the approved procedures established by the U.S. Supreme Court. The next section explores the specific procedures in the applications of proportionality review as observed by various commentators.

II. THE PROCEDURES FOR PROPORTIONALITY REVIEW

An analysis of the steps of proportionality review are presented in this section of the article. Proportionality review procedures utilized by numerous jurisdictions have generated commentary regarding their appropriateness. Specific issues

25. Sprenger, *supra* note 15.

26. State v. McIlvoy, 629 S.W.2d 333 (Mo. 1982) (en banc).

27. *See* discussion *infra* note 82 and accompanying text.

28. The current death penalty statute in Missouri was enacted in 1977. This law is an altered version of a 1975 statute which called for a mandatory death penalty for those convicted of capital murder, MO. REV. STAT. § 559.009 (repealed 1978). With the 1976 decisions of the U.S. Supreme Court condemning mandatory death sentencing, the Missouri Supreme Court held in State v. Duren, 547 S.W.2d 476 (Mo. 1977) (en banc), that the death penalty provisions of the 1975 law were unconstitutional. The 1977 statute was declared constitutional by the Missouri Supreme Court in State *ex rel.* Westfall v. Mason, 594 S.W.2d 908 (Mo. 1980) (en banc). The Court noted that the Missouri statutes are "virtually identical" to those of Georgia, and with the U.S. Supreme Court's approval of the Georgia scheme in *Gregg*, the Missouri court observed that there could be "no serious question . . . as to [the 1977 statutes'] validity under the federal constitution." *Id.* at 916. The Missouri Supreme Court further held the statute to be constitutional under Missouri constitutional provisions, which are similar to the federal provisions. *See* Ellen Y. Suni, *Recent Developments in Missouri: Criminal Law: Homicide*, 50 UMKC L. REV. 440 (1982).

In 1983 the Missouri legislature substantially modified the 1977 statutory scheme. Changes were made in the definition of the substantive offense, the grounds, and the procedures for imposition of the death penalty. In a review of these modifications Suni observed that, despite the 1983 changes in the substantive offense, there would be little real impact and that "defendants will be convicted of the same degree of murder under the new statute as they would have been under the old." *Id.* at 554.

regarding the procedures on creating the pool of cases and determining comparative excessiveness are examined here.

A. *Pool Of Cases*

The universe from which similar cases are drawn is not uniformly constructed by the state supreme courts.[29] The State of Washington uses all cases involving a conviction of a crime, first degree murder, which is capitally chargeable, whether the defendant is actually capitally charged or not.[30] Some courts may consider only death sentences.[31] Commentary indicates that some courts consider both life and death sentence cases whether or not they advanced to a penalty trial, but only those cases that had been appealed.[32] A further approach[33] that some jurisdictions take is to limit the universe of potentially similar cases to those that resulted in either a life or death sentence, but only if they advance to a penalty trial.

The method used in a jurisdiction will have important consequences for the proportionality review. Where a pool does not use all capitally chargeable or even all capitally charged crimes in the jurisdiction, the sample will be skewed. A pool of cases that excludes plea-bargained cases and cases in which the defendant was found guilty of a lesser included offense excludes from the

---

29. Sprenger, *supra* note 15, at 721.

30. WASH. REV. CODE ANN. § 10.95.130(2)(b) (West 1988). Similarly the Pennsylvania Supreme Court includes "all cases of murder of the first degree convictions which were prosecuted or could have been prosecuted under the [state's death penalty act]." Commonwealth v. Frey, 475 A.2d 700, 707 (Pa. 1984).

31. According to commentators states with such an approach have included Alabama (Beck v. State, 396 So.2d 645 (Ala. 1980)); Illinois (People v. Free, 447 N.E.2d 218 (Ill. 1983)); Indiana (Judy v. State, 416 N.E.2d 95 (Ind. 1981)); Kentucky (Gall v. Commonwealth, 607 S.W.2d 96 (Ky. 1980)); Mississippi (King v. State, 421 So.2d 1009 (Miss. 1982) (en banc)); North Carolina (State v. Williams, 292 S.E.2d 243 (N.C. 1982)); Ohio (State v. Mapes, 484 N.E.2d 140 (Ohio 1985)); Oklahoma (Parks v. State, 651 P.2d 686 (Okla. Crim. App. 1982)); South Carolina (State v. Koon, 328 S.E.2d 625 (S.C. 1985)); and Tennessee (State v. Smith, 695 S.W.2d 954 (Tenn. 1985)); *see* Van Duizend, *supra* note 14, and Sprenger, *supra* note 15, at 730.

32. State v. Harding, 687 P.2d 1247 (Ariz. 1984); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Ross v. Georgia, 211 S.E.2d 356 (Ga. 1974), *cert. denied*, 428 U.S. 910 (1976); State v. Flowers, 441 So.2d 707 (La. 1983); State v. Reeves, 344 N.W.2d 433 (Neb. 1984); State v. Garcia, 664 P.2d 969, 978 (N.M. 1983); *see* Sprenger, *supra* note 15, at 737.

33. Riley v. State, 496 A.2d 997, 1027 (Del. 1985); Bowers v. State, 507 A.2d 1072, 1092-94 (Md. 1986); *see* Sprenger, *supra* note 15, at 734.

analysis those cases involving the leniency of juries and prosecutors.[34]

B. *Determining Comparative Excessiveness*

The second major task in the comparative review process is the method for determining comparative excessiveness. Beyond defining the general pool of cases eligible for comparison, the selection of the specific cases for the comparative review and determining the appropriate method of comparison present unique questions.

1. Selection Of Cases For Comparison

In the selection of the specific pool of cases to be used for the comparative review, Goodpaster[35] would call for a careful selection of characteristics which establish the class of similar cases. This entails the necessity of finding the precise bases for the sentence chosen. A reviewing court will need to know which sentencing factors were found by the sentencer and their relative importance. Yet, an observation of the certified aggravating factor in a case may not illuminate the actual reason for the sentence. Since the finding of an aggravating circumstance merely permits the sentencing of death, as Goodpaster[36] noted the specific reason for the death sentence may have arisen from the numerous other circumstances a sentencer is permitted to consider under the threshold-function interpretation approved by the U.S. Supreme Court in *Zant v. Stephens*.[37] With a detailed trial report a reviewing court should be able to discern the reason for a sentence in order for the case to be used for the comparative review process.

2. Appropriate Method of Comparison

Once the underlying basis for a sentence has been determined the appropriate method for the comparison of cases must be established. Several different methods can be used by appellate courts in the proportionality review.[38] Baldus, Pulaski, and

34. State v. Mercer, 618 S.W.2d 1, 20-21 (Mo. 1981) (en banc) (Seiler, J., dissenting); Gary Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786 (1983).

35. Gary Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786 (1983).

36. *Id.*

37. Zant v. Stephens, 462 U.S. 862 (1983); *see supra* note 13 and accompanying text.

38. Paternoster & Kazyaka, *supra* note 1, at 339.

Woodworth[39] identified three methods. Under the "reasonableness" approach no comparison or even reference to other cases is made. Instead an assessment of the egregiousness of the case is made and the court subjectively determines whether a death sentence is a reasonable penalty.[40] Under the "precedent-seeking" approach the reviewing court will identify specific aggravating features about the offense which justify a death sentence. In affirming a death sentence the court will select previously affirmed death sentences which it will cite as comparable based on the identified aggravating features.

The "frequency approach" entails a true comparative review of similar cases.[41] Under this approach the reviewing court should determine the elements which lead to a death sentence in the case and identify the comparison cases using the identified relevant factors. With this data the reviewing court estimates the number of death sentences which have been imposed in this identified pool of cases. A determination is made as to whether the death penalty is being imposed sufficiently often to justify affirming the sentence under review.[42]

A genuine comparative review, which the frequency approach offers, would appear necessary[43] to alleviate the concerns of comparative excessiveness identified in the plurality opinion in *Gregg v. Georgia.* Despite the lack of a constitutional requirement[44] for proportionality review, statutory requirements of appellate review calling for comparison of a death sentence with similar cases would appear to dictate the use of a "frequency" approach. As Goodpaster[45] suggested, a comparison to other cases provides an external check to comparative excessiveness that other forms of comparison, such as offense proportionality comparison[46] or intra-case proportionality comparison,[47] cannot accomplish.

---

39. David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience,* 74 J. CRIM. L. & CRIMINOLOGY 661, 669 (1983).

40. Paternoster & Kazyaka, *supra* note 1, at 339; *see* South Carolina v. Hyman, 281 S.E.2d 209 (S.C. 1981), *cert. denied,* 458 U.S. 1122 (1982).

41. Paternoster & Kazyaka, *supra* note 1, at 341.

42. Baldus et al., *supra* note 39.

43. Paternoster & Kazyaka, *supra* note 1, at 342.

44. Pulley v. Harris, 465 U.S. 37 (1984).

45. Goodpaster, *supra* note 34.

46. An example of offense proportionality comparison would be the imposition of the death penalty for non-homicidal offenses.

47. An example of intra-case proportionality comparison is where multiple defendants are disparately sentenced though they were charged with same crimes on the same evidence.

III. MISSOURI'S PROPORTIONALITY REVIEW PROCEDURES

This section of the article will present both an analysis of the steps of proportionality review as applied in Missouri and an empirical analysis of the Supreme Court's proportionality reviews. Missouri's requirement for its independent, proportionality review is similar to Georgia's formulation.[48] The Missouri statutory requirement is to determine whether:

> the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both [*sic*] the crime, the strength of the evidence and the defendant.[49]

In *Wilkins v. State*[50] the Missouri Supreme Court noted the 1984 statutory amendments which added the "strength of the evidence" language. This allowed the court to distinguish life sentenced cases which involved heinous murders where evidence was circumstantial and the precise role of the accused in the killing was unclear.

The Missouri statute omits various specifics regarding the process of proportionality review. Not addressed by the statute is the determination of which murder cases and what method of comparison should be considered in the review.[51] Thus, the issues for examination in this research involve the creation of the pool of cases which are eligible for comparison, the identification of similar cases from this pool, and the appropriateness of the method of comparison.

A. *Missouri's Procedures*

1. Pool Of Cases

Although no explicit guidance is provided by the Missouri proportionality review statute, implicit directions in the selection of the pool of cases for the proportionality review are made in the Missouri statute requiring the compilation of trial reports on capital murder convictions. For purposes of determining the "validity of the sentence," Missouri state statute requires that the Supreme Court "accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed after May 26, 1977, or such earlier date as

48. The South Carolina statute is also similar to Georgia's. *See* Paternoster & Kazyaka, *supra* note 1.

49. MO. REV. STAT. § 565.035.03 (1986).

50. State v. Wilkins, 736 S.W.2d 409 (Mo. 1987) (en banc).

51. Suni, *supra* note 28, at 465.

the court may deem appropriate."[52] This statute ensures that the Supreme Court has data from both death and life sentenced capital cases. As of 1992 the Court has data on 366 cases resulting in capital murder convictions. The Court has collected data on 200 capital murder cases where the case proceeded to penalty trial. One hundred (100) resulted in a death penalty.[53]

Without this statutory requirement the Supreme Court would have only trial transcripts of the appealed death sentence cases, and would not have trial transcripts for many of the appealed life sentence cases. Life sentenced cases are subject to appeal first to the intermediate level of appellate courts. The appellate jurisdiction of the Court of Appeals extends to all cases except those within the exclusive jurisdiction of the Supreme Court.[54] The Supreme Court has exclusive jurisdiction in all cases where the punishment imposed is death.[55] Arguably the broad requirement of record collection for the Supreme Court's review requires that all capital cases where sentence was imposed either by plea agreement or through a penalty trial, appealed or not, be considered for identifying the pool of similar cases. The pool would be limited to first degree murder[56] convictions since this is the only crime for which sentences of death or life without parole are possible.

Despite this implicit guidance, the Missouri Supreme Court has limited the universe of potentially similar cases to those that resulted in either a life or death sentence,[57] but only if they advanced to a penalty trial[58] and have been appealed.[59] Consequently, cases where the death penalty was waived are not considered. The pool is further limited by the court's exclusion of cases where the jury could not reach a recommendation on a

52. MO. REV. STAT. § 565.035.6 (Supp. 1986).

53. *See* Jonathon R. Sorensen & Donald H. Wallace, An Assessment of Missouri's Comparative Review in Capital Cases Using the Barnett Scale, Paper Presented at the Academy of Criminal Justice Sciences Annual Meeting, Kansas City, MO (1993).

54. MO. CONST. art. V, § 3.

55. MO. CONST. art. V, § 3; MO. REV. STAT. §§ 565.035.1, 565.035.7 (1986).

56. MO. REV. STAT. § 565.020.2 (Supp. 1990).

57. In Missouri the defendant is entitled to be sentenced by jury, though the sentencer may be a jury or a judge. A defendant can waive sentencing by a jury and choose to be sentenced by the judge; or if a jury is unable to agree on the sentence, the judge may declare the punishment as death or life imprisonment. MO. REV. STAT. § 565.030.4 (1986); *see* State v. Griffin, 756 S.W.2d 475 (Mo. 1988) (en banc).

58. State v. Sloan, 756 S.W.2d 503 (Mo. 1988) (en banc).

59. State v. Battle, 661 S.W.2d 487, 495 (Mo. 1983) (en banc).

sentence and the judge exclusively decided the sentence.[60] Thus, only those cases are included in the pool where a jury was confronted with the choice between death and life imprisonment and exercised that choice.[61]

The limitations on pool inclusion of cases removes cases involving the leniency of juries and prosecutors.[62] The smaller pool will result in a greater proportion of those defendants eventually sentenced to death than if the pool had not been so reduced by the limitations imposed by the Missouri Supreme Court.[63] Thus, the probability is created of a greater likelihood of a finding of proportionateness.

The Court has collected data on 173 capital murder cases where punishment was decided by a jury. Ninety-three (93) resulted in a death penalty and in 80 cases the jury chose a life sentence.[64]

2. Selection Of Cases For Comparison

The Missouri Supreme Court has ample information regarding the underlying circumstances that provided the basis of the sentence in a reported case. The trial judge reports required to be collected by the Missouri Supreme Court contain information on all aggravating and mitigating factors submitted to the jury and those aggravating factors that were certified by the jury. Evidence of non-statutory aggravating and mitigating circumstances is also listed in these reports. Data concerning the defendant, the trial, the offense, and representation of the defendant are provided in these reports. The trial judge is given the opportunity to comment on the appropriateness of the sentence imposed in the case. Despite the abundance of information available to the Court, according to one observer,[65] the Missouri Supreme Court tends to select its cases for its comparison largely on the singular basis of a common aggravating factor certified by the jury. By confining its attention solely to the aggravating factors the court excludes the examination of many nonstatutory circumstances which a jury is permitted to consider after the finding of an aggravating factor (where a defendant is sentenced to death).

60. State v. Byrd, 676 S.W.2d 494, 507 (Mo. 1984) (en banc).
61. State v. Zeitvogel, 707 S.W.2d 365, 370 (Mo. 1986) (en banc).
62. *See supra* text accompanying note 34.
63. *See infra* note 105 and accompanying text.
64. *See* Sorensen & Wallace, *supra* note 53.
65. Ellen Y. Suni, *Capital Punishment in Missouri: Recent Developments in the Interpretation and Administration of the Death Penalty*, 58 UMKC L. REV. 523, 566 (1990).

3. Methods of Comparison

Case law in Missouri does not suggest a clear characterization of the methodology used by the Supreme Court in its reviews. According to Suni[66] a strict precedent-seeking approach at times is used where the court looks to see whether a prior case exists in which a jury imposed a death sentence in similar circumstances. Thus, an examination of Missouri cases can reveal which of the "reasonableness," "precedent-seeking," or "frequency" approaches is used predominantly by the Court in its review.

B. *Examination Of Missouri's Procedures*

The cases under consideration in this article are cases where a death penalty was appealed to the Missouri Supreme Court during the years 1981 through 1991. The following table summarizes the number of cases cited in the court's review of a sentence and whether the cited cases were life or death sentenced. It also details the number of citations made of a case in later reviews. The court's finding of the basis of the sentence for selection of the cases for the comparison and the type of review are also presented.

TABLE 1. SUMMARY OF ANALYSES OF MISSOURI SUPREME COURT'S PROPORTIONALITY REVIEW METHODS

Defendant	Year of appeal decision	Method of comparison	Method of selection of comparable cases	# of cases cited in review			# of later reviews citing this case
				Total	Life	Death	
Amrine	1987	P	AGG	3	0	3	3
Antwine	1987	P	AGG	9	0	9	3
Baker, R.	1982	P	AGG	2	2	0	1
Bannister	1984	R	NOBAS	4	0	4	3
Battle	1983	R	CAT	0	0	0	16
Blair	1982	R	CAT/NOBAS	1	0	1	16
Bolder	1982	R	CAT	0	0	0	13
Boliek	1986	P	AGG	3	0	3	2
Byrd	1984	P	AGG	4	0	4	7
Chambers	1986	P	AGG	4	0	4	0
Cleemons	1988	P	AGG	7	0	7	2
Davis	1991	P	AGG	11	0	11	0
Driscoll	1986	P	AGG	6	0	6	6
Feltrop	1991	R	NOBAS	4	0	4	0
Foster	1985	P	AGG	4	0	4	7
Gilmore	1985	R	NOBAS	4	0	4	1
Gilmore	1983	P	AGG	4	0	4	12
Gilmore	1984	P	AGG	1	0	1	5
Griffin, L	1983	R	CAT	0	0	0	1
Griffin, M	1988	P	AGG	5	0	5	2
Grubbs	1987	R	NOBAS	4	0	4	5
Guinan-I	1985	P&P+	AGG	2	0	2	9
Guinan-II	1987	P	AGG	9	0	9	4
Johns	1984	P&P+	AGG	5	1	4	9
Jones, M	1986	R	NOBAS	3	0	3	3
Jones, W	1988	P	AGG	11	3	8	2

66. Suni, *supra* note 28.

TABLE 1 (CONTINUED)

Defendant	Year of appeal decision	Method of comparison	Method of selection of comparable cases	# of cases cited in review Total	Life	Death	# of later reviews citing this case
Kenley	1985	P	AGG	4	0	4	2
Kilgore	1989	P	AGG	10	0	10	3
Larette	1983	R	NOBAS	1	0	1	11
Lashley	1984	P	AGG	3	0	3	11
Laws	1983	P	AGG	2	0	2	8
Leisure, D	1988	P&P+	AGG	10	0	10	1
Lingar	1987	P	AGG	11	0	11	2
Mallett	1987	P&P+	AGG	12	7	5	2
Malone	1985	R	NOBAS	3	0	3	3
Mathenia	1986	P	AGG	7	0	7	4
McDonald	1983	R	CAT/NOBAS	1	0	1	15
McIlvoy	1982	R&P+	CAT/CO-DEF	1	1	0	7
McMillin	1990	P	AGG	8	0	8	1
Mercer	1981	R	CAT	0	0	0	7
Murray	1988	P	AGG	5	0	5	4
Nave	1985	P	AGG	5	0	5	1
Newlon	1982	R	CAT	0	0	0	17
Oneal	1986	P	AGG	7	0	7	6
Oxford	1990	P	AGG	10	0	10	0
Parkus	1988	P&P+	AGG	10	0	10	1
Pollard	1987	P	AGG	6	1	5	7
Powell	1990	P	AGG	8	0	8	1
Preston	1984	P+	AGG	15	7	8	5
Reese	1990	P	AGG	4	0	4	0
Roberts	1986	P	AGG	10	1	9	10
Rodden	1987	P	AGG	12	0	12	4
Sandles	1987	P	AGG	4	0	4	0
Schlup	1987	P	AGG	8	0	8	6
Schneider	1987	R	NOBAS	4	0	4	0
Shaw	1982	R&P+	CAT/AGG	3	2	1	12
Sidebottom	1988	P	AGG	10	0	10	1
Six	1991	P	AGG	4	0	4	0
Sloan	1988	P&P+	AGG	14	1	13	0
Smith, S	1989	P	AGG	10	0	10	0
Smith-I	1983	R	CAT	0	0	0	9
Smith-II	1988	P	AGG	13	0	13	2
Stokes	1982	R	CAT/NOBAS	2	0	2	11
Sweet	1990	P	AGG	4	0	4	0
Trimble	1982	R	CAT/NOBAS	2	0	2	9
Walls	1988	P	AGG	11	0	11	4
Wilkins	1987	P&P+	AGG	9	2	7	5
Williams	1983	P	AGG	1	0	1	2
Young	1985	P+	AGG	6	3	3	4
Zeitvogel	1986	P&P+	AGG	11	4	7	9
Mean				5.6	0.5	5.1	4.8

Key: Method of comparison:
R: reasonableness approach
P: precedent-seeking approach
P+: detailed precedent-seeking approach

Method of selection of cases:
CAT: catalog of cases
NOBAS: identified cases without basis
AGG: aggravating factor
CO-DEF: Co-defendant's case

1. Selection Of Cases For Comparison

a. "Cataloging" Prior Cases

In several of the earlier cases the court deemed its task in selecting cases for comparison as one of referencing all prior capital cases. For example in *State v. Battle* the Court stated that it had "reviewed the capital cases in which death and life imprisonment have been submitted to the jury . . . in which the jury

agreed on punishment and which have been ruled on appeal."[67] In a footnote the court listed all of these cases and concluded that the defendant's death sentence "is not excessive or disproportionate to the penalty imposed in similar cases."[68] In other instances the Court notes only that it has reviewed the prior cases, but does not even list them by name. In *State v. Griffin*[69] the court after making this type of statement simply concluded that these cases "do not point to excessiveness or disproportionality in the sentence in this case."[70]

In these cases where the Court has explicitly or implicitly cataloged all prior cases in the review, no basis is provided by the Court to determine which cases it deemed were similar. The Court in these cases is not relating its methodology of how it establishes the class of similar cases, or whether it even has a methodology. As the concurring opinion in *State v. Smith*[71] observed: "All an observer learns from this is that to the values of the court there is nothing wrong with the death sentence here."[72]

In these instances where the Court has made an explicit or implicit catalog of all prior cases eligible for consideration in the review these are identified by "CAT" in Table 1 in the column on Selection of Comparable Cases. Twelve reviews used this method of selection of comparable cases. Six of these used this method

67. State v. Battle, 661 S.W.2d 487, 495 (Mo. 1983) (en banc).

68. *Id.* at 495 n.8 (Mo. 1983) (en banc). *See also* State v. Blair, 638 S.W.2d 739, 759 (Mo. 1982) (en banc), *cert. denied*, 459 U.S. 1188 (1983); State v. Bolder, 635 S.W.2d 673 (Mo. 1982) (en banc), *cert. denied*, 459 U.S. 1137 (1983); State v. McIlvoy, 629 S.W.2d 333, 341 (Mo. 1982) (en banc); State v. Mercer, 618 S.W.2d 1 (Mo. 1981) (en banc), *cert. denied*, 454 U.S. 933 (1931); State v. Newlon, 627 S.W.2d 606, 623 (Mo. 1982) (en banc), *cert. denied*, 459 U.S. 884 (1982); State v. Shaw, 636 S.W.2d 667, 676 (Mo. 1982) (the Court noted all prior cases, but explicitly identified several as similar) (en banc), *cert. denied*, 459 U.S. 928 (1982); State v. Trimble, 638 S.W.2d 726, 738 (Mo. 1982) (the Court noted all prior cases, but explicitly identified two as similar) (en banc), *cert. denied*, 459 U.S. 1188 (1983); State v. Stokes, 638 S.W.2d at 715 (Mo. 1982) (the Court stated that it had "surveyed, again" the cases indicated in *Shaw* without indicating whether it was referring to the catalog of cases made in *Shaw* or just those specifically identified as being similar) (en banc), *cert. denied*, 460 U.S. 1017 (1983).

69. State v. Griffin, 662 S.W.2d 854 (Mo. 1983) (en banc).

70. State v. Griffin, 662 S.W.2d 854, 860 (Mo. 1988) (en banc). In State v. Smith, 649 S.W.2d 417 (Mo. 1983) (en banc), the Court stated that it had "reviewed the records of the twenty-two capital cases in which death and life imprisonment have been submitted to the jury" and noted that "sentence of death is not disproportionate to the penalty imposed in similar cases" without indicating the names of any of these cases. *Id.* at 434-35.

71. State v. Smith, 649 S.W.2d 417 (Mo. 1983) (en banc).

72. *Id.* at 435 (Mo. 1983) (en banc) (Seiler, J., concurring).

exclusively. In Table 1 the number of cases identified as being similar reflects this cataloging technique. Where the Court merely catalogs prior decided cases, Table 1 lists the Number Of Cases Cited In Review as zero, "0." If other cases are specifically identified by the Court as similar these will be counted in Table 1.

This cataloging method of selecting the cases for review from the eligible pool of cases will dictate the method of comparison used by the court. Where an explicit or an implicit catalog of all cases is made this would likely fit within the definition of the "reasonableness" approach identified by Baldus, Pulaski, and Woodworth.[73] This is indicated in Table 1 by an "R" in the column describing the Method of Comparison. Where an additional letter appears in this column this indicates the Method of Comparison for specifically identified cases that were included with the cataloged list of cases.

b. Cases Identified Without Basis

The Court has selected cases for comparison without indicating the basis of similarity. Usually the court will note that these identified cases "comport with affirmance of the death penalty in this case."[74] This method of selection of comparative cases will be indicated in Table 1 in the column on the Selection of Comparable Cases with a "NOBAS." Ten cases were identified which used this method of selecting comparable cases; eight of these used this method exclusively.

It will be assumed that the court utilized the "reasonableness" approach identified by Baldus, Pulaski, and Woodworth.[75] This is identified in Table 1 by an "R" in the column describing the Method of Comparison.

c. Aggravating Factor

The majority of the Missouri Supreme Court reviews relied upon a certified aggravating factor to find similar cases for the comparison. Frequently the bare aggravating factor itself is the only means used to identify similar cases. For example in *State v. Amrine*[76] it was found that the defendant as an inmate committed capital murder of a fellow inmate. The Court indicated that in "reviewing prior cases involving death sentences imposed for murders committed within correctional institutions, we have

73. Baldus et al., *supra* note 39, at 668.
74. State v. Bannister, 680 S.W.2d 141, 149 (Mo. 1984) (en banc).
75. Baldus et al., *supra* note 39, at 668.
76. State v. Amrine, 741 S.W.2d 665 (Mo. 1987) (en banc).

found the sentence to be neither disproportionate or excessive."[77] The Court then identified three cases where a prison killing was identified as the aggravating factor.

This method of selecting similar cases is indicated in Table 1 with "AGG" in the column dealing with the Selection of Comparable Cases. Fifty-one cases were identified using this method of selecting cases, fifty of these used this method exclusively. This limited means of identifying similar cases usually leads to a precedent-seeking approach for the Method of Comparison and this is indicated on Table 1 with a "P" in this column.

A more detailed precedent-seeking approach has been utilized.[78] This approach involves more than the bare precedent-seeking approach identified by Baldus *et al.*[79] A comparison of the factors of the crime, evidence, and the defendant with other cases is made. This detailed precedent-seeking approach differs from the frequency approach identified by Baldus *et al.*[80] because it does not involve an estimation of the number of death sentences imposed in the identified pool. An example of this approach is *State v. Mallett.*[81] Here the Court distinguished the similar life sentenced cases by assessing the various factors involving the crime and the defendant. This approach is frequently found where life sentenced cases are involved in the review. This more detailed precedent-seeking approach is indicated on Table 1 with a "P+" in the column defining the Method of Comparison.

d. Co-Defendant's Case

In only one case has the Missouri Supreme Court determined that a death sentence was disproportionate. In *State v. McIlvoy*[82] the court made reference to the names of all capital cases eligible for proportionality review. However, the court appears to have made its decision on the basis of the co-defendant's life sentence and of the defendant being "but a weakling [mentally and educationally deficient] and follower in executing the murder scheme perpetrated by [the co-defendant.]"[83] Thus, in the one case reversed because of disproportionality, the Court's task was simplified by the comparison to the co-defend-

77. *Id.* at 676.
78. Suni, *supra* note 28.
79. Baldus et al., *supra* note 39, at 668.
80. *Id.*
81. State v. Mallett, 732 S.W.2d 527 (Mo. 1987) (en banc).
82. State v. McIlvoy, 629 S.W.2d 333 (Mo. 1982) (en banc).
83. *Id.* at 341.

ant.[84] This intra-case proportionality comparison does not provide much assistance to defendants who acted without a co-defendant in their crimes, nor much guidance to the Missouri Supreme Court in reviews involving these latter defendants. This method of selection of the case is noted as "CO-DEF" in Table 1.

2. Methods of Comparison

In twenty cases the Court used a reasonableness approach in its review. In two of these, this was combined with a detailed precedent-seeking approach. In 48 cases the Court used a strict precedent-seeking approach. This was combined with a more detailed precedent-seeking approach in eight of the 48 cases identified. In twelve cases the Court used a detailed precedent-seeking approach. This approach was combined with other approaches in ten of these twelve cases.

In none of these cases did the Court use the frequency approach. Some cases implemented a review involving a number of cases. The review using the most prior cases in its review was *State v. Preston* with[85] 15. Seventeen cases used ten or more cases in its review. All of these cases identified a common aggravating factor as the method of selecting comparable cases. All of these cases using ten or more decisions in their review used the precedent-seeking method of review; six included a detailed precedent-seeking approach. Forty-one cases used 5 or fewer cases in their reviews. Six referred to no individual case. The average number of cases cited in the reviews was 5.6 (5.1 death- and 0.5 life-sentenced cases).

Twenty-two reviews used a common aggravating factor as a method of selecting similar cases. Twenty-three used a precedent-seeking approach, some combined with another approach, in their reviews. Twenty used a reasonableness approach in their reviews, some combined with another.

The case most frequently cited in later cases is *State v. Newlon.*[86] This case has been cited 17 times. Eleven cases have been cited 10 or more times; 29 (less than half the cases reviewed) have been cited 5 or more times in later cases.

---

84. Were the Missouri Supreme Court faced with the *McIlvoy* review today, it is questionable whether the court would decide the case the same way, observed Judge Billings, concurring in State v. Bibb, 702 S.W.2d 462, 466 (Mo. 1985) (en banc). *See* Suni, *supra* note 28.

85. State v. Preston, 673 S.W.2d 1 (Mo. 1984) (en banc).

86. State v. Newlon, 627 S.W.2d 606 (Mo. 1982) (en banc).

3. Life Sentenced Cases In Reviews

A second table is presented which examines the 32 life sentence cases the Missouri Supreme Court referred to either specifically or explicitly cataloged in its proportionality reviews. This table details the number of times the case was cited and those cases which cited it.

The table indicates that 34 life sentenced cases have been used by the Missouri Supreme Court in 18 cases. Only 24 life cases (identified by **) were more than merely catalogued in 13 proportionality reviews (identified by *). This should be compared to the Court's access to the trial court reports of 80 jury life-sentenced and appealed cases. This represents a small portion of the available cases being utilized for the proportionality review.

Thus, a total of 13 death sentence reviews identified individual life cases. These reviews involved more than mere cataloging of all prior decided cases. All of these reviews were decided before 1989, the most recent were decided in 1988 (*State v. Jones*[87] and *State v. Sloan*[88]). Ten reviews have been decided since *Sloan* and none of these referred to any life cases, either being individually identified or even merely cataloged.

C. *Summary of Comparative Review*

In summary, this analysis of the Missouri Supreme Court's procedures shows that the pool of eligible cases for the proportionality review is severely constricted. Yet, even the pool is not used to its full extent. Rarely does the Court even refer to a life sentence case; frequently, if a life sentence case is cited it is referred to only by name without articulating a "standard by which . . . [these life cases] support the affirmance of the death penalty."[89]

The Court uses a variety of methods of selecting cases for comparison. The methods include: cataloging all prior decisions, citing identified cases without indicating the basis of similarity, and relying upon a common aggravating factor. Of these methods the last is preferable, but even this falls far short of an adequate method of selecting similar cases for the review. Even though this aggravating factor may have been certified by the jury, the threshold-approach to the sentencer's use of aggravating factors approved by the Missouri Supreme Court undercuts

87. State v. Jones, 749 S.W.2d 356 (Mo. 1988) (en banc).

88. State v. Sloan, 756 S.W.2d 503 (Mo. 1988) (en banc).

89. State v. Mercer, 618 S.W.2d 1, 21 (Mo. 1981) (en banc) (Seiler, J., dissenting).

TABLE 2. LIFE SENTENCED CASES USED IN MISSOURI SUPREME COURT PROPORTIONALITY REVIEWS

Defendant in life sentenced case	Year of life sentenced case affirmed	Cases that reviewed this case	# of times cited
Allen**	1986	Jones*	1
Bashe**	1983	Preston*	1
Baskerville**	1981	Battle, Blair, Bolder, McIlvoy, Sloan*	5
Betts**	1983	Pollard*	1
Borden	1982	Battle, Blair, Bolder, McIlvoy, Mercer, Newlon	6
Bostic**	1981	Battle, Blair, Bolder, McIlvoy, Preston*	5
Carr**	1986	Mallett*, Zeitvogel*	2
Coleman	1983	Battle	1
Davis**	1983	Baker*, Battle, Johns*, Mallett*, Shaw*	5
Downs**	1980	Battle, Bolder, McIlvoy, Mercer, Newlon, Young*	6
Emerson	1981	Battle, Blair, Bolder, McIlvoy	4
Engleman	1982	Blair, Battle	2
Greathouse	1982	Blair, Battle, Bolder, McIlvoy	4
Hurt**	1984	Zeitvogel*	1
Jensen	1981	Battle, Blair, Bolder, McIlvoy	4
Laws**	1983	Preston*	1
Lomax**	1986	Mallett*	1
Martin	1983	Battle	1
Mitchell**	1981	Battle, Blair, Bolder, McIlvoy, Mercer, Newlon, Preston*, Wilkins*, Young*	9
Royal**	1981	Battle, Blair, Bolder, McIlvoy, Mercer, Newlon, Preston*	7
Salkil	1983	Battle	1
Sargent**	1985	Mallett*	1
Scott	1983	Battle	1
Stephens**	1984	Mallett*	1
Stewart**	1986	Zeitvogel*	1
Tate**	1987	Mallett*, Jones*	2
Thomas**	1981	Baker*, Battle, Blair, Bolder, Mallett, McIlvoy, Shaw*	7
Turner**	1981	Battle, Blair, Bolder, McIlvoy, Newlon, Preston*, Wilkins*, Young*	8
White**	1981	Roberts*	1
Williams, E	1983	Battle	1
Williams, V**	1981	Battle, Blair, Bolder, McIlvoy*, Mercer, Newlon	6
Wirth**	1986	Jones*	1
Woods**	1983	Preston*	1
Zeitvogel**	1983	Zeitvogel*	1
Mean			2.9

Key:
**: Case used in review which more than merely catalogued case
*: Review which more than merely catalogued case

this method as a basis for finding similar cases. A variety of circumstances may have led the jury to decide upon the death penalty, once it has found that the defendant was eligible for the

death penalty by certifying the aggravating factor. The Missouri Supreme Court has this information available, as it has available the statutorily required trial judge reports. Yet, no Supreme Court review is found to have expressly relied upon the trial judge report in selecting similar cases for comparison.

A variety of methods are used in the actual comparison of cases. Two methods articulated by Baldus *et al.*,[90] the reasonableness and precedent-seeking, are used in addition to a detailed precedent-seeking approach identified by Suni.[91] The detailed precedent-seeking approach is preferable. However, this is not a true comparative review, which would utilize a frequency approach. Too often with the precedent-seeking approach the Court will merely seek a prior case, usually based upon a similar aggravating factor, to justify the result.[92]

The simplicity of the frequency approach avoids the complications of the precedent-seeking method of comparison. It would require the Court to determine the frequency of life sentences within a group of identified similar cases. By determining the frequency the Court can determine whether a life sentence reflected merely a rare, isolated grant of mercy from a jury, or whether the number of life sentences suggest that the death sentence being reviewed is disproportionate. In no case did the Missouri Supreme Court use the frequency approach; instead it relies upon explanations such as that from *State v. Mallett*:[93]

> The issue when determining the proportionality of a death sentence is not whether any similar case can be found in which the jury imposed a life sentence, but rather whether the death sentence is excessive or disproportionate in light of 'similar cases' as a whole.[94]

While the first part of this statement cannot be argued with, the second part seems to suggest the need to use a frequency approach to make the comparison of "similar cases as a whole." But, the Court has yet to follow its own explanation of proportionality review.

IV. THE PRECEDENT-SEEKING BASIS

The argument may be raised that the Missouri Supreme Court's methodology, despite not being a true proportionality review, still adequately identifies similar cases for its mandated

90. Baldus et al., *supra* note 39.
91. Suni, *supra* note 28.
92. Suni, *supra* note 28.
93. State v. Mallett, 732 S.W.2d 527 (Mo. 1987) (en banc).
94. *Id.* at 542 (Mo. 1987) (en banc).

review and is able to distinguish clearly proportionate and excessive cases. For if the discretion of the sentencer is controlled by a guided discretion sentencing scheme, it may be hypothesized that over an aggregate of cases consistent patterns in the use of statutorily authorized factors should appear. The Missouri Supreme Court in its precedent seeking style of proportionality review assumes this situation in its categorization of cases which are deemed not to be disproportionate because of the use of certain aggravating factors (e.g. torture or depravity of mind, multiple murders, prison killings and robbery killings). As indicated in the prior section the Missouri Supreme Court selects its cases for its comparison largely on the basis of a particular certified aggravating factor. For example, the Court in several cases has held that murders where the aggravating factor (involving torture or depravity of mind and thus outrageous, wantonly vile, horrible or inhuman) is found, have consistently resulted in the death penalty.[95] The Court has cited the aggravating factor of being a multiple murderer as meriting justification of the death sentence.[96] Where the murderer killed while in a place of lawful confinement, the Court has observed that it has consistently found death sentences not to be disproportionate.[97] For indiscriminant murders occurring during the course of a robbery, the Court has stated it has repeatedly affirmed death sentences in such cases as not being disproportionate.[98] From these categorizations it can be concluded that where common aggravating factors are identified in prior cases and in the case under review the Court will not find the death sentence to be disproportionate.[99]

The Missouri Supreme Court uses the same method of seeking a precedent among similar death sentences when the Court turns its attention to the importance of the presence of a mitigating factor. The Court's proportionality review appears to be a matter of demonstrating that the presence of certain mitigating factors has not precluded the death penalty in prior cases.[100] The Court has observed that death sentences have been affirmed where defendants have alleged their participation in the crime

95. *See* State v. Leisure, 749 S.W.2d 366 (Mo. 1988) (en banc) (citing cases); State v. Antwine, 743 S.W.2d 51 (Mo. 1987) (en banc).

96. *See* State v. Rodden, 728 S.W.2d 212 (Mo. 1987) (en banc) (citing cases).

97. *See* State v. Clemmons, 753 S.W.2d 901 (Mo. 1988) (en banc); State v. Schlup, 724 S.W.2d 236 (Mo. 1987) (en banc).

98. *See* State v. Griffin, 756 S.W.2d 475 (Mo. 1988) (en banc); State v. Murray, 744 S.W.2d 762 (Mo. 1988) (en banc); State v. Pollard, 735 S.W.2d 345 (Mo. 1987) (en banc).

99. Suni, *supra* note 65.

100. *Id.*

was minor.[101] The Court has on several occasions pointed out that despite a petitioner's allegation of young age, defendants of young ages have had death sentences affirmed.[102] Where defendants have lacked a history of assaultive convictions, the Court has noted that death sentences have still been affirmed.[103] The Court has observed that death sentences have been upheld in cases where evidence was presented to show the defendant's diminished capacity.[104]

A. *Testing the Precedent-Seeking Basis*

This part of the article presents an empirical analysis of the Missouri Supreme Court's assumptions regarding the adequacy of the methods used in its proportionality reviews. Missouri case law raises empirical questions regarding the adequacy of its precedent-seeking method of proportionality review and its identification of categories of nondisproportionate death sentences. The analysis in this part of the article examines the sentences in Missouri where they have advanced to a penalty trial and resulted in either a life or death sentence by a jury and seeks to delineate important sentencing factors that consistently relate to the sentences. A frequency analysis is presented here of the Missouri Supreme Court's assumption that particular aggravating factors consistently result in the death penalty.

B. *Results Of Analysis Of Court's Assumptions*

Using data collected by the Missouri Supreme Court the Court's assumptions regarding its proportionality review can be tested. The data come from trial judge reports collected by the Supreme Court. As of November 1992, a total of 366 capital murder convictions were contained in these reports, 173 of which met the Supreme Court's criteria to be selected for proportionality review. These 173 cases were sentenced by a jury and resulted in either a life or death sentence and have been appealed. Excluded are all sentences which resulted from plea bargains, bench trials, and also those cases in which jurors were unable to reach a decision.[105]

---

101. State v. Walls, 744 S.W.2d 791 (Mo. 1988) (en banc) (citing cases).

102. State v. Wilkins, 736 S.W.2d 409 (Mo. 1987) (en banc) (age 16); State v. Pollard, 735 S.W.2d 345 (Mo. 1987) (en banc); State v. Lashley, 667 S.W.2d 712 (Mo. 1984) (en banc) (age 17).

103. State v. Walls, 744 S.W.2d 791 (Mo. 1988) (en banc) (citing cases).

104. State v. Lingar, 726 S.W.2d 728 (Mo. 1987) (en banc) (citing cases).

105. *See* discussion *supra* note 58 and accompanying text. While it may be more appropriate to consider all death-eligible cases among those arrested or all cases resulting in capital murder convictions, only examined here are the

With these data, a rudimentary frequency analysis can be constructed based on the factors most commonly identified by the Court in its selection of similar cases for proportionality review — aggravating circumstances.[106] In addition, since the Court also typically mentions the lack of importance of mitigating factors present in the case, these frequencies are also presented. The statutory language of these variables is located in the appendix to this article.[107] Finally, a table is constructed in order to determine if death sentencing rates are contingent upon the raw numbers of aggravating or mitigating factors, or a combination of the two. This approach is based on the statutory imperative that jurors weigh mitigating against aggravating evidence in the punishment decision and the aggregation of the raw numbers of factors allows for some comparison on this basis of net level of aggravation.

1. Death Sentencing Frequencies—Aggravating Factors

When the court's citations to life-sentenced cases in Table 2 are compared to Table 3 a much larger pool of available cases is seen to exist than is utilized by the Court. While the Court inevitably cites a list of cases resulting in death sentences with aggravating factors similar to those in the case under review, only 93 of 173 or 54% of cases decided by juries resulted in death sentences.

What Table 3 reveals is that the death-sentencing rates for cases grouped by aggravating circumstances are about 50%. Using the Baldus *et al.*[108] standard for the presumption of pro-

---

data that is readily available to the justices that are collected by statute for the purpose of proportionality review. This gives a very generous estimate of proportionality and an extremely conservative estimate of comparative excessiveness. The larger the pool of cases used in proportionality reviews, the smaller is the proportion of those eventually sentenced to death.

106. A confound may have been introduced into these analyses by the 1983 modifications of the language of some of the mitigating and aggravating factors. It is unclear to what extent later death sentences were obtained under modified statutes which would not have been obtained under the previous versions of these statutes. *See* discussion *supra* note 13.

107. It is being considered here whether a factor was instructed, not whether it was actually present or certified by a jury. This approach is used here because: 1) the trial judge is only required to give instructions on aggravating and mitigating circumstances that are supported by the evidence; 2) the trial judge report only shows which mitigating factors were instructed, not whether present or certified; and 3) while it does indicate which aggravating factors were certified by the jury, in many of the life-sentenced cases reports are not explicit about which aggravating factors were certified if any.

108. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990). A comparison can be made between

TABLE 3. DEATH SENTENCING RATES OF CONVICTED CAPITAL OFFENDERS IN PUNISHMENT TRIALS BY INSTRUCTED AGGRAVATING FACTORS

Aggravating Factors		Death sentencing rate .54 (93/173)
a.	Prior murder or serious assaultive convictions	.75 (36/48)
b.	Multiple murder or attempt	.46 (18/39)
c.	Risk of death to 2 or more in public	.55 (6/11)
d.	Money/value motive	.51 (42/83)
e.	Victim/judicial officer exercising official duty	.00 (0/1)
f.	Murder for hire	.40 (4/10)
g.	Murder vile, horrible, or inhuman	.50 (52/103)
h.	Victim/police or fireperson	.54 (7/13)
i.	Defendant was an inmate or escapee	.87 (20/23)
j.	Killing to avoid/stop an arrest	.50 (12/24)
k.	Enumerated contemporaneous felonies	.54 (13/24)
l.	Victim/witness or potential witness	.59 (13/22)
m.	Victim/correctional officer or inmate	1.00 (5/5)
n.	Murder during hijacking	—
o.	Killing to conceal specified drug offenses	—
p.	Killing to prevent prosectuion for specified drug offense	.00 (0/2)
q.	Nonstatutory aggravating circumstances	.63 (50/80)

portionality of .8 or higher, the only presumptively proportionate cases involve prison killings, those cases having as aggravating factors the killings committed by inmates or escapees or killings in which the victim was a correctional officer or inmate. The only other aggravating factor which comes close to the standard of .8 involves prior murders or serious assaultive convictions. Three-quarters of those with previous murder or serious assaultive convictions are sentenced to death. The death-sentencing rates for the remainder of the categories are similar to the overall death-sentencing rate.

None of the categories of cases are presumptively excessive, given the present methodology; many are closer to the Baldus *et al.* standard of presumptive excessiveness at .35 or less than to the presumptive standard of proportionality. Basing a proportionality review on frequency analysis rather than merely citing precedents, the current practice of the Court in most cases,

these results for Missouri and the authors' observation that in 68 of the 69 death penalty cases the Georgia Supreme Court reviewed pursuant to its proportionality legislation, the sentences in most, if not all, of the similar cases, were death sentences. In almost 90% of the 68 cases analyzed:

> [E]very case identified in the court's appendix as similar to the death cases under review resulted in a death sentence. For only five of the sixty-eight cases was the death-sentencing rate among the appendix cases less than .75, and for only one case was it less than .50.

Id. at 203.

would lead to very different conclusions.[109] Based solely on aggravating factors as a measure of similarity, the odds of being sentenced to death for cases in most categories are a coin toss, about one-half.[110]

2. Death Sentencing Frequencies—Mitigating Factors

Oftentimes the Missouri Supreme Court will state that the presence of a mitigating factor does not preclude the death penalty because similarly situated defendants have been sentenced to death.[111] Again, what appears true when using the precedent-seeking approach becomes suspect when using the frequency approach. The data presented in Table 4 show that mitigating factors have little to do with the death sentencing decision.[112]

---

109. At a minimum for these cases which fall between presumptive proportionateness and presumptive excessiveness other circumstances should be examined beyond the common aggravating circumstance. For example the National Center for State Court Proportionality Review Project (Van Duizend, *supra* note 14) suggests a determination be made of the appropriate purposes of imposing capital punishment in a particular case. The U.S. Supreme Court has indicated two purposes, retribution and deterrence. If retribution is the desired purpose for a "class of murders" (such as those homicides that are particularly heinous, cruel or vile), then the "regularity of imposition becomes far less important, and the line between proportiona[teness] and excessiveness may be set so as to exclude all but the extreme cases;" if deterrence is the goal for a class of murders (such as murders committed by prisoners upon guards or other prisoners) then the penalty must be imposed sufficiently often to have some deterrent effect. Van Duizend, *supra* note 14, at 12.

110. While the seemingly acceptable rate for the Missouri Supreme Court falls far short of the standard suggested by the empirical research of Baldus et al., *supra* note 108, one jurist has suggested that the threshold frequency at which a death sentence becomes appropriate should be significantly greater than 50 percent, State v. Jeffries, 717 P.2d 722, 744 (Wash. 1986) (Utter, J., dissenting). Justice Utter of the Washington Supreme Court noted in dissent in State v. Benn, 845 P.2d 289, 332 (Wash. 1993), that another jurisdiction, the Pennsylvania Supreme Court, does look closely at the relative frequency of death sentences in a given pool of similar cases and approves death sentences as proportionate where the vast majority of defendants in similar cases also received the death penalty. Examples of these reviews by the Pennsylvania court include Commonwealth v. Smith, 513 A.2d 1371 (Pa. 1986) (finding death penalty proportionate where it was imposed in eight of nine similar cases) and Commonwealth v. Morales, 494 A.2d 367, (Pa. 1985) (finding death penalty proportionate where it was imposed in seven of seven similar cases).

111. *See supra* note 100 and accompanying text.

112. It is assumed for purposes of this study that an instruction on a mitigating factor bears some resemblance to the underlying evidence presented to the jury. Some evidence of mitigation before an instruction on mitigation is submitted is required by the Notes on the Use of the Missouri Approved Criminal Instructions: "(4) Any one or more of the eight subparagraphs on statutory mitigating circumstances will be given upon request by the defendant *if there is evidence* to support the specific mitigating circumstance or

For the most part, death-sentencing rates hover around 50%, regardless of which mitigating factors have been instructed. The most helpful mitigating factor tends to be the lack of a significant prior record, with a death-sentencing rate of .38 in cases where this mitigating factor is instructed. The presence of nonstatutory mitigating circumstances,[113] usually surrounding the stability of a defendant's home life, employment history, or standing in the community, also appears to lower the odds of being sentenced to death. Some counterintuitive findings include slightly higher rates of death sentencing among defendants who acted under duress or lacked substantial mental capacity.[114]

---

circumstances requested." MAI-CR 3d § 313.44, Notes on Use (emphasis added).

This assumption of underlying evidence may not be entirely warranted, as judges may give suggested instructions when there is actually little supporting evidence to avoid appellate reversal, or out of some attempt to show some deference to the defendant. The Missouri Supreme Court has recognized this possibility where it observed that the trial court in State v. Johns appeared to have "prudently submitted any mitigating circumstance that had any basis, however tenuous." State v. Johns, 679 S.W.2d 253, 268 (Mo. 1984) (en banc).

It might seem that judges are exercising more care with instructions upon aggravating circumstances in assuring there is adequate underlying evidence to submit an aggravating circumstance to the jury for its consideration. This caution in submitting aggravating factors is largely for the same reasons (deference for the defendant, and a desire to avoid appellate reversal) a judge may be encouraged to more generously submit instructions on mitigating factors. *See, e.g.*, State v. Stokes, 638 S.W.2d 715 (Mo. 1982) (en banc).

However, a lack of supporting evidence for a mitigating factor instruction is probably not the norm as the data shows instances where trial judges refuse to instruct on mitigating factors despite the claims of some supporting evidence. *See, e.g.*, trial court reports submitted pursuant to MO. REV. STAT § 565.035.6 (Supp. 1986) for State v. Lashley, 667 S.W.2d 712 (Mo. 1984) (en banc), and State v. Shaw, 636 S.W.2d 667 (Mo. 1982) (en banc).

113. Instructions regarding specific statutory mitigating factors are permitted. Missouri law does not allow an instruction for jurors to consider specific nonstatutory mitigating evidence. They may be instructed in a general manner to consider any circumstance which is found from the evidence in mitigation of punishment. State v. Smith, 756 S.W.2d 493 (Mo. 1988) (en banc).

114. Research in other jurisdictions has found that some factors listed as mitigative, such as mental or emotional disturbance, may be viewed as aggravative by the sentencer because of its perceived association with dangerousness. E.F. Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291 (1989). There could be several reasons for this counterintuitive result. An instruction on this factor may dehumanize the convicted defendant in the eyes of the sentencer. *See* Penry v. Lynaugh, 492 U.S. 302 (1989). A further explanation may be that although an instruction on this factor is given, the underlying evidence is not well presented. This may be due to inadequate investigation by the defense or lack of expert testimony.

TABLE 4. DEATH SENTENCING RATES OF CONVICTED CAPITAL OFFENDERS IN PUNISHMENT TRIALS BY INSTRUCTED MITIGATING FACTORS

Mitigating Factors		Death sentencing rate .54 (93/173)
a.	Lacks significant prior record	.38 (30/78)
b.	Influenced by extreme mental or emotional distrubance	.58 (35/60)
c.	Victim precipitation or consent	.50 (5/10)
d.	Defendant was a only minor participant	.49 (20/41)
c.	Defendant acted under duress or domination of another	.62 (21/34)
f.	Lacked substantial capacity to appreciate/conform conduct	.62 (32/52)
g.	Defendant's age	.48 (47/98)
h.	Nonstatutory mitigating circumstances	.43 (27/63)

3. Aggregated Aggravating and Mitigating Factors

Rather than specific aggravating and mitigating factors, death sentences may be related to the aggregate number of aggravating and mitigating factors.[115] This possibility is considered in Table 5. The number of aggravating factors does appear to make a difference. In cases with only one aggravating factor instructed, two-fifths are sentenced to death as compared to

115. As the importance or weight of just one factor may outweigh a multitude of factors that are presented by the opposing side, it would be incorrect to assume that the presentation of more mitigating factors than aggravating factors will always result in a life sentence. The Missouri Supreme Court has cautioned that consideration of the factors in the sentencing determination is not supposed to be a "tallying" process. State v. Wilkins, 736 S.W.2d 409, 415 (Mo. 1987) (en banc).

Despite this cautionary statement, the Missouri Supreme Court seems to have been influenced by the mere number of aggravating and mitigating factors presented in its review of death sentences. The Court has on occasion referred to the number of factors instructed upon in assessing the strength of one side's case. By statute the Missouri Supreme Court is required to examine whether a sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor. Mo. Rev. Stat. § 565.035.3(1) (1984). The Court has in several cases found a lack of arbitrariness in the sentence by referring to the multiple number of aggravating factors certified by the jury. In State v. Schneider, 736 S.W.2d 392 (Mo. 1987) (en banc), the Court referred to three statutory and six nonstatutory factors that were certified by the jury; in State v. Laws, 661 S.W.2d 526 (Mo. 1983) (en banc), State v. Blair 638 S.W.2d 739, 746 (Mo. 1982) (en banc), and State v. Driscoll, 711 S.W.2d 512 (Mo. 1986) (en banc), three aggravating factors were certified by the jury; and, in State v. Foster, 700 S.W.2d 440 (Mo. 1982) (en banc), four statutory factors were certified by the jury. The Court has also contrasted the number of aggravating factors with the number or lack of mitigating circumstances submitted by the defendant. In State v. Amrine, 741 S.W.2d 665 (Mo. 1987) (en banc), three statutory and six nonstatutory factors were compared to the dearth of mitigating factors submitted to jury.

about three-fifths of those with two or more.[116] The only anomaly is the lower rate among cases with five or more aggravating factors, but this finding should be considered cautiously given the small number of cases.[117] There seems to be no pattern in death-sentencing rates by the number of mitigating factors, other than cases involving either two or five, which have the lowest rates.

Due to the small number of cases in the cells of Table 5 it is difficult to ascertain the simultaneous effects of aggravating and mitigating factors. However, death sentences could be expected to be most common when aggravating factors outnumber mitigating factors, and lower when mitigating outnumber aggravating. To test this possibility, a diagonal box is drawn in Table 5 and those cases above the box (mitigating outnumber aggravating), within the box (aggravating and mitigating equal), and below the box (mitigating outnumber the aggravating) are compared. Overall, the pattern of death sentencing does support such a relationship. Cases above the box result in death sentences at a rate of .47 (27/57) compared to those in the box at .51 (19/37) and those below at .59 (47/79). However, the variation within these categories is broad, as can be seen in Table 5. Given these data, it would be incorrect to say that in cases in

116. The likelihood that the number of aggravating factors instructed upon may reflect the aggravative qualities of a capital case is increased by the incentives under which the prosecution operates. The prosecutor has an incentive to request as many instructions on aggravating factors as are permitted to reduce the likelihood of having the sentence reversed on appeal, particularly if an appellate court finds insufficient supporting evidence for one of the aggravating factors found by the jury. Zant v. Stephens, 462 U.S. 862 (1983), held that an appellate invalidation of one aggravating circumstance does not require reversal if other valid aggravating factors were sufficient to support a death sentence.

117. Despite these findings there is the likelihood that the number of mitigating factors instructed upon could reflect the mitigative qualities of the case. The defense also has an incentive to have instructed as many mitigating factors as possible to allow a jury wide opportunity to give the lesser sentence. It is assumed for purposes of this study that the number of mitigating factors bears some resemblance to the underlying evidence presented to the jury. That is, trial judges will not give an instruction on a mitigating factor unless there was some submissible evidence to justify this instruction. The notes on the use of the Missouri Approved Criminal Instructions require that there be some evidence of mitigation before an instruction on mitigation is submitted. In the Notes on Use of the Missouri Approved Instructions—Criminal, it is stated that: "Any one or more of the eight subparagraphs on statutory mitigating circumstances will be given upon request by the defendant *if there is evidence* to support the specific mitigating circumstance or circumstances requested." MAI-CR 3d § 313.44(4), Notes on Use (emphasis added).

TABLE 5. DEATH SENTENCING RATES OF CONVICTED CAPITAL OFFENDERS IN PUNISHMENT TRIALS BY THE NUMBER OF INSTRUCTED AGGRAVATING AND MITIGATING FACTORS

Number of Aggravating Factors	Number of Mitigating Factors						
	0	1	2	3	4	5+	Total
1	.43 (3/7)	.71 (5/7)	.10 (1/10)	.31 (4/13)	.80 (4/5)	.33 (1/3)	.40 (18/45)
2	.50 (3/6)	.69 (9/13)	.45 (9/20)	.71 (10/14)	.67 (2/3)	.60 (3/5)	.59 (36/61)
3	1.0 (5/5)	.60 (6/10)	.50 (6/12)	.67 (4/6)	.67 (2/3)	.00 (0/1)	.62 (23/37)
4	.50 (1/2)	.60 (3/5)	.80 (4/5)	.71 (5/7)	.25 (1/4)	—	.61 (14/23)
5+	1.0 (1/1)	—	.25 (1/4)	.00 (0/2)	—	—	.29 (2/7)
Total	.62 (13/21)	.66 (23/35)	.41 (21/51)	.55 (23/42)	.60 (9/15)	.44 (4/9)	.54 (93/173)

which the aggravating outnumber the mitigating factors death sentences are presumptively proportionate.

V. CONCLUSION

The results of this research indicate that the Missouri Court's methods for proportionality review are inappropriate for the needs of the task. As has been stated[118] about the proportionality review conducted by another jurisdiction:

> "This is not proportionality review as mandated by the capital statute . . . but a process of legally rationalizing trial court decisions to impose death as punishment, regardless of proportionality or excessiveness relative to the sentences in similar cases."

118. William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1094 (1983).

The Missouri Supreme Court itself has suggested that the requirements of proportionality are not to be taken seriously.[119] In *State v. Jones*[120] the Court ruled that only "relative proportionality" is required. "A death sentence does not have to be set aside simply because the jury decreed life imprisonment in what might seem to be a more aggravated case."[121] The observations of a dissenting Supreme Court judge in one Missouri case are applicable to the Missouri proportionality review process as a whole. The process "does not . . . demonstrate that the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases."[122] Frequently the Court will dispose of this aspect of an appeal "with a single sentence at the close of the opinion, stating the conclusion that the penalty imposed is not excessive or disproportionate and citing, without elaboration,"[123] at most a few cases.

The Court relies upon a small sub-sample of death cases[124] and has come to rely exclusively upon death cases.[125] Without using a frequency approach, there is no way for the Court to indicate what degree of relativity it desires for the statutory proportionality requirement.

The analyses employed to test the assumptions of the Missouri Supreme Court[126] constitute but the roughest frequency approach possible. Yet, if the Missouri Supreme Court were to have completed even this simple analysis, its conclusions in many cases would have been vastly different. Its presumption of proportionality generally rests on a selective list of precedents. Whereas, if all cases with similar aggravating and mitigating circumstances were consulted in a case under review, the proportion of cited cases sentenced to death would average about one-half. The only exception would probably be in the cases of prison killings. With such figures, it would be difficult to claim proportionality.

Significant improvements could be made in the Missouri Supreme Court's procedures on proportionality review with little effort. Suggestions for improvements have been made in this

119. *See* State v. Jones, 749 S.W.2d 356 (Mo. 1988) (en banc); State v. Mallett, 732 S.W.2d 527 (Mo. 1987) (en banc).

120. State v. Jones, 749 S.W.2d 356, 366 (Mo. 1988) (en banc).

121. *Id.* at 366.

122. State v. LaRette, 648 S.W.2d 96, 107 (Mo. 1983) (en banc) (Seiler, J., dissenting in part).

123. *Id.* at 108.

124. *See supra* Table I.

125. *See supra* Table II.

126. *See supra* Tables III, IV and V.

article.[127] Importantly, the comparison cases should be drawn from a much larger pool from the earlier stages of the arrest, charging or indictment. Since more life cases would be included in the review[128] such a procedure would be more effective at identifying presumptively proportionate and presumptively excessive cases. Such an approach would likely lead to a large number of cases in which the imposition of the death penalty is obviously disproportionate or at the least questionable.[129]

A more effective means of testing for proportionality would be to perform a Baldus-style analysis in which cases are grouped by the level of seriousness. Factors including the blameworthiness of the defendant and seriousness of the case could be included.[130] While such an approach is beyond the scope of the current article,[131] even using the Missouri Supreme Court's methods in choosing the pool of eligible cases and in selecting comparable cases, the simple frequency analyses presented herein do not show the vast majority of death penalty cases to be either presumptively proportionate or excessive. Only more extensive analyses based on the seriousness of the cases would provide sufficient evidence of proportionality.[132]

The Missouri Supreme Court has the "time and the means by which to compare cases and then articulate why or what it is

---

127. *See* Bentele, *supra* note 33 (criticism of threshold function interpretation of aggravating factors); Suni, *supra* note 65 (suggestion for greater use of available information in sentencing review); Van Duizend, *supra* note 109 (suggestions for review of cases falling between levels of presumed proportionateness and excessiveness).

128. *See* discussion *supra* in note 105.

129. The recommendation of the National Center for State Court Proportionality Review Project was to have the pool of cases include all cases in which the criminal charge included a death eligible offense and homicide conviction was obtained. *See* Van Duizend, *supra* note 14, at 11.

130. The most vociferous proponent on the Washington Supreme Court of a more rigorous proportionality review has found that this approach using a multiple regression analysis to calculate a culpability score may seem overly complex and quantitative for a court not made up of statisticians. State v. Jeffries, 717 P.2d 722, 744 (Wash. 1986) (Utter, J., dissenting); accord Blake v. Zant, 513 F. Supp. 772 (S.D. Ga. 1981), State v. Williams, 301 S.E.2d 335, 355-56 (N.C. 1983).

131. The salient-features approach, described in David C. Baldus et al., *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980), may be more feasible. With this approach the reviewing court would: "(1) identify some major aggravating and mitigating factors, (2) pool all cases having those characteristics, and (3) compute the death penalty frequency within that pool." State v. Jeffries, 717 P.2d 722, 744 (Wash. 1986) (Utter, J., dissenting).

132. *See* discussion *supra* note 109.

that causes [it] to reach the end result."[133] However, the Court has not elected to use its available resources for a meaningful proportionality review process. Proportionality review as applied in this jurisdiction does little more than allow the reviewing court to justify a death sentence.

This analysis indicates an enfeebled proportionality review process. This can only exacerbate a system that is not operating to minimize the possibility of arbitrary and capricious sentencing. Where the role of aggravating factors in sentencing does not narrow the kinds of murders that may be subject to the death penalty,[134] a subsequent ineffective method of proportionality review renders a capital punishment process subject to the sentencing evils condemned in *Furman v. Georgia.*[135]

APPENDIX

Missouri Statutes on Aggravating and Mitigating Sentencing Factors

MO. REV. STAT. § 565.032.2(1) (1984): "The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions[.]"

MO. REV. STAT. § 565.032.2(2) (1984): "The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide[.]"

MO. REV. STAT. § 565.032.2(3) (1984): "The offender by his act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person[.]"

MO. REV. STAT. § 565.032.2(4) (1984): "The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another[.]"

MO. REV. STAT. § 565.032.2(5) (1984): "The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace

133. State v. LaRette, 648 S.W.2d 96, 111 (Mo. 1983) (en banc) (Seiler, J., dissenting in part).

134. *See* discussion *supra* note 13.

135. Furman v. Georgia, 408 U.S. 238 (1972).

officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty[.]"

MO. REV. STAT. § 565.032.2(6) (1984): "The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person[.]"

MO. REV. STAT. § 565.032.2(7) (1984): "The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind[.]"

MO. REV. STAT. § 565.032.2(8) (1984): "The murder in the first degree was committed against any peace officer, or fireman while engaged in performance of his official duty[.]"

MO. REV. STAT. § 565.032.2(9) (1984): "The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement[.]"

MO. REV. STAT. § 565.032.2(10) (1984): "The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another[.]"

MO. REV. STAT. § 565.032.2(11) (1989): "The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195, RSMo[.]"

MO. REV. STAT. § 565.032.2(12) (1984): "The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness[.]"

MO. REV. STAT. § 565.032.2(13) (1984): "The murdered individual was an employee of an institution or facility of the department of corrections and human resources of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility[.]"

MO. REV. STAT. § 565.032.2(14) (1984): "The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance[.]"

MO. REV. STAT. § 565.032.2(15) (1989): "The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195, RSMo[.]"

MO. REV. STAT. § 565.032.2(16) (1989): "The murder was committed for the purpose of causing or attempting to cause a per-

son to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195, RSMo."

MO. REV. STAT. § 565.032.1(3) (1984): "Any . . . aggravating circumstances otherwise authorized by law and supported by the evidence and requested by a party including any aspect of the defendant's character, the record of any prior criminal convictions, and pleas and findings of guilty and admissions of guilt of any crime or pleas of nolo contendere of the defendant[.]"

MO. REV. STAT. § 565.032.3(1) (1984): "The defendant has no significant history of prior criminal activity[.]"

MO. REV. STAT. § 565.032.3(2) (1984): "The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance[.]"

MO. REV. STAT. § 565.032.3(3) (1984): "The victim was a participant in the defendant's conduct or consented to the act[.]"

MO. REV. STAT. § 565.032.3(4) (1984): "The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor[.]"

MO. REV. STAT. § 565.032.3(5) (1984): "The defendant acted under extreme duress or under the substantial domination of another person[.]"

MO. REV. STAT. § 565.032.3(6) (1984): "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired[.]"

MO. REV. STAT. § 565.032.3(7) (1984): "The age of the defendant at the time of the crime[.]"

MO. REV. STAT. § 565.032.1(3) (1984): "Any mitigating . . . circumstances otherwise authorized by law and supported by the evidence and requested by a party including any aspect of the defendant's character . . . [.]"