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LAW SUMMARY

The Debate on Whether Life Sentences Should Be Considered: Will Missouri's Proportionality Review Remain Meaningful?

ALEXANDRA E. WILSON-SCHOONE

I. INTRODUCTION

To ensure that the imposition of death sentences is not the result of an aberrant jury, appellate courts may engage in death penalty “proportionality review” by comparing the facts of a case to prior factually similar cases.¹ If the court determines that a death sentence proves proportionate to sentences imposed in prior similar cases, the court affirms the imposition of the death penalty.² If the court determines that a death sentence is not proportionate, the court vacates the sentence. The Supreme Court of Missouri engages in statutorily-required proportionality review for every sentence of death.³ However, the specifics of how to engage in proportionality review have been, and continue to be, a point of contention for the court.

From 1981 to 1987, when determining whether the death sentence before it proved proportional to the sentences in other factually similar capital cases, the Supreme Court of Missouri considered affirmed, factually similar cases that resulted in either life imprisonment or a death sentence.⁴ The court later decided to consider only affirmed, factually similar cases that resulted in a death sentence.⁵ More recently, the court has returned to the practice of considering both factually similar cases that resulted in either life imprison-

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1. Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only “The Appearance of Justice”?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 131-32 (1996).

2. *See id.*

3. MO. REV. STAT. § 565.035 (2000).

4. *See infra* Part II.C.

5. *See infra* Part II.C.

ment or a death sentence.⁶ Therefore, since 1977, the Supreme Court of Missouri varied its approach to which category of cases must be considered.⁷

The court addressed these variations in its application of proportionality review in *State v. Deck*, leaving the question unanswered.⁸ The court split three to three on whether similar capital cases that resulted in a life sentence must be considered under Missouri's proportionality review statute, with a seventh judge concurring only in the result.⁹

This Law Summary will address the Supreme Court of Missouri's proportionality review jurisprudence,¹⁰ the rationales of two opinions in *Deck*,¹¹ and the relationship of the *Deck* opinions to precedent and public policy.¹² Additionally, this Summary will address the court's subsequent application of and debate about proportionality review as well as the legislative response.¹³ Finally, this Summary will conclude that for proportionality review to serve a meaningful function, the court must consider all affirmed, factually similar capital cases that resulted in either life imprisonment or a death sentence because only considering factually similar cases which resulted in the death penalty essentially guarantees a finding of proportionality.¹⁴

II. LEGAL BACKGROUND

First, to provide a framework for Missouri's death penalty scheme, this section will discuss the seminal death penalty decisions of the Supreme Court of the United States. Second, this section will demonstrate how the Supreme Court of the United States' favorable opinion of proportionality review impacted Missouri's legislative enactments. Third and finally, this section will examine how the Supreme Court of Missouri has interpreted and applied the proportionality review legislation in capital cases.

A. Seminal Decisions of the Supreme Court of the United States

In 1972, the Supreme Court of the United States decided the seminal case of *Furman v. Georgia*,¹⁵ in which the Court held that for a state death penalty scheme to be constitutional, the scheme must provide safeguards

6. *See infra* Part II.C.

7. *See infra* Part II.B.

8. *See State v. Deck*, 303 S.W.3d 527 (Mo. 2010) (en banc).

9. *Id.* at 553.

10. *See infra* Part II.C.

11. *See infra* Part III.A.

12. *See infra* Part IV.

13. *See infra* Part III.B.

14. *See infra* Part IV.B.

15. 408 U.S. 238 (1972) (per curiam).

against arbitrary and capricious application of the death penalty.¹⁶ The Court also suggested that all current state death penalty statutes were unconstitutional because they allowed for arbitrariness.¹⁷ As a result, state legislatures nationwide began drafting new death penalty schemes.¹⁸

Just four years later, in *Gregg v. Georgia*,¹⁹ the Court analyzed a state death penalty scheme that attempted to satisfy the requirements of *Furman*.²⁰ The new death penalty scheme required that the state supreme court “review every death sentence to determine whether . . . the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”²¹ The Court, after discussing a Georgia Supreme Court decision that vacated a death sentence and imposed life imprisonment, found that cases factually similar to the case at issue had only imposed life imprisonment.²² The Court stated:

The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.²³

Thus, the Court found that the statutorily required proportionality review served to meet the concerns of *Furman*.²⁴

In 1987, the Court decided another historically significant death penalty case in *McCleskey v. Kemp*.²⁵ The defendant in *McCleskey* argued that the

16. *See id.* at 313 (White, J., concurring) (noting that state death penalty schemes must provide a “meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”).

17. *Id.* at 310 (Stewart, J., concurring) (“[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”).

18. William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441, 464 (2011).

19. 428 U.S. 153 (1976).

20. *See id.*

21. *Id.* at 204.

22. *Id.* at 205.

23. *Id.* at 206.

24. *Id.* at 207. While the Court found that proportionality review helped to satisfy the concerns articulated in *Furman*, the Court clarified in *Pulley v. Harris* that proportionality review is not required for a death penalty scheme to be constitutional. *Pulley v. Harris*, 465 U.S. 37, 53 (1984).

imposition of the death penalty violated the Equal Protection Clause of the Fourteenth Amendment and also violated the Eighth Amendment.²⁶ Specifically, the defendant utilized the finding of the Baldus Study – that the death penalty is disproportionately imposed on black defendants who are found guilty of killing white victims²⁷ – to argue that “the State as a whole has acted with a discriminatory purpose in its death penalty cases.”²⁸

The Baldus Study, which the Supreme Court of the United States accepted as valid,²⁹ examined over 2,000 Georgia capital cases and demonstrated that defendants charged with killing a white victim received the death penalty in eleven percent of the cases whereas those charged with killing a black victim only received the death penalty in one percent of the cases.³⁰ Moreover, the study illustrated that those charged with capital murder of a white victim were 4.3 times more likely to receive a death sentence than those charged with killing black victims.³¹ Accordingly, the study concluded that black defendants who are found guilty of murdering “white victims have the greatest likelihood of receiving the death penalty” when compared to other defendant-victim racial pairings.³² While accepting the study as true, the Court did not vacate the defendant’s death sentence because the defendant’s particular case lacked evidence of racial bias.³³

B. Missouri’s Legislative Response to the Supreme Court of the United States Decisions

In 1977, just five years after the high Court’s decision in *Furman*, the Missouri legislature enacted a new death penalty scheme that required the Supreme Court of Missouri to review all death sentences.³⁴ Specifically, the statute required the court to determine:

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) Whether the evidence supports the jury’s or judge’s finding of a statutory aggravating circumstances as enumerated in section 565.012; and (3) Whether the sentence of death is excessive or disproportionate to

25. 481 U.S. 279 (1987).

26. *Id.* at 291-300.

27. *Id.* at 297.

28. *Id.*

29. *Id.* at 291 n.7.

30. *Id.* at 286.

31. *Id.* at 287.

32. *Id.*

33. *See id.* at 305-19.

34. MO. REV. STAT. § 565.014 (1978) (repealed 1983).

the penalty imposed in similar cases, considering both the crime and the defendant.³⁵

The statute further compelled the court to include references to the cases it considered when reaching its decision.³⁶ It also mandated that a court-appointed assistant collect “the records of all capital cases in which sentence was imposed after May 16, 1977, or such earlier date as the court may deem appropriate.”³⁷ Moreover, the legislature required that the assistant “provide the court with whatever extracted information the court desires with respect” to the accumulated records of all capital cases that resulted in an imposition of a sentence.³⁸

Later, the Missouri legislature updated the proportionality review statute, which became effective in October 1984.³⁹ The new statute required “the supreme court [to] determine . . . [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, *the strength of the evidence* and the defendant.”⁴⁰ Therefore, the only new charge to the court when conducting proportionality review was consideration of “the strength of the evidence.”⁴¹ The statutory language requiring the court assistant to collect the records of capital cases and to provide the court with the information it desires for the purposes of conducting proportionality review remained the same.⁴²

C. *The History of the Supreme Court of Missouri's Application of Proportionality Review*

The Supreme Court of Missouri first discussed the proportionality review statute in 1980, in *State v. Holmes*.⁴³ Noting that the legislature's enactment of the proportionality review statute served to reduce the risk of arbitrary and capricious imposition of the death penalty, Judge Seiler, in a concurring opinion, asserted the necessity of including a complete recitation of the facts regarding the crime and the defendant in the court opinion,⁴⁴ even though a death sentence was not directly at issue in that case.⁴⁵ Specifically, Judge Seiler stated that:

35. *Id.* § 565.014.3.

36. *Id.* § 565.014.5.

37. *Id.* § 565.014.6.

38. *Id.*

39. MO. REV. STAT. § 565.035 (1994).

40. *Id.* § 565.035(3) (emphasis added).

41. *Id.*

42. *Id.* § 565.035(6).

43. 609 S.W.2d 132 (Mo. 1980) (en banc).

44. *Id.* at 139 (Seiler, J., concurring).

45. *Id.* at 133.

While in this particular case the prosecutor waived the death penalty . . . in order to comply with [the proportionality review statute] and make the required comparison, we must know what the facts are in capital murder convictions for which the death penalty was not assessed, as well as in those for which it was.⁴⁶

Less than one year later, Judge Seiler echoed this sentiment again in his concurring opinion in *State v. Hudgins*.⁴⁷ There, he stated that to meet the duty required by the proportionality statute, the court's decision "must contain a statement of the facts, even though the penalty assessed was life without parole or probation for fifty years, rather than death."⁴⁸

That same year, in *State v. Mercer*,⁴⁹ the Supreme Court of Missouri faced the first death sentence imposed in a capital murder case since the legislature's enactment of the new death penalty scheme.⁵⁰ The court considered affirmed, factually similar capital cases that resulted in either life imprisonment or a death sentence.⁵¹ In *State v. Newlon*,⁵² the court considered the same category of cases as it did in *Mercer* – "similar cases in which both death and life imprisonment were submitted to the jury, and which have been affirmed on appeal."⁵³

From 1980-1984, the Supreme Court of Missouri consistently utilized the *Mercer* and *Newlon* category of cases to satisfy the requirements of the proportionality statute.⁵⁴ In *State v. McIlvoy* – the third death penalty case

46. *Id.* at 139.

47. 612 S.W.2d 769 (Mo. 1981) (en banc) (Seiler, J., concurring).

48. *Id.* at 770.

49. 618 S.W.2d 1 (Mo. 1981) (en banc).

50. *Id.* at 11.

51. *Id.*

52. 627 S.W.2d 606 (Mo. 1982) (en banc), *overruled on other grounds by State v. Carson*, 941 S.W.2d 518 (Mo. 1997) (en banc).

53. *Id.* at 623.

54. *See, e.g.*, *State v. Johns*, 679 S.W.2d 253, 268 (Mo. 1984) (en banc), *overruled on other grounds by State v. O'Brien*, 857 S.W.2d 212 (Mo. 1993) (en banc); *State v. Griffin*, 662 S.W.2d 854, 860 (Mo. 1983) (en banc); *State v. Battle*, 661 S.W.2d 487, 495 (Mo. 1983) (en banc); *State v. McDonald*, 661 S.W.2d 497, 507 (Mo. 1983) (en banc), *abrogated on other grounds by State v. Richardson*, 923 S.W.2d 301, 314-15 (Mo. 1996) (en banc); *State v. Smith*, 649 S.W.2d 417, 434-35 (Mo. 1983) (en banc), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. 2008) (en banc); *State v. Blair*, 638 S.W.2d 739, 759 (Mo. 1982) (en banc); *State v. Stokes*, 638 S.W.2d 715, 724 (Mo. 1982) (en banc) (considering similar cases in which death was imposed and cases in which life imprisonment was imposed by considering all cases that were considered in *State v. Shaw*, 636 S.W.2d 667, 676-77 (Mo. 1982) (en banc)); *State v. Trimble*, 638 S.W.2d 726, 738 (Mo. 1982) (en banc); *State v. Baker*, 636 S.W.2d 902, 911 (Mo. 1982) (en banc); *Shaw*, 636 S.W.2d at 676-77 (considering cases in which the death sentence was imposed and cases in which life imprisonment was imposed by discussing a case where the court affirmed a death

since the enactment of the new death penalty scheme⁵⁵ – the court found the death sentence disproportionate after noting the factual similarities of the case at issue to others that resulted in life imprisonment.⁵⁶ Shortly thereafter, in *State v. Bolder*, the court noted the paramount need to consider both factually similar capital cases that resulted in a death sentence and factually similar capital cases that resulted in life imprisonment.⁵⁷ The court acknowledged its concern about ensuring consistent and rational imposition of the death penalty,⁵⁸ it then asserted that “[o]ur inquiry would be unduly slanted were we to compare only those cases in which the death penalty has been imposed.”⁵⁹

Just a few years later, the Supreme Court of Missouri took a drastic turn in its approach to proportionality review. In *State v. Lingar*,⁶⁰ the court reviewed its first death sentence after the 1984 statutory modifications requiring the court to review the “strength of the evidence” when conducting proportionality review.⁶¹ The court considered the defendant, the crime, and “other cases in which the penalty of death was imposed,” when finding Lingar’s death sentence to be neither excessive nor disproportionate.⁶² Put simply, the court only considered factually similar cases that resulted in a death sentence; it did not consider cases that resulted in a life sentence.⁶³ The court, without discussing the statutory changes,⁶⁴ asserted that the “facts of this case show a level of inhumanity and depravity similar to or greater than other cases in which the death penalty was imposed.”⁶⁵ Thus, *Lingar* marked the first decision where the court considered only cases that resulted in a death sentence, and the court did so without explaining why it changed its approach.

In another case that same year, the court utilized the *Lingar* language and the *Lingar* category of cases to affirm a death sentence.⁶⁶ But just a few months later, the court reverted back to its original method of considering factually similar cases that resulted in either life imprisonment or a death sentence.⁶⁷ In *State v. Mallett*, the court compared the facts of the case before

sentence and a case in which the court reversed a death sentence because of disproportionality); *State v. Bolder*, 635 S.W.2d 673, 684-85 (Mo. 1982) (en banc); *State v. McIlvoy*, 629 S.W.2d 333, 341 (Mo. 1982) (en banc).

55. *McIlvoy*, 629 S.W.2d at 341.

56. *Id.* at 342.

57. *Bolder*, 635 S.W.2d at 684-85.

58. *Id.*

59. *Id.* at 685.

60. 726 S.W.2d 728 (Mo. 1987) (en banc), *abrogated on other grounds by State v. Taylor*, 238 S.W.3d 145 (Mo. 2007) (en banc).

61. *See id.* at 741-42.

62. *Id.* at 742.

63. *Id.*

64. *Id.* at 741-42.

65. *Id.* at 741.

66. *State v. Rodden*, 728 S.W.2d 212, 222-23 (Mo. 1987) (en banc).

67. *State v. Mallett*, 732 S.W.2d 527 (Mo. 1987) (en banc).

it and another case in which the defendant received a life sentence to reach its finding of proportionality.⁶⁸

However, after *Mallett*, the court resumed the *Lingar* trend of considering only cases that resulted in a death sentence.⁶⁹ Occasional interruptions of this trend occurred when the court responded to a defendant's attempt at analogizing his case to a prior case in which the court vacated the death sentence⁷⁰ and also in three instances in which the court considered both cases that resulted in life imprisonment and that resulted in a death sentence.⁷¹

In 1993, the court affirmatively announced in *State v. Ramsey*⁷² a change in the category of cases to be considered when conducting proportionality review.⁷³ After asserting that proportionality review serves as a mere safeguard to prevent "freakish and wanton application of the death penalty," and after reiterating that the United States Constitution does not require proportionality review,⁷⁴ the court stated:

When conducting proportionality review, this [c]ourt makes a review of the whole record, independent of the findings and conclusions of the judge and jury. *If the case, taken as a whole, is plainly lacking circumstances consistent with those in similar cases in which the death penalty has been imposed, then a resentencing will be ordered.* In those rare instances where no prior similar cases exist, this [c]ourt will make an independent judgment as to whether the imposition of death is freakish or wanton under the facts of the case.⁷⁵

68. *Id.* at 542-43.

69. *See, e.g.*, *State v. Davis*, 814 S.W.2d 593, 606 (Mo. 1991) (en banc); *State v. Sweet*, 796 S.W.2d 607, 616-17 (Mo. 1990) (en banc), *abrogated on other grounds by Sanders v. State*, 807 S.W.2d 493 (Mo. 1991) (en banc); *State v. Oxford*, 791 S.W.2d 396, 402 (Mo. 1990) (en banc); *State v. Griffin*, 756 S.W.2d 475, 490-91 (Mo. 1988) (en banc); *State v. Smith*, 756 S.W.2d 493, 502 (Mo. 1988) (en banc); *State v. Clemmons*, 753 S.W.2d 901, 914 (Mo. 1988) (en banc); *State v. Leisure*, 749 S.W.2d 366, 382 (Mo. 1988) (en banc); *State v. Walls*, 744 S.W.2d 791, 800 (Mo. 1988) (en banc); *State v. Murray*, 744 S.W.2d 762, 776 (Mo. 1988) (en banc); *State v. Antwine*, 743 S.W.2d 51, 73 (Mo. 1987) (en banc); *State v. Sandles*, 740 S.W.2d 169, 179 (Mo. 1987) (en banc); *State v. Schneider*, 736 S.W.2d 392, 404 (Mo. 1987) (en banc); *State v. Pollard*, 735 S.W.2d 345, 350 (Mo. 1987) (en banc).

70. *See, e.g.*, *State v. Parkus*, 753 S.W.2d 881, 890 (Mo. 1988) (en banc).

71. *State v. Reuscher*, 827 S.W.2d 710, 716 (Mo. 1992) (en banc); *State v. Feltrop*, 803 S.W.2d 1, 17 (Mo. 1991) (en banc), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. 2008) (en banc); *State v. Six*, 805 S.W.2d 159, 169 (Mo. 1991) (en banc).

72. 864 S.W.2d 320 (Mo. 1993) (en banc).

73. *Id.* at 328.

74. *Id.*

75. *Id.* (emphasis added).

Moreover, the court noted that because of the specific guidance given to jurors and trial judges as a result of the statutory death penalty scheme, jurors and judges impose the death penalty with significant consistency for certain types of murder cases before the cases are reviewed by the Supreme Court of Missouri.⁷⁶ For this reason, the court asserted that the proportionality review statute does not require a new sentence when no legal error occurred during the original proceedings.⁷⁷

Therefore, when conducting proportionality review post-*Ramsey*, the court continued to consider only factually similar cases that resulted in a death sentence.⁷⁸ In doing so, the court regularly utilized the *Ramsey* language: “[i]f the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed, then a resentencing will be ordered.”⁷⁹ Moreover, when defendants challenged the court’s application of proportionality review for not considering cases in which the jury imposed a life sentence, the court rejected such claims, citing *Ramsey*.⁸⁰

The last case – prior to the more recent developments in Missouri’s proportionality review jurisprudence – that required the court to conduct proportionality review was *State v. Taylor*.⁸¹ The court stayed true to its trend and

76. *Id.*

77. *Id.*

78. *See, e.g., State v. Johnson*, 244 S.W.3d 144, 164 (Mo. 2008) (en banc); *State v. Barton*, 240 S.W.3d 693, 710-11 (Mo. 2007) (en banc); *State v. Forrest*, 183 S.W.3d 218, 232 (Mo. 2006) (en banc); *State v. Gill*, 167 S.W.3d 184, 197 (Mo. 2005) (en banc); *State v. Glass*, 136 S.W.3d 496, 521-22 (Mo. 2004) (en banc); *Lyons v. State*, 39 S.W.3d 32, 44-45 (Mo. 2001) (en banc); *State v. Taylor*, 18 S.W.3d 366, 379 (Mo. 2000) (en banc); *State v. Winfield*, 5 S.W.3d 505, 516-17 (Mo. 1999) (en banc); *State v. Rousan*, 961 S.W.2d 831, 854 (Mo. 1998) (en banc); *State v. Brooks*, 960 S.W.2d 479, 502-03 (Mo. 1997) (en banc); *State v. Hutchison*, 957 S.W.2d 757, 766-67 (Mo. 1997) (en banc); *State v. Roll*, 942 S.W.2d 370, 379 (Mo. 1997) (en banc); *State v. Kreutzer*, 928 S.W.2d 854, 878-79 (Mo. 1996) (en banc); *State v. Nunley*, 923 S.W.2d 911, 926 (Mo. 1996) (en banc); *State v. Richardson*, 923 S.W.2d 301, 330 (Mo. 1996) (en banc); *State v. Smulls*, 935 S.W.2d 9, 24 (Mo. 1996) (en banc); *State v. Tokar*, 918 S.W.2d 753, 773 (Mo. 1996) (en banc); *State v. Brown*, 902 S.W.2d 278, 301 (Mo. 1995) (en banc); *State v. Chambers*, 891 S.W.2d 93, 114 (Mo. 1994) (en banc); *State v. Gray*, 887 S.W.2d 369, 389 (Mo. 1994) (en banc); *State v. Harris*, 870 S.W.2d 798, 819 (Mo. 1994) (en banc); *State v. Parker*, 886 S.W.2d 908, 934 (Mo. 1994) (en banc); *State v. Wise*, 879 S.W.2d 494, 525 (Mo. 1994) (en banc), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. 2008) (en banc).

79. *Ramsey*, 864 S.W.2d at 328; *see, e.g., Hutchison*, 957 S.W.2d at 766; *Kreutzer*, 928 S.W.2d at 878; *Smulls*, 935 S.W.2d at 24; *Tokar*, 918 S.W.2d at 773; *Brown*, 902 S.W.2d at 300; *Gray*, 887 S.W.2d at 389.

80. *See, e.g., Rousan*, 961 S.W.2d at 854-55; *Brooks*, 960 S.W.2d at 501-02; *State v. Carter*, 955 S.W.2d 548, 561-62 (Mo. 1997) (en banc).

81. 298 S.W.3d 482 (Mo. 2009) (en banc).

only considered cases that resulted in a death sentence when conducting proportionality review.⁸²

III. RECENT DEVELOPMENTS

First, this section will address the Supreme Court of Missouri decision that triggered recent changes to the court's application of proportionality review. Second, this section will discuss the court's current application of proportionality review and the ongoing debate between the Supreme Court of Missouri judges regarding such application. Third and finally, this section will examine the Missouri legislature's response to the court's debate.

A. The Supreme Court of Missouri's First Articulated Debate on Conducting Proportionality Review

1. The Principal Opinion

In *State v. Deck*,⁸³ the Supreme Court of Missouri, for the first time fully articulated its disparate views on conducting proportionality review.⁸⁴ The principal opinion, written by Judge Zel Fischer, relied on statutory language, *stare decisis*, and the presumption of legislative knowledge to find it statutorily proper to consider only affirmed, factually similar cases that resulted in a death sentence.⁸⁵ Judge Fischer began the discussion of proportionality review by addressing its purpose.⁸⁶

First, Judge Fischer asserted that proportionality review provides “an additional safeguard against arbitrary and capricious sentencing and . . . promote[s] the evenhanded, rational and consistent imposition of death sentences.”⁸⁷ Second, Judge Fischer rejected the defendant's claim that the court's proportionality review was flawed because the court “considers only cases in which death was imposed instead of all factually similar cases[,]”⁸⁸ referencing three prior cases where the court rejected the same argument.⁸⁹

82. *Id.* at 513.

83. 303 S.W.3d 527 (Mo. 2010) (en banc).

84. *See id.* In 1996, Carman Deck robbed and shot James and Zelma Long. *Id.* at 532. A jury found Deck guilty of two counts of first-degree murder, two counts of armed criminal action, one count of first-degree robbery, and one count of first-degree burglary. *Id.* Deck received two death sentences. *Id.*

85. *Id.* at 550-53.

86. *Id.* at 551.

87. *Id.* (quoting *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. 1993) (en banc)).

88. *Id.*

89. *Id.* (citing *State v. Johnson*, 207 S.W.3d 24, 50-51 (Mo. 2006) (en banc); *State v. Smith*, 32 S.W.3d 532, 559 (Mo. 2000) (en banc); *State v. Clay*, 975 S.W.2d 121, 146 (Mo. 1998) (en banc)).

Next, after addressing the purpose of proportionality review, Judge Fischer responded to an assertion made in Judge Laura Stith's concurrence that the court has been incorrectly conducting proportionality review since the 1993 *State v. Ramsey* decision.⁹⁰ Judge Fischer asserted that in seventeen years, no member of the court has questioned the unanimous *Ramsey* holding that proper proportionality review need only consider affirmed, factually similar cases that resulted in a death sentence.⁹¹ Additionally, because the legislature is presumed to know of the *Ramsey* decision, Judge Fischer asserted that the legislature likely would have addressed *Ramsey* by statute had the decision contradicted legislative intent.⁹²

Turning to the statutory language, Judge Fischer asserted that even though the proportionality review statute requires a court appointed assistant to accumulate the records of all capital cases that imposed either life imprisonment or a death sentence, the statute only requires that the assistant gather such information the court desires for the specific purpose of the court's proportionality review.⁹³ Judge Fischer continued by noting that the statute simply mandates that the court reference the similar cases it considered when reaching its decision.⁹⁴ Accordingly, Judge Fischer asserted that "[r]ead as a whole, these provisions demonstrate that the legislature expressly left to this [c]ourt the determination of what cases are similar."⁹⁵ Concluding it proper to consider only affirmed, factually similar cases that resulted in death sentences,⁹⁶ the principal opinion engaged in such proportionality review⁹⁷ and found the defendant's two death sentences proportionate to prior cases.⁹⁸

90. *Id.*

91. *Id.*

92. *Id.* at 552.

93. *Id.* at 551.

94. *Id.*

95. *Id.*

96. *See id.* at 551-52.

97. *Id.* at 552.

98. *Id.* at 553.

2. The Concurring Opinion⁹⁹

A concurring opinion written by Judge Laura Stith relied on statutory language, *stare decisis*, and the effect of excluding capital cases that resulted in life imprisonment from consideration in proportionality review, to find that the proportionality review statute requires consideration of affirmed, factually similar capital cases that resulted in either life imprisonment or a death sentence.¹⁰⁰ Moreover, Judge Stith found consideration of such category of cases necessary to prevent arbitrary application of the death penalty.¹⁰¹ Thus, Judge Stith concurred only in the result of the principal opinion.¹⁰²

Judge Stith began the proportionality review discussion by addressing the court's historical application of proportionality review, starting with *State v. Mercer*,¹⁰³ the first case before the court after the legislature enacted the new death penalty statute.¹⁰⁴ In *Mercer*, when conducting proportionality review, the court considered all affirmed, factually similar capital cases regardless of whether the jury imposed life imprisonment or death.¹⁰⁵ Judge Stith emphasized that the court's concern in *Mercer* was whether considering only factually similar cases that resulted in life imprisonment or a death sentence proved too narrow for meaningful review.¹⁰⁶ Then, she noted that shortly after *Mercer*, the court in *State v. Bolder* reached the same conclusion regarding the proper category of cases.¹⁰⁷ Next, Judge Stith discussed the significance of the language utilized in the death penalty statute.¹⁰⁸

Judge Stith first noted the specific language of “[t]he court shall accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed.”¹⁰⁹ Reasoning that requir-

99. An additional concurring opinion was written by Judge Patricia Breckenridge, who concurred in the result because she agreed that the death sentences in this case were proportionate to other factually similar cases. *Id.* at 553 (Breckenridge, J., concurring). Judge Breckenridge agreed with Judge Stith that the death penalty statute showed legislative intent for factually similar cases that resulted in life imprisonment to be considered by the court when conducting proportionality review, but disagreed with Judge Stith's discussion of the principal opinion's use of “freakish or wanton.” *Id.* at 554. Judge Breckenridge further noted that she is “committed firmly to the principle of *stare decisis* but, where the issue being addressed is life or death, it is more important to correct a prior erroneous decision of the [c]ourt and to undertake the proportionality review as it is intended by the legislature.” *Id.*

100. *Id.* at 555-63 (Stith, J., concurring).

101. *See id.* at 556, 560-61.

102. *Id.* at 555.

103. *Id.* at 555-56 (citing *State v. Mercer*, 618 S.W.2d 1 (Mo. 1981) (en banc)).

104. *Id.* at 556.

105. *Id.* (citing *Mercer*, 618 S.W.2d at 11).

106. *Id.*

107. *Id.* (citing *State v. Bolder*, 635 S.W.2d 673 (Mo. 1982) (en banc)).

108. *Id.* at 556-57 (citing MO. REV. STAT. § 565.035 (2000)).

109. *Id.* at 556 (quoting MO. REV. STAT. § 565.035.6).

ing record collection of all capital cases that resulted in life imprisonment or a death sentence would be unnecessary if the statute did not also require the court to consider both categories of cases,¹¹⁰ Judge Stith concluded that the statute expressly required review of both death sentence and life imprisonment capital cases.¹¹¹

Judge Stith then recounted the series of decisions in which the court considered factually similar cases resulting in either life imprisonment or a death sentence when conducting proportionality review.¹¹² She asserted that, beginning with the court's decision in *State v. Ramsey*, the court consistently and improperly conducted proportionality review because the court only considered factually similar cases that resulted in a death sentence.¹¹³ Judge Stith further emphasized that the *Ramsey* court did so "without distinguishing or overruling any of this [c]ourt's many cases . . . stating that proportionality review requires consideration of all prior capital cases."¹¹⁴

Judge Stith concluded that by not considering affirmed, factually similar capital cases that resulted in life imprisonment, the court necessarily renders proportionality review incomplete.¹¹⁵ Additionally, she argued that so limiting proportionality review "will overlook a sentence infected by impermissible considerations"¹¹⁶ and will lead to arbitrary application of the death sentence.¹¹⁷ Moreover, Judge Stith asserted that if proportionality review requires only consideration of similar cases in which the death penalty resulted, then the court will almost always find proportionality.¹¹⁸ Such a limitation "says nothing about whether the case also is similar to cases outside the orbit of the court's analysis."¹¹⁹ Thus, Judge Stith concurred only in the result, finding that consideration of cases that resulted in life imprisonment would not alter the conclusion that the instant defendant's death sentences proved proportionate to all prior similar cases.¹²⁰

3. The Results of the Plurality Votes

While all seven judges agreed in the result, only three judges – Judge Zel Fischer, Judge Mary Russell, and Chief Justice William Price Jr. – endorsed the view that, when engaging in proportionality review, the court

110. *Id.* at 559.

111. *Id.*

112. *Id.* at 557.

113. *Id.*

114. *Id.* at 558 (citing *State v. Ramsey*, 864 S.W.2d 320, 327 (Mo. 1993) (en banc)).

115. *Id.* at 559.

116. *Id.* at 559-60 (quoting *Walker v. Georgia*, 129 S. Ct. 453, 456 (2008)).

117. *See id.* at 560.

118. *Id.*

119. *Id.*

120. *Id.* at 563.

should only consider affirmed, factually similar cases that resulted in a death sentence.¹²¹ Additionally, only three judges – Judge Laura Stith, Judge Patricia Breckenridge, and Judge Michael Wolff – endorsed the view that the court should consider affirmed, factually similar capital cases in which either life imprisonment or a death sentence resulted.¹²² Judge Richard Teitelman concurred only in the result and provided no opinion on the category of cases to be considered when performing proportionality review.¹²³

B. Subsequent Application of and Debate about Proportionality Review

Less than two months after the debate in *Deck*, the Supreme Court of Missouri decided yet another case which resulted in a death sentence. In *State v. Anderson*,¹²⁴ Judge Zel Fischer again wrote the principal opinion, and again Chief Justice William Price Jr. and Judge Mary Russell joined in his opinion.¹²⁵ The principal opinion conducted proportionality review by considering only affirmed, factually similar cases that resulted in death sentences and concluded that the defendant's death sentence proved proportionate to prior cases.¹²⁶ Judge Patricia Breckenridge wrote a concurring opinion in which she concurred in part and concurred in the result.¹²⁷

Judge Breckenridge began her opinion by asserting that the proportionality review statute “requires consideration of all factually similar cases in which the death penalty was submitted to the jury, including those resulting in a sentence of life imprisonment without the possibility of probation or parole.”¹²⁸ This subsequent opinion echoed many of the arguments Judge Stith presented in her *Deck* concurrence.¹²⁹ Judge Breckenridge reiterated that the death penalty scheme requires the court-appointed assistant to compile the records of all capital cases that resulted in the imposition of life imprisonment or a death sentence.¹³⁰ Because of this requirement, Judge Breckenridge asserted that the legislature intended for the court to consider all factually similar cases when conducting proportionality review.¹³¹ Using this category of

121. *Id.* at 553 (plurality opinion).

122. *Id.* (Breckenridge, J., concurring); *id.* at 555 (Stith & Wolff, JJ., concurring).

123. *Id.* at 553 (plurality opinion).

124. 306 S.W.3d 529 (Mo. 2010) (en banc).

125. *Id.* at 533, 544.

126. *Id.* at 544.

127. *Id.* (Breckenridge, J., concurring).

128. *Id.* at 545.

129. Compare *id.* at 545-47, with *State v. Deck*, 303 S.W.3d 527, 555-63 (Mo. 2010) (en banc) (Stith, J., concurring). See also *supra* notes 99-120 and accompanying text.

130. *Anderson*, 306 S.W.3d at 545 (Breckenridge, J., concurring).

131. *Id.*

cases, Judge Breckenridge then conducted proportionality review.¹³² Judge Breckenridge concurred in the result, because she concluded that even when considering factually similar cases resulting in life imprisonment, the defendant's sentence proved proportionate to prior cases.¹³³

Additionally, Judge Michael Wolff wrote a dissenting opinion that primarily focused on an issue other than proportionality review.¹³⁴ Because he believed the case required remand, he felt the court need not engage in proportionality review, but even so, he concurred with Judge Breckenridge's opinion regarding what category of cases the court should consider when conducting proportionality review.¹³⁵ Judge Laura Stith and Judge Richard Teitelman concurred in Judge Wolff's opinion.¹³⁶ Thus, in *Anderson*, the judges voted four to three in favor of considering affirmed, factually similar capital cases that resulted in either life imprisonment or a death sentence when conducting proportionality review.

Three months after the *Anderson* decision, Judge Zel Fischer specifically called upon the legislature to clarify the proportionality review statute in his concurring opinion in *State v. Davis*.¹³⁷ In *Davis*, Judge Fischer stated:

As I noted in the principal opinion in [*Deck*], the circumstances concerning the appropriateness of capital punishment is a very serious and ongoing public concern. As such, it would be a rare scenario that the legislature would leave the holding in *Ramsey* – that review is of similar cases where death is imposed – unaddressed for 17 years. At this point, our legislature should readdress this issue to make it clear to the members of this [c]ourt what type of statutory proportionality review, if any, should be required.¹³⁸

Less than one month later, in *State v. Dorsey*,¹³⁹ the Supreme Court of Missouri emphasized that Judge Stith's concurrence in *Deck* and Judge Breckenridge's concurrence in *Anderson* articulated "the applicable law with respect to proportionality review."¹⁴⁰ Even so, three of the seven judges demonstrated permanent resistance to the practice of considering affirmed, factually similar capital cases that resulted either in life imprisonment or a death sentence when conducting proportionality review.¹⁴¹ In a jointly written concurrence, Chief Justice William Price Jr., Judge Mary Russell, and

132. *Id.* at 545-47.

133. *Id.* at 547.

134. *Id.* at 547-51 (Wolff, J., dissenting).

135. *Id.* at 551.

136. *Id.* at 544.

137. 318 S.W.3d 618, 646 (Mo. 2010) (en banc) (Fischer, J., concurring).

138. *Id.*

139. 318 S.W.3d 648 (Mo. 2010) (en banc).

140. *Id.* at 659.

141. *Id.* at 659-60 (Price, C.J., Russell & Fischer, JJ., concurring).

Judge Zel Fischer asserted that proportionality review requires only consideration of affirmed, similar capital cases that resulted in death sentences.¹⁴² The three ended their opinion stating, “[a]lthough we will continue to disagree with the majority’s proportionality analysis, we will not object in all opinions hereafter.”¹⁴³

C. Missouri Legislative Trends

Not long after the Supreme Court of Missouri reached a conclusion on how proportionality review would now be conducted, the Missouri legislature responded. In February 2011, Missouri House Bill 692 was introduced.¹⁴⁴ House Bill 692 proposed that the proportionality review statute be modified so that the Supreme Court of Missouri need only determine “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases *in which a sentence of death was imposed*, considering both the crime, the strength of the evidence and the defendant.”¹⁴⁵ The Missouri House of Representatives did not pass the bill to the Missouri Senate.¹⁴⁶ Also in February 2011, Senate Bill 338 was proposed.¹⁴⁷ Senate Bill 338 proposed that the court-appointed assistant only be required to accumulate records of all cases in which a death sentence resulted.¹⁴⁸ The Missouri Senate did not pass the bill to the Missouri House of Representatives.¹⁴⁹ Around that same time, House Bill 600 was proposed, which would limit proportionality review to “similar cases in which a sentence of death was imposed.”¹⁵⁰ The Missouri House of Representatives passed the bill to the Missouri Senate.¹⁵¹ However,

142. *Id.* at 660.

143. *Id.*

144. H.B. 692, 96th Gen. Assemb., Reg. Sess. (Mo. 2011).

145. *Id.* (emphasis added).

146. *Id.* Neither the official Missouri House of Representatives nor the E-Lobbyist websites provided information as to why House Bill 692 did not pass to the Missouri Senate. *See id.*; *see also* H.B. 692, MO. HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/billsummary.aspx?bill=HB692&year=2011&code=R> (last visited July 16, 2012).

147. S.B. 338, 96th Gen. Assemb., Reg. Sess. (Mo. 2011).

148. *Id.*

149. *Id.* Neither the official Missouri Senate nor the E-Lobbyist websites provided information as to why House Bill 692 did not pass to the Missouri House of Representatives. *See id.*; *see also* S.B. 338, MO. SENATE, http://www.senate.mo.gov/11info/BTS_Web/Actions.aspx?SessionType=R&BillID=4181651 (last visited July 16, 2012).

150. H.B. 600, 96th Gen. Assemb., Reg. Sess. (Mo. 2011). The relevant proportionality review language was added in the House Committee Substitute for the bill. *See* H.B. 600, MO. HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/billtracking/bills111/billpdf/commit/HB0600C.PDF> (last visited July 16, 2012).

151. *Id.*

the Senate committee that reviewed it stripped the revisions to the proportionality review statute from the bill.¹⁵²

IV. DISCUSSION

A. *The Current Status of Proportionality Review in Missouri*

The effect of only the principal decisions in *Deck* and *Anderson* would be that if any prior defendant suffered imposition of the death penalty and if the prior case shared factual similarities with the case at issue, the Supreme Court of Missouri would find the death sentence proportionate to the prior similar cases.¹⁵³ According to the principal opinions in both cases, absent a finding of passion, prejudice, or another arbitrary factor, or absent a finding that the evidence did not support the finding of statutory aggravators, the court would affirm the death sentence.¹⁵⁴ However, as a result of the plurality votes in *Anderson*, the court now must consider all affirmed, factually similar capital cases that resulted in either life imprisonment or a death sentence.¹⁵⁵

The principal opinion in *Deck* properly asserted that *stare decisis* supported its decision,¹⁵⁶ but so did Judge Stith's concurrence.¹⁵⁷ In 1987, the court in *Lingar* began considering only affirmed, factually similar capital cases that resulted in the death penalty and did so consistently until *Deck*.¹⁵⁸ However, as stated by Judge Stith's concurrence,¹⁵⁹ immediately after the enactment of Missouri's death penalty statute, for over a decade the court consistently considered affirmed, factually similar cases that resulted in either life imprisonment or a death sentence.¹⁶⁰

After the Missouri legislature amended the proportionality review statute, the Supreme Court of Missouri decided *Lingar*,¹⁶¹ however, the amended statute proved identical to the original proportionality statute except for one additional requirement to consider "the strength of the evidence."¹⁶² Because the amended statute added an additional factor for the court to consider and

152. See *H.B. Nos. 600, 337 & 413*, MO. HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/billtracking/bills111/hlrbillspdf/1167S.05C.PDF> (last visited May 28, 2012).

153. See *State v. Deck*, 303 S.W.3d 527, 551-53 (Mo. 2010) (en banc); *State v. Anderson*, 306 S.W.3d 529, 544 (Mo. 2010) (en banc).

154. See *Deck*, 303 S.W.3d at 550; *Anderson*, 306 S.W.3d at 543-44.

155. See *supra* notes 124-43 and accompanying text.

156. See *supra* notes 83-92 and accompanying text.

157. See *supra* notes 99-120 and accompanying text.

158. See *supra* notes 60-65 and accompanying text.

159. *Deck*, 303 S.W.3d at 557.

160. See *supra* notes 43-59 and accompanying text.

161. *State v. Lingar*, 726 S.W.2d 728 (Mo. 1987) (en banc), *abrogated on other grounds* by *State v. Taylor*, 238 S.W.3d 145 (Mo. 2007) (en banc).

162. See *supra* notes 39-42 and accompanying text.

did not amend the statute's language regarding the category of cases to consider, the change in approach demonstrated in *Lingar* cannot likely be attributed to the statutory changes. Moreover, the *Lingar* court cited no authority and provided no explanation for why it utilized a more limited category of cases than previously considered by the court.¹⁶³ Further, none of the subsequent cases explained why the court changed the considered category of cases.

Therefore, the court never articulated a reason for its departure from the original statutory interpretation that the court "must know what the facts are in capital murder convictions for which the death penalty was not assessed, as well as in those for which it was."¹⁶⁴ Nor did the court articulate why it departed from the rationale that "[its] inquiry would be unduly slanted were [it] to compare only those cases in which the death penalty has been imposed."¹⁶⁵

Considering Judge Seiler's early discussions on what the proportionality review statute required¹⁶⁶ and the decade of cases in which the court considered capital cases resulting in a life sentence in addition to those that resulted in a death sentence,¹⁶⁷ the original and early interpretations by the court demonstrate consistency with the conclusion that proportionality review requires consideration of all affirmed, factually similar capital cases. The *Lingar* line of cases, however, support the conclusion that proportionality review only requires consideration of affirmed, factually similar capital cases that resulted in death sentences.¹⁶⁸ Without any of the later cases explaining the departure from earlier practice, determining the catalyst for the change proves difficult.

B. Explaining the Recent Changes to the Application of Proportionality Review

Perhaps the catalyst can be explained by the court's desire for efficiency. Not surprisingly, the further in time from the enactment of the death penalty scheme, the greater the number of affirmed capital cases. Therefore, the pool of cases available for consideration continues to grow over time. If the court considered all prior factually similar, affirmed capital cases that resulted in either life imprisonment or a death sentence each time the court conducted proportionality review, the task may prove cumbersome and may delay disposition of the defendant's appeal. Administrative efficiency is not a foreign rationale and indeed proves to be a substantial state interest.¹⁶⁹

163. See *Lingar*, 726 S.W.2d at 741-42.

164. *State v. Holmes*, 609 S.W.2d 132, 139 (Mo. 1980) (en banc).

165. *State v. Bolder*, 635 S.W.2d 673, 685 (Mo. 1982) (en banc).

166. See *supra* notes 43-48 and accompanying text.

167. See *supra* notes 43-59 and accompanying text.

168. See *supra* notes 60-82 and accompanying text.

169. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 380-81 (1968).

Alternatively, the death penalty is different from all other penalties in the United States criminal justice system, as it is the only penalty that prematurely ends a person's life, and thusly requires special attention.¹⁷⁰ Because the death penalty is demonstratively distinct from any other penalty in the penal system, administrative efficiency falls short of a convincing explanation for why the court, beginning in 1987, ceased consideration of affirmed, factually similar capital cases that resulted in life imprisonment.

As early as 1982, the court recognized that proportionality review would be improperly slanted if it considered only cases in which a death sentence was imposed.¹⁷¹ Moreover, the Baldus Study indicates that the imposition of the death penalty for similar crimes varies depending on the race of the defendant and the race of the victim.¹⁷² Considering a category of cases limited to affirmed, factually similar cases that resulted in a death sentence will prevent the court from identifying the disproportionate imposition of the death penalty by the jury based upon arbitrary factors such as race. The court would affirm regardless of whether the death penalty proves to typically only be imposed on black defendants because the court would not analyze prior affirmed, factually similar capital cases that resulted in a life sentence for white defendants. Therefore, when conducting proportionality review by considering the more limited category of cases, the court will affirm a death sentence simply because the case before the court shared similarities with other cases in which a death sentence resulted.

Moreover, if the case before the court shared factual similarities to a prior case that resulted in a death sentence, the court will affirm the death sentence regardless of whether juries no longer typically impose death for that type of crime. Such a result proves contrary to the Supreme Court of the United States' reasoning in *Gregg* for supporting proportionality review.¹⁷³ The Court in *Gregg* asserted that:

[P]roportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury.

170. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“[T]he penalty of death is qualitatively different’ from any other sentence [and] this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.” (internal citation omitted) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976))); *Woodson*, 428 U.S. at 303-04 (“[M]embers of the Court acknowledge what cannot fairly be denied that death is a punishment different from all other sanctions in kind rather than degree.”).

171. *State v. Bolder*, 635 S.W.2d 673, 685 (Mo. 1982) (en banc).

172. See *supra* notes 29-32 and accompanying text. While the Baldus Study specifically analyzed the existence of system-wide prejudice of the Georgia death penalty system, Missouri defendants have asserted similar claims regarding the Missouri death penalty system. See *State v. Parker*, 886 S.W.2d 908, 933-34 (Mo. 1994) (en banc); *State v. Mallet*, 732 S.W.2d 527, 538 (Mo. 1987) (en banc).

173. See *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).

*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.*¹⁷⁴

Therefore, even though the United States Constitution lacks a proportionality review requirement for the imposition of the death penalty, the Supreme Court of the United States endorses a form of proportionality review that enables recognition of disparate imposition of the death penalty.¹⁷⁵ Considering only affirmed, factually similar capital cases that resulted in a death sentence does not enable such recognition. Because the Supreme Court of Missouri originally interpreted the proportionality review statute to require comparison of affirmed, factually similar capital cases that resulted in either life imprisonment or a death sentence, because the death penalty is different from all other penalties, and because proportionality review serves to prevent death sentences from being imposed by an aberrant jury, the reasons for considering only prior affirmed capital cases that resulted in a death sentence proves unclear.

Without considering affirmed, factually similar capital cases that resulted in life imprisonment, the court prevents itself from determining whether juries no longer impose the death sentence in the kind of case before the court, whether juries impose the death penalty with systematic racial bias, and whether the instant case shares more factual similarities to those cases which resulted in life imprisonment. Such a limited comparison proves perfunctory, rendering the comparison meaningless. “Similarity between cases can . . . mean nothing more than similarity to only one other death sentence which has been upheld.”¹⁷⁶ Indeed, the only decision in which the court found a death sentence disproportionate utilized the broader category, which includes life imprisonment cases.¹⁷⁷ Consequently, the court can always rationalize its proportionality determination when only considering cases that resulted in a death sentence.

Therefore, if proportionality review is to serve any meaningful purpose, the court must consider life imprisonment cases. Accordingly, considering affirmed, factually similar capital cases that resulted in either life imprisonment or a death sentence when conducting proportionality review proves consistent with the original interpretation of the proportionality review statute and proves more effective at preventing death sentences from being imposed by an aberrant jury. The broader category of cases also demonstrates consistency with the Supreme Court of the United States’ perspective on the function of proportionality review.

174. *Id.* (emphasis added).

175. *See id.*

176. Bienen, *supra* note 1, at 173.

177. *State v. McIlvoy*, 629 S.W.2d 333, 341-42 (Mo. 1982) (en banc).

These consistencies likely explain why the Supreme Court of Missouri eventually adopted the perspective that proportionality review requires consideration of affirmed, factually similar capital cases that resulted in either life imprisonment or a death sentence.¹⁷⁸ Even so, such application of the proportionality review statute has met judicial resistance and a call upon the legislature to clarify the proportionality review statute.¹⁷⁹

C. *The Missouri Legislature is Trending in the Wrong Direction*

Members of the Missouri legislature responded to the court's debate by attempting legislative change. In the 2011 General Assembly, Missouri legislators demonstrated a trend among its bill proposals regarding proportionality review – re-writing the statute so as to limit the court's review to factually similar cases that resulted in a death sentence.¹⁸⁰ Significantly, one such proposal survived the House of Representatives and was passed to the Senate.¹⁸¹ The Missouri House of Representatives therefore appears to have reached a consensus that proportionality review should be limited to consideration of affirmed, factually similar cases that resulted in a death sentence.

Even though Judge Stith's concurring opinion in *Deck* and Judge Breckenridge's concurring opinion in *Anderson* regarding the category of cases that should be considered when conducting proportionality review eventually became the practice of the Supreme Court of Missouri, the court's history of changing how it conducts proportionality review, the three-judge resistance, and the consensus among the Missouri House of Representatives that proportionality review should be limited to similar cases in which the jury imposed death suggests that the issue of the proper category of cases to be considered during proportionality review may not be settled.

The current status of proportionality review, which involves consideration of both affirmed, factually similar cases that resulted in either life imprisonment or a death sentence, proves a more meaningful form of review than considering only similar cases that resulted in a death sentence. Accordingly, new legislation limiting proportionality review to factually similar cases which resulted in a death sentence proves unnecessary and is a step in the wrong direction if the goal is truly to provide meaningful appellate review.

178. *State v. Dorsey*, 318 S.W.3d 648, 659 (Mo. 2010) (en banc).

179. *State v. Davis*, 318 S.W.3d 618, 645-46 (Mo. 2010) (en banc) (Fischer, J., concurring). Judge Fischer specifically called upon the legislature to clarify the proportionality review statute in *Davis*, and three of the seven Supreme Court of Missouri judges demonstrated permanent resistance to the practice of considering affirmed, factually similar capital cases that resulted in either life imprisonment or a death sentence when conducting proportionality review. *Dorsey*, 318 S.W.3d at 659-60.

180. *See supra* Part III.C.

181. *See supra* notes 150-51 and accompanying text.

V. CONCLUSION

The Supreme Court of Missouri's plurality decision in *Deck* provides the first fully articulated discussion on the court's disparate views on how proportionality review should be conducted. The opinion splits regarding whether affirmed, factually similar capital cases that resulted in life imprisonment or a death sentence or whether only those affirmed, factually similar capital cases that resulted in a death sentence should be considered continues to spark debate among the court and the legislature.

Even so, the court currently considers affirmed, factually similar capital cases that resulted in life imprisonment as well as those that resulted in death sentences. This result finds support in the court's original interpretation of the proportionality review statute, the decade of death penalty cases that conducted proportionality review by considering this broader category of cases, the Supreme Court of the United States' reasoning behind its endorsement of proportionality review, and the policy perspective that the death penalty is inherently different from other sentences. Moreover, the broader category of cases ensures that proportionality review is a meaningful exercise.

With the call upon the legislature to act by clarifying the proportionality review statute, with responses by the legislators favoring the more limited category of cases, and with three Supreme Court of Missouri judges asserting their permanent disagreement with the practice of considering affirmed, factually similar capital cases that resulted in either life imprisonment or a death sentence during proportionality review, the issue, however, may not be settled.

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