

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NEW HAMPSHIRE
SUPREME COURT
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No. 2008-945

2009 MAY -4 P 4: 17

State of New Hampshire

v.

Michael Addison
(Capital Murder)

**MEMORANDUM OF THE NEW HAMPSHIRE ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF MICHAEL ADDISON'S
MOTION TO STAY APPELLATE PROCEEDINGS PENDING THE PROMULGATION
OF RULES OF APPELLATE PROCEDURE UNDER R.S.A. 630:5, X & XI**

I. Background

Michael Addison was convicted of capital murder pursuant to R.S.A. 630:1 (a) and sentenced to death under the statutory procedures set forth at R.S.A. 630: 5, I through IX. His judgment of conviction and sentence is pending automatic review in this Court pursuant to R.S.A. 630:5, X. R.S.A. 630:5, X, in pertinent part, provides that automatic review in this Court "shall have priority over all other cases and shall be heard in accordance with rules adopted by said court." R.S.A. 630:5, XI, requires this court to determine the following issues as part of its review:

- (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.

R.S.A. 630:5, XI. At present this Court does not have rules specifically governing the automatic review process or the procedures to be used in determining the sentencing issues set forth at R.S.A. 630:5, XI.

On December 31, 2008, this Court issued an Order that included, *inter alia*, a request that the parties file either a stipulation or memoranda addressing the "... process that the court should follow in reviewing the sentence of death, and in making specific determinations required by R.S.A. 630:5, XI." Michael Addison responded to the order with a memorandum requesting the Court to stay appellate review of the death sentence pending the promulgation of rules of appellate procedure under R.S.A. 630:5, X & XI. The State responded to the Court's order by asserting that existing court rules govern the Court's review and if they do not the Court should adopt rules that reflect the "precedent-seeking method of proportionality review." On April 2, 2009, the Court issued an order that allowed Michael Addison to file a supplemental brief or memorandum supporting his motion to stay proceedings pending the promulgation of rules of appellate procedure under R.S.A. 630:5, X and XI by May 4, 2009. The State's supplemental response is due by June 3, 2009. On April 8, 2009, the Court clarified its order and specified that the issue to be briefed did not include what specific rules should be adopted but only whether the Court should stay the capital appeal in order to adopt rules.

On May 30, 2007, well prior to trial, Michael Addison sought the promulgation of rules of appellate procedure to govern the issues contained in R.S.A. 630:5, XI, by filing a Petition for Writ of Mandamus in this court. (See, Docket No. 2007-0362). After denying the stay but inviting the parties to submit proposed rules for consideration the

Court eventually denied the petition on January 9, 2008, without opinion. In the interim, pursuant to the Court's interim ruling on the Petition for Writ of Mandamus, the Court's Advisory Committee on Rules conducted a public proceeding and took testimony on the issue. Due to the obvious conflict that would exist between representing a client facing the death penalty and advocating for rules that might legitimize the ultimate penalty, the New Hampshire Public Defender Program did not participate by taking a position on specific rules before the Advisory Rules Committee. The Committee determined that it could not perform its responsibility to consider the impact of proposed rules because the appropriate process would require the participation of the Public Defender Program. See, Report to the Supreme Court on Review of a Proposed Rules Regarding the Death Penalty Appellate Procedure, January 8, 2008¹.

NHACDL supports the motion of Michael Addison to stay further appellate proceedings pending promulgation of rules of appellate procedure under R.S.A. 630:5, X and XI by May 4, 2009. In this memorandum NHACDL does not seek to re-argue the points already made by Michael Addison but will address why this court should adopt rules of procedure governing the automatic review process.

II. R.S.A. 630:5, X, Requires that this Court's Automatic Review Be Conducted in Accordance with Rules Adopted by the Court and No Such Rules Presently Exist

R.S.A. 630:5, X and XI were added to the statute in 1986. At that time this Court did not have any rules specifically pertaining to the review of death penalty cases. To date, this Court has not adopted any such rules. Nonetheless, the statute is specific in

1. The Advisory Rules Committee Report can be found at:
[http://www.courts.state.nh.us/rules/FINAL_Cap_Punishmt_App_Rules_Report_\(1-08-08\).pdf](http://www.courts.state.nh.us/rules/FINAL_Cap_Punishmt_App_Rules_Report_(1-08-08).pdf)

that it requires that such review be heard in accordance with rules, R.S.A. 630:5, X, and it specifies the particular issues that must be addressed, R.S.A. 630:5, XI. In interpreting statutory language this Court will “examine the language of the statute, and, where possible, ... apply the plain and ordinary meanings to the words used.” *State v. Wamala*, ___ NH ___ (Slip Opinion April 17, 2009, p. 7). The plain language used in the statute clearly anticipates that this Court would promulgate rules specifically governing the process of automatic review and the procedures by which the specific issues would be addressed. If the legislature intended nothing more than review under Supreme Court Rule 7 (or its then-existing counterpart) there would be no need to mention Supreme Court rules at all.

It is also a recognized rule of construction that a statute must be interpreted in the context of its overall scheme and not in isolation. *See, State v. Bernard*, 158 N.H. 43, 44 (2008). R.S.A. 630:5, X through XII, create a process for the Court to use in the conduct of an automatic review of a death penalty case. The process includes procedures and issues that do not exist elsewhere in New Hampshire law, either by statute or rule. The statute’s plain language throughout the pertinent sections anticipate that this Court would promulgate rules specifically for the purpose of conducting death penalty automatic review and for consideration of the specific issues outlined in the statute.

The automatic review required by the capital murder statute at R.S.A. 630:5, X through XII, anticipates that such review would be conducted in accordance with rules promulgated by this Court. To date no such rules have been promulgated and therefore, this Court must stay its appellate review until such time as appropriate rules

are promulgated.

III. The Promulgation of Rules Pertaining to the Review of Death Penalty Cases Would Allow the Parties in this Case and in Future Cases to Completely Understand their Obligations and Role in Building a Record

Presently, there is no statute or court rule that governs the method or manner in which this Court should conduct its statutory automatic review of a death penalty case under R.S.A. 630:5, X - XII. Likewise, there is no rule or statute that provides guidance to the parties about what information is appropriate to submit for this Court to conduct its review. This point is particularly poignant in consideration of the fact that the Court must determine if "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." R.S.A. 630:5, XI (c). The State recognizes that comparative disproportionality review can be conducted using entirely different methods. See, State's Response Pursuant to Supreme Court Order Dated December 31, 2008 and Accompanying Memorandum of Law, p. 18-19 (recognizing the differences between the "frequency method" and the "precedent seeking method" of comparative disproportionality review.) There are also a number of different methods to determine what constitutes a "similar case." *Id.* at 19 -23 (discussion of the various methods used to determine what is a "similar case.") The promulgation of rules governing the appellate process would be the most prudent method for this Court to allow the parties in this case and in future capital cases to understand and to prepare a record that appropriately assists the Court in conducting its statutory review.

The promulgation of rules of appellate procedure would also assist prosecutorial

authorities in determining whether to seek the death penalty in any particular case. At present the Attorney General has no formalized guidance upon which to rely in determining whether or not to seek the death penalty or whether or not such a decision will survive automatic review. 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, § 9-10.080², 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. The adoption of rules by this Court concerning its automatic review process would, much like the federal Department of Justice process, serve to inform and assist the State in determining whether to seek the death penalty in any particular case. Such assistance would serve the interests of justice, foster judicial economy and may result in considerable savings for the taxpayers of the state.

IV. Death is Different and Our Constitutions Require the Greater Degree of Reliability that is Provided by the Promulgation of Rules of Appellate Procedure Pertaining to this Court's Automatic Review.

Many courts have recognized that the death penalty presents circumstances and stakes that are different than the ordinary criminal case. "The qualitative difference between death and other penalties calls for a greater degree of reliability." *Lowenfield v.*

²Section 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

Phelps, 484 U.S. 231, 238 (1988); *see also*, *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (“There is no question that death as a punishment is unique in its severity and irrevocability.”) In death penalty cases the Court should “insure that every safeguard is observed.” *State v. Johnson*, 134 N.H. 570, 577 (1991) *citing* *State v. Frampton*, 95 Wash. 2d 469, 478, 627 P.2d 922, 926 (1981). Meaningful appellate review assures reliability. The adoption of rules that guide such review, especially in the determination of disproportionality or excessive nature of a death sentence, will provide a measure of reliability against which a death sentence can be measured.

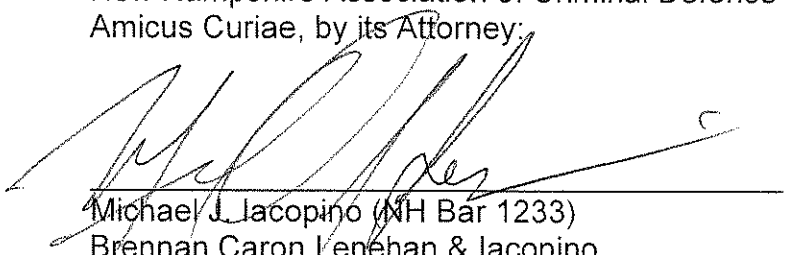
This Court has recognized that Part I, Articles 18 and 33 of the State Constitution provide at least as much protection against disproportionate and excessive punishment as does the Eighth Amendment to the Federal Constitution. *See*, *State v. Enderson*, 148 N.H. 252, 258 (2002). The mandatory appellate review of death sentences to avoid arbitrariness and to assure proportionality has been a primary reason that the United States Supreme Court has over the years affirmed death sentences. *See, e.g., Zant v. Stephens*, 462 U.S. 862, 890 (1983) (“Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.”) Adopting procedural rules that will guide this Court’s automatic review of a sentence of death will serve to enhance reliability in such determinations. Resolving such issues on an *ad hoc* basis reduces reliability. The promulgation of procedural rules will insure that every safeguard is observed in the case at bar and in future death penalty cases.

V. Conclusion

The adoption of rules of procedure pertaining to this Court's automatic review under R.S.A. 630:5, X - XII, is required by the plain language of the statute when reviewed in its context. It is also good policy and serves to safeguard the enhanced reliability that is constitutionally required in death penalty cases. The motion to stay proceedings pending the adoption of rules of procedure should be GRANTED.

Respectfully submitted,
New Hampshire Association of Criminal Defense Lawyers,
Amicus Curiae, by its Attorney:

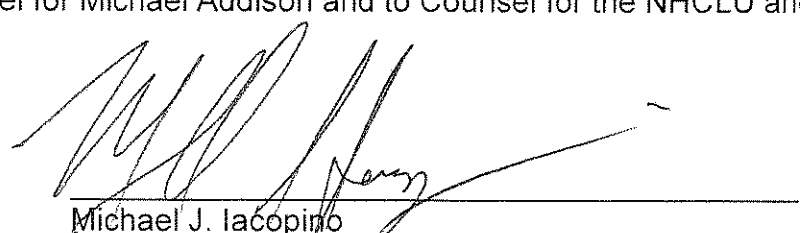
May 4, 2009



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was mailed via U.S. Mail, First Class, pre-paid, to Senior Assistant Attorney General, N. William Delker; to Richard Guerriero, Esq. counsel for Michael Addison and to Counsel for the NHCLU and the ACLU.



Michael J. Iacopino