THE STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO. 2008-0945

STATE OF NEW HAMPSHIRE

V.

MICHAEL ADDISON

AMICUS BRIEF OF THE NEW HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Michael J. Iacopino, Esq. (Bar #1233)
NH Assoc. of Criminal Defense Lawyers
Brennan, Caron, Lenehan & Iacopino
85 Brook Street
Manchester, NH 03104
(603) 668-8300

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QUESTION PRESENTED

By Opinion dated July 9, 2009 and Order of July 29, 2009, the Court ordered the parties to file briefs addressing:

> The process that the court should follow in reviewing the sentence of death and in making the specific determinations required by RSA 630:5, XI, and the standards the court should apply to each of the three factors enumerated in RSA 630:5, XI.

RSA 630:5, XI, provides that in the course of its automatic review of the death sentence the Court shall determine:

> (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and,
>
> (b) Whether the evidence supports the jury's finding of an aggravating circumstance as authorized by law; and,
>
> (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

See, State v. Michael Addison, ___ N.H. ___ (July 9, 2009); State v. Michael Addison, No. 2008-0945, Order (Briefing Schedule), July 29, 2009.

CONSTITUTIONAL PROVISIONS AND STATUTES

RSA 630:1:

I. A person is guilty of capital murder if he knowingly causes the death of:

(a) A law enforcement officer or a judicial officer acting in the line of duty or when the death is caused as a consequence of or in retaliation for such person's actions in the line of duty;

(b) Another before, after, while engaged in the commission of, or while attempting to commit kidnapping as that offense is defined in RSA 633:1;

(c) Another by criminally soliciting a person to cause said death or after having been criminally solicited by another for his personal pecuniary gain;

(d) Another after being sentenced to life imprisonment without parole pursuant to RSA 630:1-a, III;

(e) Another before, after, while engaged in the commission of, or while attempting to commit aggravated felonious sexual assault as defined in RSA 632-A:2;

(f) Another before, after, while engaged in the commission of, or while attempting to commit an offense punishable under RSA 318-B:26, I(a) or (b).

II. As used in this section, a "law enforcement officer" is a sheriff or deputy sheriff of any county, a state police officer, a constable or police officer of any city or town, an official or employee of any prison, jail or corrections institution, a probation-parole officer, or a conservation officer.

II-a. As used in this section, a "judicial officer" is a judge of a district, probate, superior or supreme court; an attorney employed by the department of justice or a municipal prosecutor's office; or a county attorney; or attorney employed by the county attorney.

III. A person convicted of a capital murder may be punished by death.

IV. As used in this section and RSA 630:1-a, 1-b, 2, 3 and 4, the meaning of "another" does not include a foetus.

V. In no event shall any person under the age of 18 years at the time the offense was committed be culpable of a capital murder.

RSA 630:5, X:

X. In all cases of capital murder where the death penalty is imposed, the judgment of conviction and the sentence of death shall be subject to automatic review by the supreme court within 60 days after certification by the sentencing court of the entire record unless time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules adopted by said court.

RSA 630: 5, XI:

XI. With regard to the sentence the supreme court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

(b) Whether the evidence supports the jury's finding of an aggravating circumstance, as authorized by law; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

RSA 630: 5, XII:

XII. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for resentencing.

STATEMENT OF THE CASE AND INTEREST OF *AMICUS CURIAE*

A. Statement of the Case

The Defendant, Michael Addison, was convicted of capital murder, contrary to R.S.A. 630:1, I (a), for knowingly causing the death of Michael Briggs, a Manchester police officer acting in the line of duty. On December 22, 2008, Michael Addison was sentenced to death.

Pursuant to R.S.A. 630:5, X, this Court must conduct an automatic review of the judgment of conviction and the sentence of death.

On or about March 3, 2009, the Defendant moved for a stay of his appeal pending the promulgation of rules of appellate procedure implementing the requirements of R.S.A. 630:5, X & XI. By opinion, dated July 9, 2009, this Court denied the Defendant's motion for a stay but held that it would "determine the standards to be applied to each of the three factors in RSA 630:5, XI prior to our review of the merits." State v. Michael Addison, ____ N.H. ____ (Slip Opinion p. 8, July 9, 2009). The Court issued a briefing schedule on these issues on July 29, 2009.

B. Interest of *Amicus Curiae*: New Hampshire Association of Criminal Defense Lawyers.

The New Hampshire Association of Criminal Defense Lawyers (NHACDL) consists of approximately 280 New Hampshire lawyers with practices that include a significant amount of criminal defense work. The membership of NHACDL includes private practitioners, and state and federal public defenders. NHACDL is the local affiliate of the National Association of Criminal Defense Lawyers (NACDL) and shares its mission to ensure due process and fairness in the administration of the criminal justice system. NHACDL provides its membership with significant continuing legal

education opportunities in the field of criminal defense. NHACDL facilitates communication amongst members of the organization about issues that confront criminal defense lawyers on a daily basis. NHACDL will also, from time to time, take public positions with respect to important cases before the courts, or proposed legislation, that affect fairness and due process in the administration of the criminal justice system.

The adoption of a process that provides meaningful automatic appellate review of death sentences is a matter that affects fairness, due process and constitutional concerns pertaining to the administration of the criminal justice system in New Hampshire. NHACDL has previously addressed these issues in public comment before the New Hampshire Supreme Court Rules Advisory Committee on December 12, 2007, and in an *amicus* memorandum concerning the Defendant's motion to stay appellate review. *See*, State v. Addison, ____ N.H. ____ (July 9, 2009). While the New Hampshire Public Defender Program has the singular interest of representing the Defendant, Michael Addison, in this proceeding, NHACDL's interest is to assure that this Court adopts an automatic review process that guarantees rigorous and meaningful review with regard to each of the statutory factors across the spectrum of defendants that may face a sentence of death in New Hampshire. NHACDL has the further interest of ensuring that the proportionality review contemplated by RSA 630:5, XI (c) is conducted in a manner that will guarantee fairness and proportionality in the state's death penalty system.

STATEMENT OF FACTS

Amicus was not involved in the trial of this matter and therefore defers to the Brief of Michael Addison for a statement of facts.

SUMMARY OF ARGUMENT

Ultimately this Court will determine whether Michael Addison will live or die. The importance of the process underlying that determination cannot be overstated. This Court must impose a rigorous and meaningful standard of review during the automatic appeal process. The review must be *de novo*. *De novo* review is required by the plain language of the capital murder statute. The fact that New Hampshire's statute may be more narrowly drawn than in other jurisdictions does not diminish the nature or scope of the review that this Court must apply. *De novo* review is also important in this case because it appears that neither the executive branch, the legislative branch nor the trial court made an effort to determine whether a sentence of death for Michael Addison is excessive or disproportionate to the sentences imposed in similar cases considering, both the crime and the defendant. Finally, recent events in New Hampshire require a searching *de novo* review in order to determine whether disproportionality based on race or any other impermissible factor infected the proceedings below.

In determining whether the sentence is excessive or disproportionate pursuant to R.S.A. 630:5, XI (c), this Court should, for the most part, adopt the two-tiered multi-faceted process urged by the Defendant in his brief. Meaningful proportionality review requires that this Court define a universe of cases that includes all homicides that were eligible for the death penalty, regardless of whether the State sought a capital murder indictment and regardless of the penalty actually imposed. The Court should include in the first tier of the universe all death eligible cases from New Hampshire. The universe should also include a second tier of cases from other jurisdictions. A neutral special master should be appointed to identify the cases that fit within the universe defined by

the Court. Once the universe has been defined and the cases that fit within the universe are identified, this Court should use both quantitative and qualitative methods to determine whether the sentence of death imposed in this case is excessive or disproportionate to similar cases.

ARGUMENT

I. Standards of Review

Amicus urges the Court to adopt a rigorous *de novo* review when considering each of the three statutory factors set forth in R.S.A. 630:5, XI. A rigorous *de novo* review is required by the plain language of the statute and the obligation of "automatic" review contained within the law. Moreover, the fact that the capital murder statute in New Hampshire may be claimed to be "narrowly drawn" does not diminish the obligation of the Court to rigorously apply a *de novo* standard of review. A *de novo* standard of review is particularly important in this case because no other branch of the government appears to have considered the issues set forth in R.S.A. 630:5, XI, and because recent death penalty events in the State of New Hampshire, at the very least, give the appearance of a racially disproportionate outcome in this death penalty case.

A. The Plain Language of the Statute Requires *De Novo* Review by this Court.

This case presents the first occasion for this Court to review the imposition of a death sentence in over thirty years. Eighteen years ago, this Court recognized that, in matters pertaining to the death penalty, it must be "particularly sensitive to insure that every safeguard is observed." State v. Johnson, 134 N.H. 570, 577 (1991). In Johnson, this Court recognized that "death is different" and cited the oft quoted words of Justice Stewart: "There is no question that death as a punishment is unique in its severity and irrevocability." Gregg v. Georgia, 428 U.S. 153, 187 (1976). The Court also cautioned that the legislature "must be absolutely certain that its laws clearly implement its intentions when legislating a punishment as serious as death." Johnson at 577. The Johnson Court declared the previous version of the death penalty statute to

be unconstitutional and further refused to apply the 1990 version of the statute retroactively to the defendant.

It may be presumed that the legislature foresaw the Court's admonition in Johnson when it re-wrote the capital punishment statute in 1990. The rewritten statute contains an automatic appeal. "In all cases of capital murder where the death penalty is imposed, the judgment of conviction and the sentence of death shall be subject to automatic review by the supreme court . . ." RSA 630:5, X. The automatic appeal is mandatory. *See*, Kerouac v. Division of Motor Vehicles, 158 N.H. 353, 357 (2009) ("The use of the word 'shall' is generally regarded as a command and usually indicates the legislature's intention that the statute is mandatory.") The statute also mandates that the Court "shall determine" the three issues set forth in RSA 630:5, XI, (a)–(c). RSA 630:5, XI.

While the statute requires the appeal, it is important to note that the statute itself places no burden on the defendant to satisfy a burden of proof. The plain language of the statute requires automatic review whether or not the defendant in a capital appeal files a traditional notice of appeal, *see*, Supreme Court Rule 7, or otherwise participates in the process. The plain language of the statute also requires the Court to determine each of the three issues. When faced with the issue of whether a defendant sentenced to death could waive an automatic appeal, the Pennsylvania Supreme Court noted:

> "automatic review ... is an integral and absolutely essential procedural safeguard prescribed by the legislature in the enactment of Pennsylvania's death penalty statute.... Thus although no issues have been presented for our consideration in this matter, we must fulfill our statutory obligation by examining the record lodged in this Court to ensure that the sentences imposed comport with the

> requirements of our death penalty statute and may be legitimately executed."

Commonwealth v. Graham, 661 A. 2d 1367, 1369, (Penn., 1995), quoting, Commonwealth v. Appel, 539 A.2d 780, 781 (Penn., 1989)[1]. Even in cases where the defendant waives or refuses to participate, the Court must conduct the appeal. Because the statute requires the automatic review and assigns no burden of either production or persuasion, it follows that the standard of review for each issue during the automatic review of the death sentence is a *de novo* review. As an appellate standard, when "*de novo*" review is applied, "no form of appellate deference is acceptable." Salve Regina College v. Russell, 499 U.S. 225, 238 (1991); *see also*, Town of Hinsdale v. Town of Chesterfield, 153 N.H. 70, 73 ("*de novo* review means that the reviewing court decides the matter anew, neither restricted by nor deferring to decisions made below").

A *de novo* review is also required when one considers the extent of authority granted to the Supreme Court by RSA 630:5, XII:

> In addition to its authority regarding the correction of errors, the court, with regard to review of death sentences shall be authorized to:
>
> (a) Affirm the sentence of death; or
>
> (b) Set the sentence aside and remand the case for resentencing.

The statute itself imbues the Court with the full range of authority to either affirm or vacate the sentence and does not cabin that authority in any fashion. Therefore, *de novo* review appears to be the statutorily intended standard of review for this Court to a

[1] It should be noted that the Pennsylvania death penalty statute required the Court as part of automatic review to determine whether the evidence was sufficient to support the conviction for first degree murder. In assessing that element, the Pennsylvania court used its traditional sufficiency of the evidence test viewing all reasonable inferences in the light most favorable to the verdict. Appel at 782. The issue *sub judice* involves the three statutory factors set forth at RSA 630:5, XI, not the sufficiency of evidence supporting the conviction and there is no reason for the application of any level of deference.

apply when exercising its "crucial role . . . in ensuring that the death penalty is not imposed arbitrarily or irrationally." *See*, Parker v. Dugger, 498 U.S. 308, 320-21 (1991).

B. A "Narrowly Drawn" Capital Punishment Statute Does Not Diminish the Scope or Importance of Automatic Review.

In its pleading dated and filed on March 2, 2009, the State seeks a truncated version of mandatory proportionality review because RSA 630:1, I (a-f) is one of "the narrowest capital murder statutes in the country." *See*, States Response Pursuant to Supreme Court Order Dated December 31, 2008 and Accompanying Memorandum of Law, p. 22. The fact that the New Hampshire statute is applicable only to a limited number of classes of murder does not diminish or extinguish the importance of RSA 630:5, X, XI and the mandatory review required of the Supreme Court. The fact that the death penalty statute in New Hampshire is applicable only to a subset of murders does not limit the need for this Court to examine passion, arbitrariness and prejudice; the existence of aggravating factors; nor does it in any way diminish the requirement that this Court review the sentence for excessiveness and proportionality. The plain language of RSA 630:5, X and XI mandates that the Court must conduct its automatic review. Nothing within the statute itself permits a finding that this automatic review process should be less than robust merely because the capital murder statute is not as expansive as in other jurisdictions. The fact that the legislature defined capital murder and additionally required automatic review of certain features of a death sentence belie the State's notion that the limited definition of capital murder diminishes the scope of automatic review that this Court must impose. "When a defendant's life is measured as an appropriate punishment, a court must be particularly sensitive to insure that every safeguard is observed." Johnson at p. 577-578, *quoting,* State v. Frampton, 95

Wash.2d at 478, 627 P.2d at 926. Similarly, this Court's automatic review should be expansive and robust.

C. The Supreme Court Must Conduct an Extensive and Robust *De Novo* Review Because Neither the Executive Branch, the Legislative Branch Nor the Trial Court, Did So In This Case.

It is particularly necessary that the Supreme Court establish a robust and searching *de novo* application of RSA 630:5, XI in order to ensure that the capital punishment system is administered in a fair, just, and proportionate manner. The trial court did not undertake any process to compare this case to similar cases, or to determine whether this case was "excessive or disproportionate" to "similar cases considering both the crime and the defendant." *See*, R.S.A. 630:5, XI. There is no lower court ruling in this regard to be reviewed. There is no data contained within the lower court record upon which such a determination could be made. Thus, it follows that *de novo* review of the excessiveness and proportionality issue is the only review that this Court could undertake in order to comply with the statutory mandate.

Moreover, neither the legislative nor the executive branches appear to have taken the time to consider excessiveness or proportionality in this case. It is undisputed that the Attorney General of New Hampshire announced that she would seek the death penalty against Michael Addison less than twenty four hours after his arrest, and within approximately two hours of the death of Officer Michael Briggs. The State essentially admits this fact. *See*, State's Objection to the Defendant's Motion to Bar the Death Penalty (No. 24: Regarding the Defendant's Challenge to the Exercise of Prosecutorial Discretion); *see also*, Manchester Union Leader, October 18, 2006, p. A1, Death Penalty Sought: Bail Set At $2Million For Suspected Shooter; Ayotte Will Seek Death

Penalty in Officer's Killing, October 17, 2006, http://www.nhpr.org/node/11672 (Website audio file of Attorney General Ayotte's actual announcement). Within one day of the Attorney General's announcement, the New Hampshire Joint Legislative Fiscal Committee approved the expenditure of $420,000.00 "for the purpose of prosecuting the Capital Murder case arising from the murder of Manchester Police Officer Michael Briggs." *See*, NH Department of Justice, Press Release October 18, 2006, Joint Legislative Fiscal Committee Authorizes Funds For Capital Murder Prosecution[2]; *see also*, Fiscal Committee of the General Court, Minutes, October 18, 2006, p. 4-5[3]; Top Lawmakers Push for Prosecution Money in Briggs Killing, October 18, 2006, http://www.nhpr.org/node/11673.

The timing of these acts alone suggest a lack of a serious review of excessiveness and proportionality in seeking the death penalty against Michael Addison and, in fact, may demonstrate the disproportionate nature of the death penalty as applied to Mr. Addison. Neither the executive nor the legislative branch appeared to exercise any serious review of these issues. Therefore, this Court should impose a robust and searching *de novo* review of the factors set forth in RSA 630:5, XI - a review that recognizes that the death penalty is appropriate only if it is applied in a system that is without passion, prejudice or arbitrariness; and only in cases where legitimate aggravating circumstances exist and in a manner that is not excessive or disproportionate considering both the crime and the defendant.

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[2] See the NH DOJ press release at http://doj.nh.gov/publications/nreleases2006/101806autopsy.html .
[3] Ironically, in the same session, the Joint Fiscal Committee disapproved the expenditure of $193,077.00 in general funds for the general operation of the New Hampshire Public Defender Program, Addison's counsel. See, Joint Fiscal Committee minutes at http://www.gencourt.state.nh.us/lba/FiscalMinutes/fiscal_minutes_10_18_2006.pdf

D. The Appearance of Disproportionate Imposition of the Death Penalty.

Recent New Hampshire history with the death penalty urges this Court to exercise caution and employ a rigorous automatic review process. There have been two recent cases where the State has obtained capital murder indictments. In one case, a wealthy white man, convicted of murder for hire (the facts of which proved that he both solicited and hired the murderers of his victim and participated in the murder itself), was spared the death penalty after his conviction. On the other hand, Michael Addison, a poor, African American man with no appreciable assets, was convicted of capital murder and sentenced to death even though, at sentencing, the jury did not find that his murderous act was purposeful, and the jury did not find that he posed a future danger. These cases, being the only capital murder indictments in New Hampshire in recent years[4], tend to support empirical studies that have demonstrated that African Americans are disproportionately more likely to be sentenced to death, especially in cases involving white victims. *See*, Baldus, Brain, Weiner & Woodworth, Evidence of Racial Discrimination in the Use of the Death Penalty: A Story from Southeast Arkansas (1990-2005), with Special Reference to the Case of Death Row Inmate Frank Williams, Jr., 76 Tenn. L. Rev. 555 (Spring, 2009). Over the years empirical studies from Arkansas, Id., Georgia and Indiana have concluded that defendants who kill white victims are far more likely to receive a death sentence than those who kill minority victims. *See,* Fleischaker, ABA State Death Penalty Assessments (Un)Discovered, Progress (To Be) Made, And Lessons Learned, 34 SPG Hum. Rts. 10, 11-12 (2007).

[4] In State v. Gordon Perry a white defendant charged with the 1997 capital murder of a white police officer in Epsom, New Hampshire, was sentenced to life without parole under the terms of a negotiated plea agreement.

Adding to the likelihood and the appearance of disproportionality is the extent of review exercised by the Attorney General in each case. As noted above, the decision to seek the death penalty in this case came within hours of the death of Officer Michael Briggs. On the other hand, John Brooks was first arrested for first degree murder and conspiracy to commit first degree murder on November 16, 2006. A complaint was filed on December 7, 2006, charging first degree murder and conspiracy to commit murder, but the determination to seek the death penalty was not announced until April 26, 2007, some 4½ months later. *See*, N.H. Department of Justice Press Release, April 27, 2007[5].

This apparently disparate consideration, along with the outcomes of these jury trials, should serve as a cautionary tale for this Court and lead to the institution of an extensive, wide ranging, quantitative and qualitative automatic review of the sentence imposed in this case and in future death penalty cases. The proposal set forth by the Defendant provides for such a review.

Under R.S.A. 630:5, XI, this Court must ultimately determine whether the sentence of death in this case is fair. Michael Addison's life hangs in the balance. This may very well be the most important task that this Court will ever undertake. In matters of such importance, the Court should employ its most scrutinizing standard of review with respect to each of the statutory issues.

[5] The press release may be found at http://doj.nh.gov/publications/nreleases2007/042707.html. See also, http://www.courts.state.nh.us/caseinfo/pdf/brooks/index.htm (Two indictments for Capital Murder dated April 26, 2007, against John A. Brooks in Rockingham County Superior Court Nos. 07-S-1028, 1029.)

II. EXCESSIVENESS AND PROPORTIONALITY

Despite the State's claim that proportionality review is a subject that is handled frequently by our courts, the capital punishment statute specifically requires something more. The statute specifically requires this court 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." RSA 631:5, XI(c). This task is significantly different than the review undertaken in the "garden variety" sentencing case. Proportionality review is required in every death penalty case and it is "an important procedural mechanism to safeguard against the arbitrary and capricious imposition of the death penalty." *See*, State v. Marshall, 613 A.2d 1059, 1062 (N.J., 1992). It was exactly this type of procedural mechanism in the Georgia death penalty statute that led the United States Supreme Court to determine that Georgia's post Furman capital punishment statute was constitutional:

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

Gregg v. Georgia, 428 U.S. 153, 198, 96 S.Ct. 2909, 937 (1976) (citation omitted). Proportionality review in a death penalty appeal is not merely a matter of whether the punishment fits the crime. It should include both a quantitative and qualitative review of the sentence of death against the sentence of others who commit similar crimes.

NHACDL supports Michael Addison's position that this Court should employ a two tier, multi-faceted analysis, to determine if his sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. NHACDL also agrees with Addison that the "universe" of cases should include all death eligible cases from New Hampshire since 1977 in Tier 1, including cases where the State chose not to bring capital murder charges. NHACDL also agrees that Tier 2 review should include the review of death eligible cases from other states.

A. The Universe of Cases

RSA 631:5, XI is silent as to what cases should be considered to be similar to the case over which the Court is exercising its mandatory review. In determining whether a death sentence is excessive or disproportionate to similar cases, it is necessary to define a universe of cases. Various courts have defined the universe of similar cases differently. Some jurisdictions have defined the universe of cases to be considered to include only cases that resulted in a death verdict. Some jurisdictions require consideration of all cases that went to the penalty phase of the case, regardless of whether the verdict was life or death**.** A third cohort of jurisdictions review all cases that are clearly death eligible, regardless of whether or not the government pursued the death penalty**.** *See generally*, State v. Loftin, 724 A.2d 129, 136-137 (N.J., 2001) (discussion of methods of determining universe of cases used in various jurisdictions).

Although it may require a deeper level of analysis, a universe that includes all death eligible cases – whether prosecuted as death penalty cases or not, will bring the truest measure of excessiveness or disproportionality. Limitation of review only to cases where there was a death verdict or to cases that advanced to the penalty phase

"ignores the significant role of prosecutorial discretion". *See*, Baime, Comparative Proportionality Review: The New Jersey Experience, 41 No. 2 Crim. Law Bull. 7 (2005). In New Hampshire, all capital murders are prosecuted by the office of the Attorney General. *See*, RSA 7:6. As discussed above, the timing of the Attorney General's decision to charge the death penalty in this case was more akin to a headlong rush than a considered deliberative process. At present, the Attorney General has not published any formal guidance upon which he relies or applies in determining whether or not to seek the death penalty. By comparison, the federal Department of Justice uses a comprehensive review process that informs the Attorney General's final decision to authorize a death penalty prosecution or not. That process includes the preparation of a comprehensive prosecution memorandum, *see*, UNITED STATES ATTORNEY MANUAL, §9-10.080 (1997)[6], and consideration by a Capital Case Review Committee at which defense counsel may be heard and which may include consideration of "claims of individual or systemic racial bias in the administration of the federal death penalty." *See*, UNITED STATES ATTORNEY MANUAL §9-10-120 (1997). Even if the Attorney General had in place a comprehensive pre-charging process, consideration of all death eligible murders would still best serve to ensure that the sentence of death is not excessive or disproportionate to similar cases.

After extensive consideration, the New Jersey Supreme Court recognized the need to include "all clearly death eligible cases" in its universe of comparison cases.

[6] Section 9-10 of the United States Attorney Manual may be found online at: http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm#9-10.010

See, State v. Marshall, 613 A.2d 1059, 1071 – 1073 (N.J., 1992). The Marshall Court stated:

> Accordingly, one of the purposes served by a universe expanded to include such death-eligible homicides not prosecuted as capital crimes is that proportionality-review process can then consider both jury and prosecutorial decisions about death worthiness in determining whether a specific death sentence is disproportionate.

Marshall, 613 A.2d at 1072. The court also recognized that the inclusion of all death eligible cases in the universe is helpful in determining whether a capital sentencing procedure is discriminatory:

> It is inescapable that a universe restricted to penalty-phase cases would be inadequate to enable us to verify that our capital-sentencing procedure does not tolerate "discrimination on an impermissible basis including but not limited race and sex".

Marshall, 613 A.2d at 1072 (internal citations omitted). In determining that New Jersey would use a universe consisting of all death eligible cases, the Marshall Court also considered that other courts have acknowledged the appropriateness of using all death of eligible homicides to form a universe of similar cases. *Id*.

Some commentators have claimed that the inclusion of death eligible cases in the universe is a "heavy, if not impossible" task. *See,* Kaufman-Osborn, Proportionality Review and the Death Penalty, 29 Just. Sys. J. 257, 260 (2006). However, the New Jersey experience demonstrates that this task can be completed in an orderly and useful fashion. In 1992, the New Jersey Supreme Court identified 246 clearly death eligible cases consisting of 132 capital murder convictions that advanced to a penalty trial, and 114 cases which were clearly death eligible but in which the prosecutor had not sought death. *See*, State v. Marshall, 613 A.2d at 1073. This figure was arrived at

by a special master who studied 3200 homicide cases that occurred in New Jersey between 1982 and 1992. *Id*. By 2002, the New Jersey universe had increased to a total of 455 death eligible cases, 176 of which had proceeded to penalty trial. *See*, State v. Papasavvas, 798 A.2d 798, 804 (N.J., 2002). While the original New Jersey universe was collected through the services of a special master; by 2002, the New Jersey universe of cases was administered by the New Jersey Administrative Office of the Courts. *Id*. Since 1977, there have been approximately 668 murders and non-negligent manslaughters in New Hampshire. *See*, U.S. Department of Justice, Bureau of Justice Statistics, State-by-State and National Trends, available at http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/StatebyState.cfm. Many of these homicides will be readily distinguishable from cases that are death-eligible. *See*, e.g., RSA 630:1 - 630:3 (statutes setting forth the elements of homicide offenses in New Hampshire). The overall review of homicides for death eligible cases in New Hampshire should be a far easier task than the review conducted in New Jersey, merely due to the lower raw number of homicides in this state. Moreover, over the last thirty years, the average homicide rate in this state has been approximately 21 homicides per year. This is not an overwhelming number of murder cases for the court to review for inclusion in the death eligible universe on a regular basis so that a database reflecting the universe may be maintained on a going forward basis, if necessary, for future death penalty cases.

NHACDL supports Michael Addison's position that this Court should employ a special master to review the cases and prepare a data base of cases that may be considered for similarity. This Court has, in the past, appointed a special master in an

extraordinary case "where the introduction of outside skills and expertise, not possessed by the judge will hasten the just adjudication of a dispute without dislodging the delicate balance of the juristic role." *See*, Below v. Secretary of State, 148 N.H. 1, 4-5 (2002); Burling v. Chandler, 148 N.H. 143, 146 (2002) (appointment of master to assist the Court in establishing a redistrict plan for state senate districts and house of representatives districts when the legislature failed to do so). The case at bar is an extraordinary one. It is the first time that this Court will review a sentence of death since at least 1977. It is the first time that this Court is called upon to determine whether a specific sentence of death is excessive or disproportionate to the sentences imposed in similar cases. This is the first occasion upon which this Court will determine whether the New Hampshire death penalty will be "wantonly . . . or freakishly imposed." *See*, Furman v. Georgia, 408 U.S. 238, 310 (1972). While the appointment of a special master may be unusual, it will assist the Court in collecting the data that is necessary to conduct its statutorily mandated obligation.

B. Determining and Measuring the Salient Factors

Once the universe of similar cases has been determined, the Court must be prepared to identify the cases from the universe that are comparable to the case at bar. The Court must then determine how the compared cases will be analyzed to determine if the sentence imposed is proportionate to sentences imposed on the comparators.

Once the universe has been determined and the comparators identified (whether the comparators consist of the entire universe or some subset), the Court must determine what methods of comparison will be used. The methods may be both

quantitative and qualitative. NHACDL joins Addison in encouraging the Court to adopt both quantitative and qualitative methods of comparison.

"Frequency analysis" appears to be the most used empirical or quantitative method used for comparison purposes. The frequency method requires the identification of a subset of cases from the universe that share identified salient factors. From the subset, the percentage of defendants who were sentenced to death is calculated. The frequency of the imposition of a death sentence is then studied to determine whether death was imposed within the group of comparators with sufficient frequency to serve as an effective deterrent, and to constitute a justifiable form of retribution in light of community standards. *See,* Van Diuizend, Comparative Proportionality Review In Death Sentence Cases, State Court Journal, Summer 1984 at 10. Put another way, the statistical frequency approach is used to "determine that the defendant . . . is sufficiently culpable that his sentence may be deemed not aberrational." Papasavvas, 798 A.2d at 805. In his brief, Addison opines, and *amicus* has no reason to disagree, that a "frequency analysis" may have little use in a universe built solely on New Hampshire cases. The in-state universe is expected to be too small upon which to perform the statistical analysis required by the frequency method. However, frequency analysis should be performed in consideration of the larger universe of out of state cases and the comparators derived from that universe. Additionally, should the New Hampshire universe be larger than expected (and should that universe grow over time), NHACDL urges the Court to apply a frequency analysis in addition to qualitative measures. Frequency analysis provides a "co-efficient of consistency", or guidepost, upon which the Court may assess and confirm its qualitative

level of scrutiny. *See*, State v. Marshall, 613 A.2d 1059, 1081 (N.J., 1992). In cases where the death penalty is infrequently imposed in similar cases, it is more likely that a death sentence is excessive or disproportionate. *See*, e.g., State v. Benson, 372 S.E. 2d 517, 523 (N.C., 1987) (only four of fifty-one robbery murder cases in the pool yielded a death sentence). In cases where the death penalty is frequently imposed in similar cases, it is more likely to be a proportionate sentence. *See*, e.g., Commonwealth v. Maxwell, 477 A.2d 1309, 1318 (Penn., 1984) (all of the comparable cases yielded a death sentence).

Amicus understands that Michael Addison will propose that the Court employ a quantitative ranking analysis based upon culpability factors as an empirical tool. Addison is expected to assert that such a tool will be a useful replacement for frequency analysis in the in-state universe of cases that is expected to be too small to support the application of frequency analysis. NHACDL supports this approach because it will provide a useful statistical measure of disproportionality across the in-state universe of cases. *Amicus* feel that such statistical measures are necessary as a check and balance on the more subjective qualitative measures that the Court will also employ in determining whether the sentence is excessive or disproportionate. Over-reliance on the subjective qualitative measures may lead to a summary and conclusory process that provides nothing more than an appearance of proportionality review. *See*, e.g., State v. Mercer, 618 S.W.2d 1, 11 (Mo., 1981), cert. den., 454 U.S. 933 (1981) (court dispenses with proportionality review in a single paragraph asserting that cases were reviewed and they support affirmance of the death penalty without appreciable discussion of reasons); *see also*, Bienen, The Proportionality Review of Capital Cases by State High Courts

After Gregg: Only "The Appearance of Justice," 87 J. Crim. L. & Criminology 130 (1996) (opining that, with the notable exception of New Jersey, many states have reduced proportionality review to a perfunctory exercise that provides only an appearance of justice).

In addition to the quantitative review of comparable cases, it is expected that the Court would also undertake a qualitative review – sometimes referred to as "precedent seeking review." *See*, Van Duizend, supra. The culpability factors that inform Addison's proposed quantitative ranking analysis provide a format for structuring the Court's qualitative review in a manner very similar to the robust and rigorous qualitative review that was the hallmark of New Jersey proportionality jurisprudence. New Jersey's precedent seeking process first identified the relevant factors in determining whether a case was "deathworthy". These factors were contained within three categories: 1) moral blameworthiness; 2) degree of victimization; and, 3) defendant's character. *See*, State v. Loftin, 724 A.2d 129, 171-172 (N.J., 1999). The New Jersey Court would then assess the appellant's case in light of the relevant factors. The court would then analyze each case in the comparison group to determine whether the defendant was more or less "deathworthy" than the comparison cases. If comparison cases that were more "deathworthy" generally received life sentences, disproportionality was strongly indicated. *See*, State v. Timmendequas, 773 A. 2d 18, 32 (N.J., 2001) cert. den., 534 U.S. 858 (2001); *see also*, State v. Papassavas, 790 A. 2d 798, 808–811 (N.J., 2002). Likewise, Tennessee has used such criteria to guide its precedent seeking review. *See*, State v. Godsey, 60 S.W.3d 759, 785–786 (Tenn., 2001) (setting forth factors in two categories: the nature of the crime and nature of the defendant). The "culpability

factors" suggested by Addison are a good start to devise a process by which this Court can institute a robust, thorough and replicable process of precedent seeking review.

CONCLUSION

For more than thirty years, this Court has not had the occasion to review a sentence of death. The legislature has mandated that the Court automatically review such sentences. The legislative mandate, by its plain language, requires this Court to employ its own review of the statutory factors and such a review should be *de novo*. Moreover, the solemn consequences of this Court's ultimate determination require the Court to employ its most scrutinizing level of review.

In conducting its scrutinizing review, this Court must adopt a process to determine excessiveness and proportionality. That process should include all death eligible cases (regardless of how charged or tried), and employ both quantitative and qualitative measures to determine whether the sentence of death is excessive or disproportionate to the sentences imposed in similar cases, considering both the crime and the defendant.

Respectfully submitted,
New Hampshire Association of Criminal Defense Lawyers
By: Brennan Caron Lenehan & Iacopino

Date: November 12, 2009

By:_____
Michael J. Iacopino, Esq. (Bar #1233)
85 Brook Street
Manchester, NH 03104
(603) 668-8300

RULE 16(1) CERTIFICATION

I certify that two copies of this Brief have been delivered or mailed by first class mail to Michael Delaney, Esq. and Will Delker, Esq. of the Attorney General's Office; David Rothstein, Esq., Christopher Johnson, Esq., and Richard Guerriero, Esq., counsel for Michael Addison; and Charles G. Douglas, III, Esq., counsel for the New Hampshire Association of Chiefs of Police, New Hampshire Sheriff's Association, New Hampshire Police Association and New Hampshire Troopers Association; Barbara Keshen, Esq., counsel for the American Civil Liberties Union and to Andru H. Volinsky, Esq., counsel for Professor Stieker and Justice Poritz this 12th day of November 2009.

Date: November 12, 2009

_____
Michael J. Iacopino, Esq.