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Criminal Procedure - Only the Supreme Court Can Determine Whether the Death Sentence Would Be Excessive or Disproportionate: State v. Wyrstek

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CRIMINAL PROCEDURE—Only the Supreme Court Can Determine Whether the Death Sentence Would be Excessive or Disproportionate: *State v. Wyrostek*

I. INTRODUCTION

In *State v. Wyrostek*,¹ the New Mexico Supreme Court held that it alone can determine whether a death sentence is excessive or disproportionate.² The issue, one of first impression in New Mexico,³ arose after a district court ruled in a pre-trial order that the death penalty would be excessive or disproportionate when compared to the penalty imposed in similar cases.⁴

By prohibiting the district court from conducting proportionality reviews, *Wyrostek* denies defendants one method of evading the death penalty. After *Wyrostek*, only the supreme court can decide if the death penalty is proportionate. This decision, a simple matter of criminal procedure, has a profound impact on the law.

This Note will give an overview of the issue in other jurisdictions, review the facts and procedural history of *State v. Wyrostek*, examine the court's rationale and policy considerations, and explore the implications of the decision.

II. STATEMENT OF THE CASE

A grand jury indicted Vance Wyrostek for first-degree murder, conspiracy to commit first-degree murder, aggravated battery, and tampering with evidence.⁵ Before the grand jury, the State alleged that Wyrostek was having a party in his home when Francisco Gomez made several sexual comments about Wyrostek's sister. In response, Wyrostek and his brother beat Gomez unconscious. Wyrostek, his brother, and Larry Lyan-

1. 117 N.M. 514, 873 P.2d 260 (1994).

2. *Id.* at 516, 873 P.2d at 262.

3. *Id.* at 519, 873 P.2d at 264.

4. *Id.* at 517, 873 P.2d at 263. The New Mexico Supreme Court has set out the following guidelines for proportionality review:

1. We will review this issue only when raised on appeal.

2. In our review, we will consider only New Mexico cases in which a defendant has been convicted of capital murder under the *same aggravating circumstance(s)*.

3. Only those New Mexico cases in which a defendant was convicted under the same aggravating circumstance(s) and then received *either* the death penalty *or* life imprisonment and whose conviction and sentence have been upheld previously by this Court, will be considered appropriate for comparison.

4. We will review the record and compare the facts of the offense and all other evidence presented by way of aggravation or mitigation to determine whether the sentence is excessive or disproportionate.

State v. Garcia, 99 N.M. 771, 780, 664 P.2d 969, 978 (N.M.), *cert. denied*, 103 S. Ct. 2464 (1983) (footnote omitted) (emphasis added).

5. Unless otherwise noted, all subsequent factual and procedural references refer to *Wyrostek*, 117 N.M. at 516-17, 873 P.2d at 262-63.

nas then loaded Gomez into a pick up truck, drove away from the house, and dumped him in a ditch. Thereafter, Wyrostek drove himself and Larry Lyannas to a convenience store where they purchased gasoline. They returned to the ditch, and Lyannas poured gasoline over the still unconscious victim. Wyrostek lit a stick and threw it on the victim. Gomez died as a result of thermal burns to his body.

Alleging that Gomez was a witness to his own beating and that Wyrostek killed him to prevent him from reporting the beating, the State sought the death penalty.⁶ The grand jury found probable cause for the State's allegations, and indicted Wyrostek. The indictment charged that Gomez had been "a witness to a crime or any person likely to become a witness to a crime, [and was killed] for the purpose of preventing report of the crime or testimony in any criminal proceeding."⁷ Before trial, Wyrostek moved for an order prohibiting the State from seeking the death penalty.⁸ The district court held that it had the discretion to decide the issue of proportionality and concluded that a death sentence would be excessive or disproportionate to the penalty imposed in similar capital murder cases in New Mexico.⁹ The State sought interlocutory appeal of the issue to the Court of Appeals.¹⁰ The Court of Appeals certified the issue to the New Mexico Supreme Court.¹¹

III. HISTORY OF THE ISSUE AND ITS TREATMENT IN OTHER JURISDICTIONS

In *Pulley v. Harris*,¹² the United States Supreme Court held that the federal Constitution does not require states to perform a comparative proportionality review in death penalty cases.¹³ Some states choose not

6. *Id.*; see N.M. STAT. ANN. § 31-20A-5 (Repl. Pamp. 1994) which states:

The aggravating circumstances to be considered by the sentencing court or jury pursuant to the provisions of Section 31-20A-2 NMSA 1978 are limited to the following:

[A-F]

G. the capital felony was murder of a witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding, or for retaliation for the victim having testified in any criminal proceeding.

7. *Wyrostek*, 117 N.M. at 517, 873 P.2d at 263.

8. *Id.* Defendant based his argument on N.M. STAT. ANN. § 31-20A-4 (Cum. Supp. 1994) which directs the Supreme Court to perform a proportionality review in death penalty cases and on *State v. Clark*, 108 N.M. 288, 772 P.2d 322 (N.M.), *cert. denied*, 493 U.S. 923 (1989), *overruled on other grounds*, *State v. Henderson*, 109 N.M. 655, 664, 789 P.2d 603, 612 (1990).

9. *Wyrostek*, 117 N.M. at 517, 873 P.2d at 263.

10. *Id.* The trial court certified the matter for interlocutory appeal because it found that the decision involved "a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from the order or decision may materially advance the ultimate termination of this litigation." District Court Order at 7, *State v. Wyrostek*, 117 N.M. 514, 873 P.2d 260 (N.M. 1994) (No. 20,696). See N.M. STAT. ANN. § 34-5-14(B) (Repl. Pamp. 1990) (setting out the supreme court's jurisdiction to review by writ or certiorari).

11. *Wyrostek*, 117 N.M. at 517, 873 P.2d at 263.

12. 465 U.S. 37 (1984).

13. *Id.* at 43-44.

to perform such a review.¹⁴ In the states that do perform a comparative proportionality review, very few have explicitly addressed the issue of whether courts other than the supreme court may conduct such reviews.

One state that has considered the question, North Carolina, held that only its supreme court can conduct a proportionality review of a death sentence.¹⁵ In other states, there is no case law on the issue of whether the trial court can conduct proportionality reviews, but state statutes seem to indicate that the supreme court is to perform the review.¹⁶

At least one state has a statute that specifically directs the trial court to conduct a proportionality review.¹⁷ Under the Nebraska statute, both the trial court and the supreme court are to conduct proportionality reviews.¹⁸

The Kentucky Supreme Court has addressed the issue, but the decision is open to various interpretations. In *McClellan v. Commonwealth of Kentucky*,¹⁹ the court held that the supreme court is required by statute to perform a proportionality review, but that "a trial judge is not *required* to conduct a proportionality review."²⁰ The *Wyrostek* court interpreted this holding to mean that a Kentucky trial court may, at its discretion, be able to conduct a proportionality review.²¹ While this is one possible interpretation, other language in *McClellan* hints that the Kentucky court intended that the trial court could not conduct such reviews.²²

14. See, e.g., WYO. STAT. ANN. § 6-4-103(d)(iii) (repealed 1989); *State v. Archuleta*, 850 P.2d 1232, 1249 (Utah), cert. denied, 114 S. Ct. 476 (1993) (finding that the courts would not make a comparison of the facts and circumstances of capital cases on a case-by-case basis); *Berget v. Oklahoma*, 824 P.2d 364, 377 (Okla. Crim. App.), cert. denied, 113 S. Ct. 124 (1992) (finding that the failure of the court to provide a proportionality review does not violate the United States Constitution.) Oklahoma had a statutorily mandated proportionality review, OKLA. STAT. ANN., tit. 21, § 701.12(c)(3) (repealed 1985).

15. *State v. Jackson*, 305 S.E.2d 703, 716 n.3 (N.C. 1983). N.C. GEN. STAT. § 15A-2000(d) (1994 Cum. Supp.) is very similar in content to N.M. STAT. ANN. § 31-20A-4 (1994 Cum. Supp.). The North Carolina statute states in pertinent part:

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant

N.C. GEN. STAT. § 15A-2000(d) (1994 Cum. Supp.).

16. See, e.g., MISS. CODE ANN. § 99-19-105 (Supp. 1994); WASH. REV. CODE ANN. § 10.95.130 (West 1995); *Reddix v. Mississippi*, 547 So. 2d 792 (Miss. 1989); *State v. Benn*, 845 P.2d 289 (Wash.), cert. denied, 114 S. Ct. 382 (1993).

17. NEB. REV. STAT. § 29-2522 (1989).

18. *Id.* §§ 29-2521.01 to 29-2522.

19. 715 S.W.2d 464 (Ky. 1986).

20. *Id.* at 472-73 (emphasis added).

21. *State v. Wyrostek*, 117 N.M. 514, 520 n.5, 873 P.2d 260, 266 n.5 (1994).

22. After stating that a trial judge is not required to conduct a proportionality review, the court stated, "That review will be conducted by the Supreme Court in the event the death penalty is imposed." *McClellan*, 715 S.W.2d at 473.

IV. RATIONALE OF THE COURT

Before *Wyrostek*, no lower court had ever challenged the supreme court's exclusive right to make death penalty proportionality determinations.²³ The supreme court had consistently made all proportionality determinations in death sentence cases in New Mexico.²⁴

The *Wyrostek* court relied on the New Mexico Constitution and statutory construction in deciding that it alone could perform proportionality reviews. The court then examined and rejected several of *Wyrostek's* policy arguments.

A. *New Mexico Constitution: The Supreme Court Shall Review Death Penalty Appeals*

The court first examined the New Mexico Constitution to determine whether district courts have the power to determine when a death sentence would be disproportionate.²⁵ Under the constitution, district courts are courts of general jurisdiction,²⁶ and have sole and exclusive jurisdiction to try felony cases.²⁷ The constitution also grants the supreme court exclusive appellate jurisdiction over district court judgments that impose a sentence of death or life imprisonment.²⁸ The issue, as framed by the court, was whether the supreme court's exclusive jurisdiction over death penalty appeals prohibits the district courts from making proportionality determinations.²⁹ The court reasoned that, without constitutional prohibition, the proportionality determination presumably falls within the district courts' general jurisdiction and can be decided during the trial of capital murder cases.³⁰ Despite framing the issue in this way, the court never explicitly reached a conclusion regarding the constitutional issue raised by the differing grants of jurisdiction. Instead, the court relied on state statutes regarding sentencing.

B. *Statutory Interpretation: The Supreme Court Shall Rule on the Validity of the Death Sentence*

The *Wyrostek* court determined that, under the Capital Felony Sentencing Act (Act),³¹ the supreme court alone can determine proportionality.

23. See *id.*; see also *State v. Compton*, 104 N.M. 683, 692, 726 P.2d 837, 846 (1986); *State v. Guzman*, 100 N.M. 756, 762, 676 P.2d 1321, 1327 (1984); and *State v. Cheadle*, 101 N.M. 282, 289, 681 P.2d 708, 715 (1983).

24. See *supra* note 23.

25. *Wyrostek*, 117 N.M. at 518, 873 P.2d at 264. The court did agree with *Wyrostek* that the issue was of constitutional importance and should be reviewed by the Supreme Court. *Id.*; see *supra* note 12.

26. N.M. CONST. art. IV, § 13 reads: "The district court shall have original jurisdiction in all matters and causes not excepted by this constitution, and [granting other jurisdiction to the district court]." *Trujillo v. State*, 79 N.M. 618, 619, 447 P.2d 279, 280 (1968).

27. *State v. Garcia*, 93 N.M. 51, 53, 596 P.2d 264, 266 (1979).

28. N.M. CONST. art. VI, § 2 states in part, "Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court."

29. *Wyrostek*, 117 N.M. at 518, 873 P.2d at 264.

30. *Id.*

31. N.M. STAT. ANN. §§ 31-20A-1 to 31-20A-6 (Repl. Pamph. 1994), which reads in pertinent

In reaching this conclusion, the court considered four main questions: (1) Is the Act directed toward actors other than the supreme court?; (2) Can an effective review be completed before the completion of the trial and sentencing?; (3) Do the aggravating and mitigating circumstances provisions of the Act indicate that proportionality review should be performed by the district courts?; and (4) Does a defendant waive his right to appeal the death sentence based on disproportionality if he does not raise the issue at trial?³² The court answered all of these questions in the negative.³³

The court determined that the plain meaning of the Act, read as a whole, is that only the New Mexico Supreme Court can determine whether a death sentence is disproportionate.³⁴ The court based this decision on section 31-20A-4 of the Act,³⁵ which states in part that the death penalty shall not be imposed if "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."³⁶ The court reasoned that, by directing this section of the Act toward the supreme court, and not the district courts, the Legislature intended only the supreme court to make the determination as to proportionality.³⁷

Second, the *Wyrostek* court reasoned that an effective review of the appropriateness of a death penalty sentence, including proportionality, can only be performed after the conclusion of the trial, including the

part:

31-20A-4. Review of judgment and sentence.

A. The judgment of conviction and sentence of death shall be automatically reviewed by the supreme court of the state of New Mexico.

B. In addition to the other matters on appeal, the supreme court shall rule on the validity of the death sentence.

C. The death penalty shall not be imposed if:

(1) the evidence does not support the finding of a statutory aggravating circumstance;

(2) the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances;

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

(4) *the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant* (emphasis added).

The Act controls the imposition and review of capital punishment in New Mexico. *Wyrostek*, 117 N.M. at 518, 873 P.2d at 264.

32. *Wyrostek*, 117 N.M. at 518-522, 873 P.2d at 264-268.

33. *Id.*

34. *Id.* at 519, 873 P.2d at 264.

35. See *supra* note 31.

36. N.M. STAT. ANN. § 31-20A-4(c)(4) (Repl. Pamph. 1994); see *supra* note 31.

37. The first sentence of N.M. STAT. ANN. § 31-20A-4 (Cum. Supp. 1994) reads: "The judgment of conviction and sentence of death shall be automatically reviewed by the supreme court of the state of New Mexico." See also *Wyrostek*, 117 N.M. at 519-21, 873 P.2d at 265-67. *Wyrostek* and the New Mexico Public Defenders Office (Amicus) argued that the statute simply states that "the death penalty shall not be imposed if: (1)-(4)" and that all state actors and citizens (including the district courts) have the duty to obey all state statutes. The court found that this argument did not take into account that the pertinent section of the statute was directed only to the supreme court and not to the district courts or the citizens of the state. *Wyrostek* at 519-21, 873 P.2d at 265-67.

sentencing phase.³⁸ The court stated that the determination of whether a death sentence is excessive or disproportionate requires a review of all the facts in the trial record.³⁹ Such a decision cannot be decided before the completion of the trial and sentencing.⁴⁰ The court concluded that the supreme court, with its exclusive appellate jurisdiction of death penalty sentences, is the only appropriate forum for proportionality determination.⁴¹

Third, the court rejected Wyrostek's argument that the Act's provisions on aggravating and mitigating circumstances indicate that the proportionality review should be conducted by the district courts.⁴² The court noted that the Act contains specific provisions that require the trial court to consider aggravating and mitigating circumstances during the sentencing phase of a capital murder trial.⁴³ On appeal, the supreme court is directed by statute to review the evidence of aggravating and mitigating circumstance presented at trial.⁴⁴ The supreme court is not to impose the death penalty if "the evidence does not support the finding of a statutory aggravating circumstance" or if "the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances."⁴⁵

The *Wyrostek* court reasoned that the proportionality review is not to be conducted in the same manner as the aggravating/mitigating factor review because the statutory scheme for the proportionality review is quite different.⁴⁶ The Act neither directs the district courts to consider proportionality, nor requires that the supreme court review evidence of disproportionality presented at trial.⁴⁷ The court stated that it will not read language into the Act that is not there.⁴⁸ Thus, it refused to adopt

38. *Wyrostek*, 117 N.M. at 519, 873 P.2d at 265.

39. *Id.*

40. *Id.*

41. The court's reasoning does not appear to take into account the fact that the guilt or innocence of the defendant is also a question of fact and that the district court has the ability to grant a directed verdict if the evidence most favorable to the State would not allow the State to prevail. It could be similarly argued that if the evidence most favorable to the State would not allow a finding that the death sentence would be proportionate in a given case that the district court could order that the death penalty not be sought.

42. *Wyrostek*, 117 N.M. at 520, 873 P.2d at 266.

43. *Id.*; see N.M. STAT. ANN. §§ 31-20A-2, which reads:

31-20A-2. Determination of Sentence

A. Capital sentencing deliberations shall be guided by the following considerations:

(1) whether aggravating circumstances exist as enumerated in Section 6 [31-20A-5 NMSA 1978] of this act;

(2) whether mitigating circumstances exist as enumerated in Section 7 [31-20A-6 NMSA 1978] of this act; and

(3) whether other mitigating circumstances exist.

B. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the jury or judge shall determine whether the defendant should be sentenced to death or life imprisonment.

44. N.M. STAT. ANN. § 31-20A-4 (Repl. Pamp. 1994).

45. *Id.*

46. *Wyrostek*, 117 N.M. at 520, 873 P.2d at 267.

47. *Id.*; see N.M. STAT. ANN. 31-20A-1 to 31-20A-6 (Repl. Pamp. 1994).

48. *Wyrostek*, 117 N.M. at 520, 873 P.2d at 266.

an interpretation of the Act that allows the trial court to determine proportionality and the supreme court to review the evidence of proportionality which was presented at trial.⁴⁹

Finally, the court rejected Wyrostek's argument that prior decisions of the New Mexico Supreme Court hold that a defendant waives the right to appeal a death sentence as disproportionate if the issue is not raised at trial.⁵⁰ In *State v. Clark*,⁵¹ the court refused to address the issue of proportionality because it found that the defendant did not raise the issue on appeal.⁵² Wyrostek argued that *Clark* meant that proportionality needed to be raised at the district court in order to preserve the issue for appeal.⁵³ The court disagreed with Wyrostek's interpretation of *Clark*, stating that *Clark* stands only for the proposition that proportionality must be raised on appeal in order to be considered.⁵⁴

C. Policy Considerations: The Supreme Court is the Best Authority to Conduct Proportionality Reviews

Wyrostek raised two major policy considerations. First, he contended that allowing the district court to make a pretrial ruling on proportionality would save the expense and delay caused by trying a death penalty case when the death penalty would be clearly excessive or disproportionate.⁵⁵ He also argued that a pretrial ruling would prevent possible unfairness.⁵⁶ The court found, however, that the proportionality review is not meant to be concerned with the fairness of the trial process.⁵⁷ Rather, "the proportionality review is a post-sentence inquiry, undertaken to identify disparities in capital sentencing and to prevent the death penalty from being administered in an arbitrary, capricious, or freakish manner."⁵⁸ Because the purpose of the review is to avoid the arbitrary administration of the death penalty, the court reasoned that the supreme court is the

49. *Id.*

50. *Id.* at 521, 873 P.2d at 267.

51. 108 N.M. 288, 772 P.2d 322, *cert. denied*, 493 U.S. 923 (1989), *overruled on other grounds*, *State v. Henderson*, 109 N.M. 655, 664, 789 P.2d 603, 612 (1990). Although it appears strange that the defendant would try to argue the waiver of proportionality review, Wyrostek argued that "if the proportionality of a death sentence must be raised at trial to be preserved on appeal, the district court has the authority to decide the issue." *Id.* Therefore, Wyrostek made this facially contradictory argument in order to have the district court determine proportionality.

52. *Id.* at 311, 772 P.2d at 335, *cert. denied*, 493 U.S. 923 (1989), *overruled on other grounds*, *State v. Henderson*, 109 N.M. 655, 664, 789 P.2d 603, 612 (1990). In *Clark*, the court found that the defendant did not allege that the death penalty was disproportionate in his case, but rather argued that the guidelines for proportionality reviews set out in *State v. Garcia*, 99 N.M. 771, 664 P.2d 969, *cert. denied*, 103 S. Ct. 2464 (1983) were unduly restrictive and should be broadened. *Clark*, at 311, 772 P.2d at 325. For the guidelines set out in *Garcia*, see *supra* note 4.

53. *State v. Wyrostek*, 117 N.M. 514, 521, 873 P.2d 260, 267 (1994). The district court agreed with Wyrostek's interpretation of *Clark* and thus found that it had the discretion to determine proportionality. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

best authority to conduct such a review.⁵⁹ The court quoted the United States Supreme Court's statement that the purpose of the proportionality review was best achieved when "a court of statewide jurisdiction . . . conduct(s) comparisons between death sentences imposed by different judges or juries within the State."⁶⁰

Second, Wyrostek claimed that when district courts are prohibited from declaring the death penalty disproportionate, the prosecutor may seek the death penalty in a clearly disproportionate case in order to (1) obtain a conviction-prone jury,⁶¹ (2) eliminate jurors on racial and religious grounds,⁶² and (3) use the threat of a death sentence for leverage in plea bargaining.⁶³ The *Wyrostek* court, however, held that since Wyrostek did not allege any of the above acts of prosecutorial misconduct, the court would not consider those issues.⁶⁴

V. ANALYSIS AND IMPLICATIONS

A. *Analysis of the Court's Decision*

While the court correctly construed the Capital Sentencing Felony Act and prior New Mexico case law, it failed to make a thoughtful inquiry into the constitutionality of allowing only the New Mexico Supreme Court to make determinations as to the proportionality of the death sentence in a given case. The court merely set out the different grants of jurisdiction that the constitution gives to the district and supreme courts.⁶⁵

After stating that the constitution does not expressly deny the district court from conducting proportionality reviews, the court immediately turned to the Capital Sentencing Act,⁶⁶ stating that the jurisdictional issue was to be "answered by construing the Act in accordance with the rules of statutory interpretation."⁶⁷ The court's reasoning is faulty. Statutes are generally interpreted in accordance with the constitution; the constitution is not interpreted in accordance with statutes. Without a more thorough constitutional analysis, the court's rationale is unfinished and the constitutional issue remains unresolved.

59. *Id.* at 523, 873 P.2d at 269.

60. *Id.* (citing *Pulley v. Harris*, 465 U.S. 37, 70-71 (1984)).

61. A jury for a capital murder trial must be "death qualified," which Wyrostek contended makes the jury more conviction-prone. Defendant-Appellee's Answer Brief at 10, *State v. Wyrostek*, 117 N.M. 514, 873 P.2d 260 (1994) (No. 20,696).

62. Wyrostek contended that being able to dismiss jurors because of their opposition to the death penalty is racially and religiously discriminatory because the largest segments of the population opposed to the death penalty are Catholics and Hispanics, but he offered no statistics or studies which support his contention. Defendant-Appellee's Answer Brief at 7, *State v. Wyrostek*, 117 N.M. 514, 873 P.2d 260 (1994) (No. 20,696).

63. *Wyrostek*, 117 N.M. at 522, 873 P.2d at 268.

64. *Id.* Nevertheless, the court went on to comment that there is an established pretrial procedure for evaluating aggravating circumstances and that this procedure both ensures fairer trials for defendants and conserves judicial resources. *Id.*

65. *Id.* at 518, 873 P.2d at 264.

66. *Id.*; see *supra* note 31.

67. *Id.*

Had the court done a more thorough constitutional analysis, it is likely that it would have found that the constitution does not prohibit district courts from making proportionality determinations. The constitutional provision that grants exclusive appellate jurisdiction over death sentence cases to the supreme court says nothing about what the district court can do during a trial.⁶⁸ The provision simply states that appeals from district court judgments imposing the death penalty shall go directly to the supreme court, thus bypassing the court of appeals.⁶⁹ The court made no attempt to explain how this provision could be interpreted to limit the district courts' sole and exclusive jurisdiction to *try* felony cases,⁷⁰ including the making of determinations as to proportionality.⁷¹

B. Implications of the Court's Decision

After *Wyrostek*, it is more difficult for a defendant to escape the death penalty in New Mexico.⁷² Defendants cannot argue at trial that the death penalty would be excessive or disproportionate in their cases. Defendants have only one state forum in which to make such an argument: the New Mexico Supreme Court. If they lose at the supreme court, they have nowhere in the state system to appeal the decision.⁷³ Furthermore, defendants are effectively denied the ability to apply for a writ of habeas corpus in federal court or to petition for certiorari to the United States Supreme Court on the issue of proportionality. Since the Supreme Court has said that there is no constitutional right to a comparative proportionality review,⁷⁴ it is very unlikely that federal courts would consider a writ for habeas corpus⁷⁵ or a petition for certiorari on this issue.⁷⁶

68. See *supra* note 28.

69. *Id.*

70. *State v. Garcia*, 93 N.M. 51, 53, 596 P.2d 264, 266 (1979) states that "[u]nder the New Mexico Constitution, sole and exclusive jurisdiction for the trial of felony cases is in the district courts."

71. The proportionality determination should not be distinguished from other matters on which district courts routinely rule as part of their authority to try felony cases. For instance, the district courts have the authority to rule that, as a matter of law, the state has failed to present sufficient evidence to submit a factual issue to a jury, and so to direct a verdict of acquittal on any or all charges. N.M. R. CRIM. PRO. 5-607(K). Allowing the district court to make proportionality determinations would not grant the district courts a substantially different type of power; both have to do with the trial (not the appeal) of a case before the court.

72. It will probably be theoretically harder for defendants to escape the death penalty for the reasons explained above. However, different factors, including the composition of the district courts and the supreme court, may at times be such that the different courts would come to substantially the same determinations as to proportionality. Therefore, a defendant's chances to evade the death penalty may not be significantly lowered by having only the supreme court make the determination.

73. Although New Mexico has a statute providing for a writ of habeas corpus, a person is only entitled to the writ if his or her imprisonment or restraint is unlawful. N.M. STAT. ANN. § 44-1-1 (1978 Pamp.). Therefore, if the New Mexico Supreme Court (on appeal) has said that the death penalty is not disproportionate in a given case, it is almost inconceivable that the same court would then find the defendant's imprisonment unlawful under the issue of proportionality. Thus, while the provision for a writ of habeas corpus exists, it is essentially denied to defendants arguing that the imposition of the death sentence was disproportionate in their cases.

74. *Pulley v. Harris*, 465 U.S. 37, 43-44 (1984).

75. 28 U.S.C. § 2254(a) (1988) requires a contention that the person applying for a writ of habeas corpus is in custody in violation of the Constitution or the laws of the United States.

76. 28 U.S.C. § 1257(a) (1988) states that:

Wyrostek's policy arguments⁷⁷ highlight other implications of this decision. For instance, death penalty cases take more time and money to try than non-death penalty cases.⁷⁸ The New Mexico Supreme Court itself has recognized that death penalty prosecutions are qualitatively and quantitatively distinct from other criminal proceedings and that capital felony prosecutions and sentencing require extra judicial resources.⁷⁹ The extra time and money needed for a death sentence case imposes a strain on both the State and the defendant.⁸⁰ It is a waste of the taxpayers' money to expend large amounts trying death penalty cases if they will be overturned on appeal. Likewise, it is harmful to defendants to have to defend against a death penalty charge when such a sentence is clearly disproportionate. An Amicus Curiae brief by the New Mexico Public Defender Department filed in *Wyrostek* points out that the defendant in a death penalty case is harmed by at least three factors: (1) the additional cost and relative scarcity of defense counsel in death penalty cases; (2) the additional publicity connected with a death penalty case; and, (3) the possibility that "death qualified" juries are more conviction-prone.⁸¹

If the district court cannot determine that the death penalty would be disproportionate, the court has little or no way in which to screen or prevent a death penalty trial, even if the death penalty could not legally be imposed. Thus, all of the difficulties involved in a death penalty case are present with no benefit to be gained by their presence (because the death penalty must be overturned on appeal as disproportionate). This situation is exacerbated by the fact that the grand jury need not find probable cause of aggravating circumstances in order for the State to seek the death penalty.⁸²

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Since the Supreme Court has already found that there is no constitutional right to a comparative proportionality review, it is unlikely that the Supreme Court would rule that a claim that the death penalty was disproportionate is included in the jurisdiction described in the above statute.

77. See *supra* notes 55-64 and accompanying text.

78. See *Wyrostek*, 117 N.M. at 522, 873 P.2d at 268.

79. *State v. Ogden*, 118 N.M. 234, 239, 880 P.2d 845, 850, *cert. denied*, 115 S. Ct. 336 (1994).

The case also states that capital prosecutions are uniquely complex and demanding because [m]ore skilled and experienced prosecutors and defenders are required: extensive investigation into the defendant's background for proof of mitigating circumstances must be done, and there will be a proliferation of pretrial motions, applications, and hearings, consuming significantly more judicial resources than non-capital prosecutions.

Id. (citations omitted).

80. See Amicus Curiae Brief—New Mexico Public Defender Department at 17-18, *State v. Wyrostek*, 117 N.M. 514, 873 P.2d 260 (1994) (No. 20,696).

81. *Id.* at 16-18.

82. *State v. Morton*, 107 N.M. 478, 481, 760 P.2d 170, 173 (Ct. App. 1988); *but see State v. Ogden*, 118 N.M. 234, 880 P.2d 845, *cert. denied*, 115 S. Ct. 336 (1994) which holds that, upon

Furthermore, since the New Mexico Capital Felony Sentencing Act became law in 1979, the government of the State of New Mexico has not executed anyone under the Act, and only two men now sit on death row.⁸³ Consequently, it is likely that a high percentage of death sentences imposed by juries could be overturned as disproportionate. Therefore, a great waste of judicial resources is possible in each death trial. If the district court could screen for proportionality, such waste could be prevented.

One positive implication of the court's decision is that by having only the supreme court perform proportionality reviews, the decisions are likely to be more uniform.⁸⁴ As the court pointed out, the purpose of the proportionality review is to make sure that the death penalty is not applied in an arbitrary or capricious manner.⁸⁵ By having the supreme court perform all such reviews, the court avoids the different standards of decision that would inevitably occur to some extent if the many different district courts were making proportionality determinations.

The implications discussed above may not be sufficient to overcome the legislative intent that only the supreme court make proportionality determinations. Nevertheless, they should be taken into account by the legislature and possibly lead to an amendment to the Capital Sentencing Act which would allow district courts, as well as the supreme court, to make proportionality determinations.

VI. CONCLUSION

In *State v. Wyrostek*, the Supreme Court of New Mexico held that it was the "sole arbiter of whether or not the death penalty would be excessive or disproportionate in a given case."⁸⁶ This decision denies the district courts the jurisdiction to make a proportionality determination pre-trial or at any point during the trial or sentencing phases. While the court's analysis of the Capital Felony Sentencing Act and the relevant policy considerations was correct, the court failed to fully answer the constitutional questions arising out of the differing grants of jurisdiction. Until the court more fully explores the constitutional issues, the district court's *constitutional* power to make proportionality reviews will remain in doubt. While the court's decision in *Wyrostek* makes it more difficult for a defendant to escape the death penalty and could lead to greater

the defendant's motion to dismiss aggravating circumstances, the district court should conduct a pretrial evaluation of aggravating circumstances. The district court should grant the motion to dismiss the aggravating circumstances if the aggravating circumstance does not apply as a matter of law or if there is not probable cause to support the aggravating circumstance.

83. Defendant-Appellee's Answer Brief at 1, *State v. Wyrostek*, 117 N.M. 514, 873 P.2d 260 (1994) (No. 20.696). In cases where a jury has given the death penalty, the New Mexico Supreme Court and/or the Governor of New Mexico has either reversed those decisions or granted a pardon from the death penalty. *Id.*

84. See *Pulley v. Harris*, 465 U.S. 37, 70-71 (1984) (finding that there is no constitutional right to a proportionality review).

85. *Wyrostek*, 117 N.M. at 522-23, 873 P.2d at 268-69.

86. *Id.* at 516, 873 P.2d at 262.

expenditure of judicial resources, it also ensures that rulings on proportionality will be issued in a uniform, non-capricious manner.

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