

## **CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE**

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### **Class Ten – Racial Discrimination**

Justice is often painted with bandaged eyes. She is described in forensic eloquence as utterly blind to wealth or poverty, high or low, black or white, but a mask of iron, however thick, could never blind American justice when a black man happens to be on trial. . . . It is not so much the business of his enemies to prove him guilty, as it is the business of himself to prove his innocence. The reasonable doubt which is usually interposed to save the life and liberty of a white man charged with crime seldom has any force or effect when a colored man is accused of a crime.

- Frederick Douglass, *The Life and Writings of Frederick Douglass* (P. Foner, ed. 1950)

The impact of our heritage of slave laws will continue to make itself felt into the future. For there is a nexus between the brutal centuries of colonial slavery and the racial polarization and anxieties of today. The poisonous legacy of legalized oppression based upon the matter of color can never be adequately purged from our society if we act as if slave laws had never existed.

- A. Leon Higginbotham, Jr., Attorney, Historian and Judge, U.S. Court of Appeals, Third Circuit

[I]t has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries. . . . [W]e remain imprisoned by the past as long as we deny its influence in the present.

- Justice William Brennan (dissenting in *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987))

## INTRODUCTION

In *Democracy in America*, Alexis De Tocqueville made the following observation regarding the relationship between social equality and punishment:

When all the ranks of a community are nearly equal, as all men think and feel in nearly the same manner, each of them may judge in a moment the sensations of all the others; he casts a rapid glance upon himself, and that is enough. There is no wretchedness into which he cannot readily enter, and a secret instinct reveals to him its extent. It signifies not that strangers or foes are the sufferers; imagination puts him in their place; something like a personal feeling is mingled with his pity and makes himself suffer while the body of his fellow creature is in torture.

Although the Americans have in a manner reduced selfishness to a social and philosophical theory, they are nevertheless extremely open to compassion. In no country is criminal justice administered with more mildness than in the United States. \* \* \*

[Y]et the slaves still endure frightful misery there and are constantly exposed to very cruel punishments. It is easy to perceive that the lot of these unhappy beings inspires their masters with but little compassion and that they look upon slavery not only as an institution which is profitable to them, but as an evil which does not affect them. Thus the same man who is full of humanity towards his fellow creatures when they are at the same time his equals becomes insensible to their afflictions as soon as that equality ceases. His mildness should therefore be attributed to the equality of conditions rather than to civilization and education.<sup>1</sup>

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1. Alexis De Tocqueville, *DEMOCRACY IN AMERICA: PART THE SECOND, THE SOCIAL INFLUENCE OF DEMOCRACY* 165-66 (Francis Bowen & Phillips Bradley eds., Henry Reeve trans., 1945) (1840).

## The Baldus Study and the *McCleskey* decision

In his concurring opinion in *Furman v. Georgia*, Justice Marshall described the racial disparities that occurred in the infliction of the death penalty up until 1972 when that case was decided. The new capital punishment statutes upheld by the Court in 1976 were supposed to eliminate arbitrariness and discrimination, but within a few years South Carolina attorney David Bruck noticed new disparities emerging under that state's post-*Furman* statute:

\* \* \* In South Carolina, where I practice law, murders committed during robberies may be punished by death. According to police reports, there were 286 defendants arrested for such murders from the time that South Carolina's death penalty law went into effect in 1977 until the end of 1981. (About a third of those arrests were of blacks charged with killing whites.) Out of all of those 286 defendants, the prosecution had sought the death penalty and obtained final convictions by the end of 1981 against 37. And of those 37 defendants, death sentences were imposed and affirmed on only 4; the rest received prison sentences. What distinguished those 4 defendants' cases was this; 3 were black, had killed white store owners, and were tried by all-white juries; the fourth, white, was represented at his trial by a lawyer who had never read the state's murder statute, had no case file and no office, and had refused to talk to his client for the last two months prior to the trial because he'd been insulted by the client's unsuccessful attempt to fire him.

If these four men are ultimately executed, the newspapers will report and the law will record that they went to their deaths because they committed murder and robbery. But when so many others who committed the same crime were spared, it can truthfully be said only that these four men were *convicted* because they committed murder. They were *executed* because of race, or bad luck, or both.

Bruck observed that this such disparities were not limited to South Carolina:

\* \* \* Each year, according to the F.B.I.'s crime report, about the same numbers of blacks as whites are arrested for murder throughout the United States, and the totals of black and white murder victims are also roughly equal. But like many other aspects of American life, our murders are segregated: white murderers almost always kill whites, and the large majority of black killers kill blacks. While blacks who kill whites tend to be singled out for harsher treatment – and more death sentences – than other murderers, there are relatively few of them, and so the absolute effect on the numbers of blacks sent to death row is limited. On the other hand, the far more numerous black murderers whose victims were also black are \* \* \* only rarely sent to death row. Because these dual systems of discrimination operate simultaneously, they have the overall effect of keeping the numbers of blacks on death row roughly proportionate to the numbers of blacks convicted of murder – even while individual defendants are being condemned, and others spared, on the basis of race. In short, like the man who, with one foot in ice and the other in boiling water, describes his situation as “comfortable on average,” the death sentencing system has created an illusion of fairness.

A number of studies of the death penalty also found racial disparities in its infliction. The United States General Accounting Office conducted a “evaluative synthesis” of 28 studies in 1990 and found:

In 82 percent of the studies, race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques. This finding held for high, medium, and low

quality studies

The race of the victim influence was found at all stages of the criminal justice system, although there were variations among studies as to whether there was a race of victim influence at specific stages. The evidence for the race of victim influence was stronger for the earlier stages of the judicial process than it was for the later stages. This was because the earlier stages were comprised of larger samples allowing for more rigorous analyses. However, the decisions made at every stage of the process necessarily affect an individual's likelihood of being sentenced to death.

The GAO found less indication of race-of-defendant discrimination:

The evidence for the influence of race of defendant on death penalty outcomes was equivocal. Although more than half of the studies found that race of defendant influenced the likelihood of being charged with a capital crime or receiving the death penalty, the relationship between race of defendant and outcome varied across studies.<sup>2</sup>

Two of those studies, conducted by Professors David Baldus, George Woodworth, and Charles A. Pulaski, Jr., were the basis for a challenge to racial disparities in capital sentencing in Georgia in the case of *McCleskey v. Kemp*. One study, the Charging and Sentencing Study (CSS), analyzed 2,484 Georgia homicide cases, processed between 1973 and 1979, which had resulted in convictions for murder or voluntary manslaughter to determine the extent to which race influenced the decisions that lead to the imposition of a death sentence.

According to the study, 65% of these cases, or 1,620, included facts that made the defendant death eligible under Georgia law. Of these cases, 128 resulted in death sentence. The study

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2. U.S. General Accounting Office, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (Feb. 1990).

examined a stratified sample of approximately 1,050 cases, which included all cases that advanced to a penalty trial, and a sample of the remaining cases. The study included over 200 variables from public records in Georgia to measure the extent to which imposition of the death penalty was influenced by legitimate factors, such as the aggravating circumstances and circumstances of the crimes, such as whether they involved multiple victims or were against strangers, and the background of the offender, and the extent to which it was influenced by race.

The study, described in more detail in the decision which follows, found that the race of the defendant was not an statistically significant influence, but that race of the victim was. A defendant's odds of receiving a death sentence increased by a factor of 4.3 when the victim is white. The presence of a white victim had about the same effect on the defendant's chances of receiving a death sentence as such legitimate aggravating factors as the presence of multiple stab wounds, an armed robbery, a child victim, or a prior record for murder, armed robbery, rape kidnapping, or kidnapping with bodily injury.

The study also found that there were some cases that were so aggravated that death was consistently imposed in them and other cases that were at the other end of the spectrum and death was seldom if ever imposed. The race-of-victim effects occurred primarily in cases that were in the midrange in aggravation level, and, within that range, the effects were much larger than in the other cases.

Warren McCleskey, represented by lawyers from the NAACP Legal Defense & Educational Fund, argued that the studies established racial discrimination in violation of the equal protection clause of the Fourteenth Amendment and an impermissible risk of discrimination in violation of the Eighth Amendment prohibition of arbitrariness in the infliction of the death penalty.

**Warren McCLESKEY, Petitioner**  
**v.**  
**Ralph KEMP, Superintendent, Georgia**  
**Diagnostic and Classification Center.**

United States Supreme Court  
481 U.S. 279, 107 S.Ct. 1756 (1987)

**Justice POWELL** delivered the opinion of the Court.

This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment.

**I**

McCleskey, a black man, was convicted of two counts of armed robbery and one count of murder in the Superior Court of Fulton County, Georgia, on October 12, 1978. McCleskey's convictions arose out of the robbery of a furniture store and the killing of a white police officer during the course of the robbery. \* \* \*

\* \* \*

McCleskey filed a petition for a writ of habeas corpus in the Federal District Court for the Northern District of Georgia. His petition raised 18 claims, one of which was that the Georgia capital sentencing process is administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution. In support of his claim, McCleskey proffered a statistical study performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth (the Baldus study) that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970's. The raw numbers collected by Professor Baldus indicate that defendants charged

with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants.

Baldus also divided the cases according to the combination of the race of the defendant and the race of the victim. He found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims. Similarly, Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.

Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.<sup>5</sup>

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5. Baldus' 230-variable model divided cases into eight different ranges, according to the estimated aggravation level of the offense. Baldus argued in his testimony to the District Court that the effects of racial bias were most striking in the midrange cases. "[W]hen the cases become tremendously aggravated so that everybody would agree that if we're going to have a death sentence, these are the cases that should get it, the

The District Court held an extensive evidentiary hearing on McCleskey's petition. \* \* \* It concluded that McCleskey's "statistics do not demonstrate a prima facie case in support of the contention that the death penalty was imposed upon him because of his race, because of the race of the victim, or because of any Eighth Amendment concern." *McCleskey v. Zant*, 580 F.Supp. 338, 379 (N.D. Ga. 1984). \* \* \*

The Court of Appeals for the Eleventh Circuit \* \* \* assumed the validity of the study itself and addressed the merits of McCleskey's Eighth and Fourteenth Amendment claims. \* \* \* Even assuming the study's validity, the Court of Appeals found the statistics "insufficient to demonstrate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context, [and] insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis."

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## II

McCleskey's first claim is that the Georgia capital punishment statute violates the Equal Protection Clause of the Fourteenth Amendment.<sup>7</sup>

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race effects go away. It's only in the mid-range of cases where the decision makers have a real choice as to what to do. If there's room for the exercise of discretion, then the [racial] factors begin to play a role." Under this model, Baldus found that 14.4% of the black-victim midrange cases received the death penalty, and 34.4% of the white-victim cases received the death penalty. According to Baldus, the facts of McCleskey's case placed it within the midrange.

7. Although the District Court rejected the findings of the Baldus study as flawed, the Court of Appeals assumed that the study is valid and reached the constitutional issues. Accordingly, those issues are before us. As did the Court of Appeals, we assume the study is valid statistically without reviewing the factual findings of the District Court. Our assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia. Even a sophisticated

He argues that race has infected the administration of Georgia's statute in two ways: persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers. As a black defendant who killed a white victim, McCleskey claims that the Baldus study demonstrates that he was discriminated against because of his race and because of the race of his victim. In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application. We agree with the Court of Appeals, and every other court that has considered such a challenge, that this claim must fail.

#### A

Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in his case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study.<sup>11</sup> McCleskey argues

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multiple-regression analysis such as the Baldus study can only demonstrate a risk that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision.

11. McCleskey's expert testified: "Models that are developed talk about the effect on the average. They do not depict the experience of a single individual. What they say, for example, [is] that on the average, the race of the victim, if it is white, increases on the average the probability . . . (that) the death sentence would be given. "Whether in a given case that is the answer, it

that the Baldus study compels an inference that his sentence rests on purposeful discrimination. McCleskey's claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black.

The Court has accepted statistics as proof of intent to discriminate in certain limited contexts. First, this Court has accepted statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district. Although statistical proof normally must present a "stark" pattern to be accepted as the sole proof of discriminatory intent under the Constitution,<sup>12</sup> "[b]ecause of the nature of the jury-selection task, . . . we have permitted a finding of constitutional violation even when the statistical pattern does not approach [such] extremes." Second, this Court has accepted statistics in the form of multiple-regression analysis to prove statutory violations under Title VII of the Civil Rights Act of 1964.

But the nature of the capital sentencing decision, and the relationship of the statistics to

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cannot be determined from statistics."

12. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), are examples of those rare cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation. In *Gomillion*, a state legislature violated the Fifteenth Amendment by altering the boundaries of a particular city "from a square to an uncouth twenty-eight-sided figure." The alterations excluded 395 of 400 black voters without excluding a single white voter. In *Yick Wo*, an ordinance prohibited operation of 310 laundries that were housed in wooden buildings, but allowed such laundries to resume operations if the operator secured a permit from the government. When laundry operators applied for permits to resume operation, all but one of the white applicants received permits, but none of the over 200 Chinese applicants were successful. In those cases, the Court found the statistical disparities "to warrant and require," a "conclusion [that was] irresistible, tantamount for all practical purposes to a mathematical demonstration," that the State acted with a discriminatory purpose.

that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases. Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. Thus, the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case. In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.

Another important difference between the cases in which we have accepted statistics as proof of discriminatory intent and this case is that, in the venire-selection and Title VII contexts, the decisionmaker has an opportunity to explain the statistical disparity. Here, the State has no practical opportunity to rebut the Baldus study. “[C]ontrolling considerations of . . . public policy,” dictate that jurors “cannot be called . . . to testify to the motives and influences that led to their verdict.” Similarly, the policy considerations behind a prosecutor’s traditionally “wide discretion” suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, “often years after they were made.”<sup>17</sup> Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.

Finally, McCleskey’s statistical proffer must be

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17. Requiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts. *See Batson v. Kentucky*, 476 U.S. 79 (1986).

viewed in the context of his challenge. McCleskey challenges decisions at the heart of the State’s criminal justice system. \* \* \* Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey’s case acted with discriminatory purpose.

## B

McCleskey also suggests that the Baldus study proves that the State as a whole has acted with a discriminatory purpose. He appears to argue that the State has violated the Equal Protection Clause by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. But “[d]iscriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect. In *Gregg v. Georgia*, this Court found that the Georgia capital sentencing system could operate in a fair and neutral manner. There was no evidence then, and there is none now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose.<sup>20</sup>

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20. McCleskey relies on “historical evidence” to support his claim of purposeful discrimination by the State. This evidence focuses on Georgia laws in force during and just after the Civil War. Of course, the “historical background of the decision is one evidentiary source” for proof of intentional discrimination. But unless historical evidence is reasonably contemporaneous with the challenged

Nor has McCleskey demonstrated that the legislature maintains the capital punishment statute because of the racially disproportionate impact suggested by the Baldus study. \* \* \* Accordingly, we reject McCleskey's equal protection claims.

### III

McCleskey also argues that the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment. \* \* \*

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### B

Two principal decisions guide our resolution of McCleskey's Eighth Amendment claim. In *Furman v. Georgia*, the Court concluded that the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive. Under the statutes at issue in *Furman*, there was no basis for determining in any particular case whether the penalty was proportionate to the crime: "[T]he death penalty [was] exacted with great infrequency even for the most atrocious crimes and . . . there [was] no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not."

\* \* \*

[In *Gregg v. Georgia* we] explained the fundamental principle of *Furman*, that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Numerous features of the then new Georgia statute met the concerns articulated in *Furman*. The Georgia system bifurcates guilt and sentencing proceedings[.] \* \* \* The statute narrows the class of murders subject to the death

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decision, it has little probative value. Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.

penalty to cases in which the jury finds at least one statutory aggravating circumstance beyond a reasonable doubt. Conversely, it allows the defendant to introduce any relevant mitigating evidence[.] \* \* \* The procedures also require a particularized inquiry into "the circumstances of the offense together with the character and propensities of the offender." \* \* \* Moreover, the Georgia system adds "an important additional safeguard against arbitrariness and caprice" in a provision for automatic appeal of a death sentence to the State Supreme Court. \* \* \*

### C

In the cases decided after *Gregg*, the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in *Gregg*. \* \* \* [A] State must "narrow the class of murderers subject to capital punishment," by providing "specific and detailed guidance" to the sentencer.

In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, "[t]he sentencer . . . [cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." \* \* \*

\* \* \*

Finally, where the objective indicia of community values have demonstrated a consensus that the death penalty is disproportionate as applied to a certain class of cases, we have established substantive limitations on its application. \* \* \*

### D

In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. \* \* \*

## IV A

In light of our precedents under the Eighth Amendment, McCleskey cannot argue



successfully that his sentence is “disproportionate to the crime in the traditional sense.” He does not deny that he committed a murder in the course of a planned robbery, a crime for which this Court has determined that the death penalty constitutionally may be imposed. \* \* \* McCleskey argues that the sentence in his case is disproportionate to the sentences in other murder cases.

On the one hand, he cannot base a constitutional claim on an argument that his case differs from other cases in which defendants did receive the death penalty. On automatic appeal, the Georgia Supreme Court found that McCleskey’s death sentence was not disproportionate to other death sentences imposed in the State. The court supported this conclusion with an appendix containing citations to 13 cases involving generally similar murders. Moreover, where the statutory procedures adequately channel the sentencer’s discretion, such proportionality review is not constitutionally required.

On the other hand, absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty. In *Gregg*, the Court confronted the argument that “the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law,” specifically the opportunities for discretionary leniency, rendered the capital sentences imposed arbitrary and capricious. We rejected this contention:

\* \* \* Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the

defendant.<sup>28</sup>

Because McCleskey’s sentence was imposed under Georgia sentencing procedures that focus discretion “on the particularized nature of the crime and the particularized characteristics of the individual defendant,” we lawfully may presume that McCleskey’s death sentence was not “wantonly and freakishly” imposed, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment.

## B

Although our decision in *Gregg* as to the facial validity of the Georgia capital punishment statute appears to foreclose McCleskey’s disproportionality argument, he further contends that the Georgia capital punishment system is arbitrary and capricious in application, and therefore his sentence is excessive, because racial considerations may influence capital sentencing decisions in Georgia. We now address this claim.

To evaluate McCleskey’s challenge, we must examine exactly what the Baldus study may show. Even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions or that race was a factor in McCleskey’s particular case. Statistics at most may show only a likelihood that a particular factor

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28. The Constitution is not offended by inconsistency in results based on the objective circumstances of the crime. Numerous legitimate factors may influence the outcome of a trial and a defendant’s ultimate sentence, even though they may be irrelevant to his actual guilt. If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the responsible law enforcement agency can vary widely. Also, the strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor’s decision to offer a plea bargain or to go to trial. Witness availability, credibility, and memory also influence the results of prosecutions. Finally, sentencing in state courts is generally discretionary, so a defendant’s ultimate sentence necessarily will vary according to the judgment of the sentencing authority. The foregoing factors necessarily exist in varying degrees throughout our criminal justice system.

entered into some decisions.<sup>29</sup> There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. The question "is at what point that risk becomes constitutionally unacceptable," McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.

Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice." Thus, it is the jury that is a criminal defendant's fundamental "protection of life and liberty against race or color prejudice." Specifically, a capital sentencing jury representative of a criminal defendant's community assures a "diffused impartiality," in the jury's task of "express[ing] the conscience of the community on the ultimate question of life or death."

Individual jurors bring to their deliberations "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that

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29. According to Professor Baldus: "McCleskey's case falls in [a] grey area where . . . you would find the greatest likelihood that some inappropriate consideration may have come to bear on the decision. "In an analysis of this type, obviously one cannot say that we can say to a moral certainty what it was that influenced the decision. We can't do that."

"buil[d] discretion, equity, and flexibility into a legal system."

McCleskey's argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system. Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense. Whereas decisions against a defendant's interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable. Similarly, the capacity of prosecutorial discretion to provide individualized justice is "firmly entrenched in American law." As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. Of course, "the power to be lenient [also] is the power to discriminate," but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice."

### C

At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is "a far cry from the major systemic defects identified in *Furman*." As this Court has recognized, any mode for determining guilt or punishment "has its weaknesses and the potential for misuse." Specifically, "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" Despite these imperfections, our consistent rule has been that constitutional guarantees are met when "the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible." Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our

criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.

## V

Two additional concerns inform our decision in this case. First, McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.<sup>38</sup> Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys, or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could – at least in theory – be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not "plac[e] totally

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38. Studies already exist that allegedly demonstrate a racial disparity in the length of prison sentences.

unrealistic conditions on its use."

Second, McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility – or indeed even the right – of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." Capital punishment is now the law in more than two-thirds of our States. It is the ultimate duty of courts to determine on a case-by-case basis whether these laws are applied consistently with the Constitution. Despite McCleskey's wide-ranging arguments that basically challenge the validity of capital punishment in our multiracial society, the only question before us is whether in his case, the law of Georgia was properly applied. \* \* \*

\* \* \*

**Justice BRENNAN**, with whom Justice MARSHALL joins, and with whom Justice BLACKMUN and Justice STEVENS join in all but Part I, dissenting.

\* \* \*

## II

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine

whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.

The Court today holds that Warren McCleskey's sentence was constitutionally imposed. It finds no fault in a system in which lawyers must tell their clients that race casts a large shadow on the capital sentencing process. The Court arrives at this conclusion by stating that the Baldus study cannot "prove that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case." Since, according to Professor Baldus, we cannot say "to a moral certainty" that race influenced a decision, we can identify only "a likelihood that a particular factor entered into some decisions," and "a discrepancy that appears to correlate with race." This "likelihood" and "discrepancy," holds the Court, is insufficient to establish a constitutional violation. The Court reaches this conclusion by placing four factors on the scales opposite McCleskey's evidence: the desire to encourage sentencing discretion, the existence of "statutory safeguards" in the Georgia scheme, the fear of encouraging widespread challenges to other sentencing decisions, and the limits of the judicial role. The Court's evaluation of the significance of petitioner's evidence is fundamentally at odds with our consistent concern for rationality in capital sentencing, and the considerations that the majority invokes to discount that evidence cannot justify ignoring its force.

### III A

It is important to emphasize at the outset that the Court's observation that McCleskey cannot prove the influence of race on any particular sentencing decision is irrelevant in evaluating his Eighth Amendment claim. \* \* \* *Furman* held that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." \* \* \* This emphasis on risk acknowledges the difficulty of divining the jury's motivation in an individual case. In addition, it reflects the fact that concern for arbitrariness focuses on the rationality of the system as a whole, and that a system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational.<sup>39</sup> As we said in *Gregg v. Georgia* \* \* \*: a constitutional violation is established if a plaintiff demonstrates a "pattern of arbitrary and capricious sentencing."

As a result, our inquiry under the Eighth Amendment has not been directed to the validity of the individual sentences before us. In *Godfrey v. Georgia*], for instance, the Court struck down the petitioner's sentence because the vagueness of the statutory definition of heinous crimes created a risk that prejudice or other impermissible

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39. Once we can identify a pattern of arbitrary sentencing outcomes, we can say that a defendant runs a risk of being sentenced arbitrarily. It is thus immaterial whether the operation of an impermissible influence such as race is intentional. While the Equal Protection Clause forbids racial discrimination, and intent may be critical in a successful claim under that provision, the Eighth Amendment has its own distinct focus: whether punishment comports with social standards of rationality and decency. It may be, as in this case, that on occasion an influence that makes punishment arbitrary is also proscribed under another constitutional provision. That does not mean, however, that the standard for determining an Eighth Amendment violation is superseded by the standard for determining a violation under this other provision. Thus, the fact that McCleskey presents a viable equal protection claim does not require that he demonstrate intentional racial discrimination to establish his Eighth Amendment claim.

influences might have infected the sentencing decision. In vacating the sentence, we did not ask whether it was likely that Godfrey's own sentence reflected the operation of irrational considerations. \* \* \* Similarly, in *Roberts v. Louisiana*, 428 U.S. 325 (1976), and *Woodson v. North Carolina*, 428 U.S. 280 (1976), we struck down death sentences in part because mandatory imposition of the death penalty created the risk that a jury might rely on arbitrary considerations in deciding which persons should be convicted of capital crimes. \* \* \* We did not ask whether the death sentences in the cases before us could have reflected the jury's rational consideration and rejection of mitigating factors. Nor did we require proof that juries had actually acted irrationally in other cases.

\* \* \* McCleskey's claim does differ, however, in one respect from these earlier cases: it is the first to base a challenge not on speculation about how a system might operate, but on empirical documentation of how it does operate.

The Court assumes the statistical validity of the Baldus study, and acknowledges that McCleskey has demonstrated a risk that racial prejudice plays a role in capital sentencing in Georgia. Nonetheless, it finds the probability of prejudice insufficient to create constitutional concern. Close analysis of the Baldus study, however, in light of both statistical principles and human experience, reveals that the risk that race influenced McCleskey's sentence is intolerable by any imaginable standard.

## B

The Baldus study indicates that, after taking into account some 230 nonracial factors that might legitimately influence a sentencer, the jury more likely than not would have spared McCleskey's life had his victim been black. The study distinguishes between those cases in which (1) the jury exercises virtually no discretion because the strength or weakness of aggravating factors usually suggests that only one outcome is

appropriate;<sup>40</sup> and (2) cases reflecting an "intermediate" level of aggravation, in which the jury has considerable discretion in choosing a sentence.<sup>41</sup> McCleskey's case falls into the intermediate range. In such cases, death is imposed in 34% of white-victim crimes and 14% of black-victim crimes, a difference of 139% in the rate of imposition of the death penalty. In other words, just under 59% – almost 6 in 10 – defendants comparable to McCleskey would not have received the death penalty if their victims had been black.

Furthermore, even examination of the sentencing system as a whole, factoring in those cases in which the jury exercises little discretion, indicates the influence of race on capital sentencing. For the Georgia system as a whole, race accounts for a six percentage point difference in the rate at which capital punishment is imposed. Since death is imposed in 11% of all white-victim cases, the rate in comparably aggravated black-victim cases is 5%. The rate of capital sentencing in a white-victim case is thus 120% greater than the rate in a black-victim case. Put another way, over half – 55% – of defendants in white-victim crimes in Georgia would not have been sentenced to die if their victims had been black. Of the more than 200 variables potentially relevant to a sentencing decision, race of the victim is a powerful explanation for variation in death sentence rates – as powerful as nonracial aggravating factors such as a prior murder conviction or acting as the

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40. The first two and the last of the study's eight case categories represent those cases in which the jury typically sees little leeway in deciding on a sentence. Cases in the first two categories are those that feature aggravating factors so minimal that juries imposed no death sentences in the 88 cases with these factors during the period of the study. Cases in the eighth category feature aggravating factors so extreme that the jury imposed the death penalty in 88% of the 58 cases with these factors in the same period.

41. In the five categories characterized as intermediate, the rate at which the death penalty was imposed ranged from 8% to 41%. The overall rate for the 326 cases in these categories was 20%.

principal planner of the homicide.<sup>43</sup>

\* \* \* Since our decision upholding the Georgia capital sentencing system in *Gregg*, the State has executed seven persons. All of the seven were convicted of killing whites, and six of the seven executed were black. Such execution figures are especially striking in light of the fact that, during the period encompassed by the Baldus study, only 9.2% of Georgia homicides involved black defendants and white victims, while 60.7% involved black victims.

McCleskey's statistics have particular force because most of them are the product of sophisticated multiple-regression analysis. Such analysis is designed precisely to identify patterns in the aggregate, even though we may not be able to reconstitute with certainty any individual decision that goes to make up that pattern. Multiple-regression analysis is particularly well suited to identify the influence of impermissible considerations in sentencing, since it is able to control for permissible factors that may explain an apparent arbitrary pattern. While the decisionmaking process of a body such as a jury may be complex, the Baldus study provides a massive compilation of the details that are most relevant to that decision. As we held in the context of Title VII of the Civil Rights Act of 1964 last term in *Bazemore v. Friday*, 478 U.S. 385 (1986), a multiple-regression analysis need not include every conceivable variable to establish a party's case, as long as it includes those variables that account for the major factors that are likely to influence decisions. In this case, Professor Baldus in fact conducted additional regression analyses in response to criticisms and suggestions by the District Court, all of which confirmed, and some of which even strengthened, the study's original conclusions.

The statistical evidence in this case thus

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43. The fact that a victim was white accounts for a nine percentage point difference in the rate at which the death penalty is imposed, which is the same difference attributable to a prior murder conviction or the fact that the defendant was the "prime mover" in planning a murder.

relentlessly documents the risk that McCleskey's sentence was influenced by racial considerations. This evidence shows that there is a better than even chance in Georgia that race will influence the decision to impose the death penalty: a majority of defendants in white-victim crimes would not have been sentenced to die if their victims had been black. In determining whether this risk is acceptable, our judgment must be shaped by the awareness that "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence," and that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." In determining the guilt of a defendant, a State must prove its case beyond a reasonable doubt. That is, we refuse to convict if the chance of error is simply less likely than not. Surely, we should not be willing to take a person's life if the chance that his death sentence was irrationally imposed is more likely than not. In light of the gravity of the interest at stake, petitioner's statistics on their face are a powerful demonstration of the type of risk that our Eighth Amendment jurisprudence has consistently condemned.

### C

Evaluation of McCleskey's evidence cannot rest solely on the numbers themselves. We must also ask whether the conclusion suggested by those numbers is consonant with our understanding of history and human experience. Georgia's legacy of a race-conscious criminal justice system, as well as this Court's own recognition of the persistent danger that racial attitudes may affect criminal proceedings, indicates that McCleskey's claim is not a fanciful product of mere statistical artifice.

For many years, Georgia operated openly and formally precisely the type of dual system the evidence shows is still effectively in place. The criminal law expressly differentiated between crimes committed by and against blacks and whites, distinctions whose lineage traced back to the time of slavery. During the colonial period, black slaves who killed whites in Georgia,

regardless of whether in self-defense or in defense of another, were automatically executed.<sup>8</sup>

By the time of the Civil War, a dual system of crime and punishment was well established in Georgia. The state criminal code contained separate sections for “Slaves and Free Persons of Color,” and for all other persons. The code provided, for instance, for an automatic death sentence for murder committed by blacks, but declared that anyone else convicted of murder might receive life imprisonment if the conviction were founded solely on circumstantial testimony or simply if the jury so recommended. The code established that the rape of a free white female by a black “shall be” punishable by death. However, rape by anyone else of a free white female was punishable by a prison term not less than 2 nor more than 20 years. The rape of blacks was punishable “by fine and imprisonment, at the discretion of the court.” A black convicted of assaulting a free white person with intent to murder could be put to death at the discretion of the court, but the same offense committed against a black, slave or free, was classified as a “minor” offense whose punishment lay in the discretion of the court, as long as such punishment did not “extend to life, limb, or health.” \* \* \*

\* \* \*

In more recent times, some 40 years ago, Gunnar Myrdal’s epochal study of American race relations produced findings mirroring McCleskey’s evidence:

As long as only Negroes are concerned and no whites are disturbed, great leniency will be shown in most cases. . . . The sentences for even

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8. Death could also be inflicted upon a slave who “grievously wound[ed], maim[ed], or bruise[d] any white person,” who was convicted for the third time of striking a white person, or who attempted to run away out of the province. On the other hand, a person who willfully murdered a slave was not punished until the second offense, and then was responsible simply for restitution to the slave owner. Furthermore, conviction for willful murder of a slave was subject to the difficult requirement of the oath of two white witnesses.

major crimes are ordinarily reduced when the victim is another Negro.

\* \* \*

For offenses which involve any actual or potential danger to whites, however, Negroes are punished more severely than whites.

\* \* \*

On the other hand, it is quite common for a white criminal to be set free if his crime was against a Negro.

This Court has invalidated portions of the Georgia capital sentencing system three times over the past 15 years. The specter of race discrimination was acknowledged by the Court in striking down the Georgia death penalty statute in *Furman*. \* \* \*

Five years later, the Court struck down the imposition of the death penalty in Georgia for the crime of rape. *Coker v. Georgia*, 433 U.S. 584 (1977). Although the Court did not explicitly mention race, the decision had to have been informed by the specific observations on rape by both the Chief Justice and Justice POWELL in *Furman*. Furthermore, evidence submitted to the Court indicated that black men who committed rape, particularly of white women, were considerably more likely to be sentenced to death than white rapists. For instance, by 1977 Georgia had executed 62 men for rape since the Federal Government began compiling statistics in 1930. Of these men, 58 were black and 4 were white.

\* \* \*

This historical review of Georgia criminal law is not intended as a bill of indictment calling the State to account for past transgressions. Citation of past practices does not justify the automatic condemnation of current ones. But it would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey’s evidence. “[A]mericans share a historical experience that has resulted in individuals within the culture ubiquitously

attaching a significance to race that is irrational and often outside their awareness.” As we said in *Rose v. Mitchell*, 443 U.S. 545 (1979). “[W]e . . . cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after *Strauder v. West Virginia*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.”

The ongoing influence of history is acknowledged, as the majority observes, by our “‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system.” These efforts, however, signify not the elimination of the problem but its persistence. Our cases reflect a realization of the myriad of opportunities for racial considerations to influence criminal proceedings: in the exercise of peremptory challenges, in the selection of the grand jury, in the selection of the petit jury, in the exercise of prosecutorial discretion, in the conduct of argument, and in the conscious or unconscious bias of jurors.

The discretion afforded prosecutors and jurors in the Georgia capital sentencing system creates such opportunities. No guidelines govern prosecutorial decisions to seek the death penalty[.] \* \* \* Once a jury identifies one aggravating factor, it has complete discretion in choosing life or death, and need not articulate its basis for selecting life imprisonment. The Georgia sentencing system therefore provides considerable opportunity for racial considerations, however subtle and unconscious, to influence charging and sentencing decisions.

\* \* \* [A]s we acknowledged in *Turner*, “subtle, less consciously held racial attitudes” continue to be of concern, and the Georgia system gives such attitudes considerable room to operate. \* \* \*

\* \* \* It is true that every nuance of decision cannot be statistically captured, nor can any individual judgment be plumbed with absolute certainty. Yet the fact that we must always act without the illumination of complete knowledge

cannot induce paralysis when we confront what is literally an issue of life and death. Sentencing data, history, and experience all counsel that Georgia has provided insufficient assurance of the heightened rationality we have required in order to take a human life.

#### IV

The Court cites four reasons for shrinking from the implications of McCleskey’s evidence: the desirability of discretion for actors in the criminal justice system, the existence of statutory safeguards against abuse of that discretion, the potential consequences for broader challenges to criminal sentencing, and an understanding of the contours of the judicial role. \* \* \*

The Court maintains that petitioner’s claim “is antithetical to the fundamental role of discretion in our criminal justice system.” \* \* \*

Reliance on race in imposing capital punishment, however, is antithetical to the very rationale for granting sentencing discretion. Discretion is a means, not an end. It is bestowed in order to permit the sentencer to “trea[t] each defendant in a capital case with that degree of respect due the uniqueness of the individual.” \* \* \*

\* \* \* Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess. Enhanced willingness to impose the death sentence on black defendants, or diminished willingness to render such a sentence when blacks are victims, reflects a devaluation of the lives of black persons. When confronted with evidence that race more likely than not plays such a role in a capital sentencing system, it is plainly insufficient to say that the importance of discretion demands that the risk be higher before we will act – for in such a case the very end that discretion is designed to serve is being undermined.

Our desire for individualized moral judgments may lead us to accept some inconsistencies in sentencing outcomes. \* \* \* There is thus a



presumption that actors in the criminal justice system exercise their discretion in responsible fashion, and we do not automatically infer that sentencing patterns that do not comport with ideal rationality are suspect.

As we made clear in *Batson v. Kentucky*, however, that presumption is rebuttable. \* \* \* As with sentencing, \* \* \* we presume that such challenges normally are not made on the basis of a factor such as race. As we said in *Batson*, however, such features do not justify imposing a “crippling burden of proof,” in order to rebut that presumption. The Court in this case apparently seeks to do just that. On the basis of the need for individualized decisions, it rejects evidence, drawn from the most sophisticated capital sentencing analysis ever performed, that reveals that race more likely than not infects capital sentencing decisions. The Court’s position converts a rebuttable presumption into a virtually conclusive one.

The Court also declines to find McCleskey’s evidence sufficient in view of “the safeguards designed to minimize racial bias in the [capital sentencing] process.” \* \* \*

It has now been over 13 years since Georgia adopted the provisions upheld in *Gregg*. Professor Baldus and his colleagues have compiled data on almost 2,500 homicides committed during the period 1973-1979. \* \* \* The challenge to the Georgia system is not speculative or theoretical; it is empirical. As a result, the Court cannot rely on the statutory safeguards in discounting McCleskey’s evidence, for it is the very effectiveness of those safeguards that such evidence calls into question. While we may hope that a model of procedural fairness will curb the influence of race on sentencing, “we cannot simply assume that the model works as intended; we must critique its performance in terms of its results.”

The Court next states that its unwillingness to regard petitioner’s evidence as sufficient is based in part on the fear that recognition of McCleskey’s claim would open the door to widespread challenges to all aspects of criminal sentencing.

Taken on its face, such a statement seems to suggest a fear of too much justice. \* \* \* The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role. \* \* \*

In fairness, the Court’s fear that McCleskey’s claim is an invitation to descend a slippery slope also rests on the realization that any humanly imposed system of penalties will exhibit some imperfection. Yet to reject McCleskey’s powerful evidence on this basis is to ignore both the qualitatively different character of the death penalty and the particular repugnance of racial discrimination[.] \* \* \*

\* \* \* The marginal benefits accruing to the state from obtaining the death penalty rather than life imprisonment are considerably less than the marginal difference to the defendant between death and life in prison. Such a disparity is an additional reason for tolerating scant arbitrariness in capital sentencing. \* \* \*

The Court also maintains that accepting McCleskey’s claim would pose a threat to all sentencing because of the prospect that a correlation might be demonstrated between sentencing outcomes and other personal characteristics. \* \* \* Race is a consideration whose influence is expressly constitutionally proscribed. We have expressed a moral commitment, as embodied in our fundamental law, that this specific characteristic should not be the basis for allotting burdens and benefits. \* \* \* That a decision to impose the death penalty could be influenced by race is thus a particularly repugnant prospect, and evidence that race may play even a modest role in levying a death sentence should be enough to characterize that sentence as “cruel and unusual.”

\* \* \* One could hardly contend that this Nation has on the basis of hair color inflicted upon persons deprivation comparable to that imposed on the basis of race. \* \* \*

\* \* \*

\* \* \* The Court can indulge in such speculation only by ignoring its own jurisprudence demanding the highest scrutiny on issues of death and race. As a result, it fails to do justice to a claim in which both those elements are intertwined – an occasion calling for the most sensitive inquiry a court can conduct. Despite its acceptance of the validity of Warren McCleskey’s evidence, the Court is willing to let his death sentence stand because it fears that we cannot successfully define a different standard for lesser punishments. This fear is baseless.

\* \* \*

For these reasons, “[t]he methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.” Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society’s demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of “sober second thought.”

## V

At the time our Constitution was framed 200 years ago this year, blacks “had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.” Only 130 years ago, this Court relied on these observations to deny American citizenship to blacks. A mere three generations ago, this Court sanctioned racial segregation, stating that “[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”

In more recent times, we have sought to free ourselves from the burden of this history. Yet it

has been scarcely a generation since this Court’s first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries. Warren McCleskey’s evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. “The destinies of the two races in this country are indissolubly linked together,” and the way in which we choose those who will die reveals the depth of moral commitment among the living.

The Court’s decision today will not change what attorneys in Georgia tell other Warren McCleskeys about their chances of execution. Nothing will soften the harsh message they must convey, nor alter the prospect that race undoubtedly will continue to be a topic of discussion. McCleskey’s evidence will not have obtained judicial acceptance, but that will not affect what is said on death row. However many criticisms of today’s decision may be rendered, these painful conversations will serve as the most eloquent dissents of all.

**Justice BLACKMUN**, with whom Justice MARSHALL and Justice STEVENS join, and with whom Justice BRENNAN joins in all but Part IV-B, dissenting.

\* \* \*

\* \* \* Analysis of his case in terms of the Fourteenth Amendment is consistent with this Court's recognition that racial discrimination is fundamentally at odds with our constitutional guarantee of equal protection. \* \* \* Disparate enforcement of criminal sanctions "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." \* \* \*

Moreover, the legislative history of the Fourteenth Amendment reminds us that discriminatory enforcement of States' criminal laws was a matter of great concern for the drafters. \* \* \* Witnesses who testified before the Committee [that drafted the Fourteenth Amendment] presented accounts of criminal acts of violence against black persons that were not prosecuted despite evidence as to the identity of the perpetrators.

## I A

The Court today seems to give a new meaning to our recognition that death is different. Rather than requiring "a correspondingly greater degree of scrutiny of the capital sentencing determination," the Court relies on the very fact that this is a case involving capital punishment to apply a lesser standard of scrutiny under the Equal Protection Clause. \* \* \* The Court explains that McCleskey's evidence is too weak to require rebuttal "because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty." \* \* \*

The Court's assertion that the fact of McCleskey's conviction undermines his constitutional claim is inconsistent with a long and unbroken line of this Court's case law. The Court on numerous occasions during the past century has recognized that an otherwise legitimate basis for a conviction does not outweigh an equal protection violation. In cases where racial discrimination in the administration of the criminal justice system is established, it has held that setting aside the conviction is the appropriate remedy. \* \* \* The Court has maintained a *per se* reversal rule rejecting

application of harmless-error analysis in cases involving racial discrimination that "strikes at the fundamental values of our judicial system and our society as a whole." \* \* \*

\* \* \*

## B

\* \* \* The Court treats the case as if it is limited to challenges to the actions of two specific decisionmaking bodies – the petit jury and the state legislature. This self-imposed restriction enables the Court to distinguish this case from the venire-selection cases and cases under Title VII of the Civil Rights Act of 1964 in which it long has accepted statistical evidence and has provided an easily applicable framework for review. Considering McCleskey's claim in its entirety, however, reveals that the claim fits easily within that same framework. A significant aspect of his claim is that racial factors impermissibly affected numerous steps in the Georgia capital sentencing scheme between his indictment and the jury's vote to sentence him to death. The primary decisionmaker at each of the intervening steps of the process is the prosecutor, the quintessential state actor in a criminal proceeding. The District Court expressly stated that there were "two levels of the system that matter to [McCleskey], the decision to seek the death penalty and the decision to impose the death penalty." I agree with this statement of McCleskey's case. Hence, my analysis in this dissenting opinion takes into account the role of the prosecutor in the Georgia capital-sentencing system. \* \* \*

## II A

A criminal defendant alleging an equal protection violation must prove the existence of purposeful discrimination. He may establish a prima facie case<sup>4</sup> of purposeful discrimination "by showing that the totality of the relevant facts gives

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4. The use of the prima facie case method to structure proof in cases charging racial discrimination is appropriate because it "progressively . . . sharpen[s] the inquiry into the elusive factual question of intentional discrimination."

rise to an inference of discriminatory purpose.” Once the defendant establishes a prima facie case, the burden shifts to the prosecution to rebut that case. “The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties.” The State must demonstrate that the challenged effect was due to “permissible racially neutral selection criteria.”

Under *Batson v. Kentucky* and the framework established in *Castaneda v. Partida*, McCleskey must meet a three-factor standard. First, he must establish that he is a member of a group “that is a recognizable, distinct class, singled out for different treatment.” Second, he must make a showing of a substantial degree of differential treatment. Third, he must establish that the allegedly discriminatory procedure is susceptible to abuse or is not racially neutral.

## B

There can be no dispute that McCleskey has made the requisite showing under the first prong of the standard. The Baldus study demonstrates that black persons are a distinct group that are singled out for different treatment in the Georgia capital sentencing system. The Court acknowledges, as it must, that the raw statistics included in the Baldus study and presented by petitioner indicate that it is much less likely that a death sentence will result from a murder of a black person than from a murder of a white person. \* \* \*

With respect to the second prong, \* \* \* [t]he Court of Appeals assumed the validity of the Baldus study and found that it “showed that systemic and substantial disparities existed in the penalties imposed upon homicide defendants in Georgia based on race of the homicide victim, that the disparities existed at a less substantial rate in death sentencing based on race of defendants, and that the factors of race of the victim and defendant were at work in Fulton County.” The question remaining therefore is at what point does that disparity become constitutionally unacceptable. \* \* \*

\* \* \* McCleskey established that because he was

charged with killing a white person he was 4.3 times as likely to be sentenced to death as he would have been had he been charged with killing a black person. McCleskey also demonstrated that it was more likely than not that the fact that the victim he was charged with killing was white determined that he received a sentence of death – 20 out of every 34 defendants in McCleskey’s midrange category would not have been sentenced to be executed if their victims had been black. \* \* \*

\* \* \* McCleskey established that the race of the victim is an especially significant factor at the point where the defendant has been convicted of murder and the prosecutor must choose whether to proceed to the penalty phase of the trial and create the possibility that a death sentence may be imposed or to accept the imposition of a sentence of life imprisonment. \* \* \*

Individualized evidence relating to the disposition of the Fulton County cases that were most comparable to McCleskey’s case was consistent with the evidence of the race-of-victim effect as well. Of the 17 defendants, including McCleskey, who were arrested and charged with homicide of a police officer in Fulton County during the 1973-1979 period, McCleskey, alone, was sentenced to death. \* \* \*

As to the final element of the prima facie case, McCleskey showed that the process by which the State decided to seek a death penalty in his case and to pursue that sentence throughout the prosecution was susceptible to abuse. \* \* \* [T]here were no guidelines informing the Assistant District Attorneys who handled the cases how they should proceed at any particular stage of the prosecution. \* \* \* [T]hese decisions were left to the discretion of the individual attorneys who then informed [the District Attorney] of their decisions as they saw fit.

\* \* \*

In addition to this showing that the challenged system was susceptible to abuse, McCleskey presented evidence of the history of prior discrimination in the Georgia system. \* \* \*

The [historical evidence] \* \* \* gives rise to an inference of discriminatory purpose. \* \* \* McCleskey's showing is of sufficient magnitude that, absent evidence to the contrary, one must conclude that racial factors entered into the decisionmaking process that yielded McCleskey's death sentence. The burden, therefore, shifts to the State to explain the racial selections. It must demonstrate that legitimate racially neutral criteria and procedures yielded this racially skewed result.

In rebuttal, the State's expert \* \* \* analyzed aggravating and mitigating circumstances "one by one, demonstrating that in life sentence cases, to the extent that any aggravating circumstance is more prevalent in one group than the other, there are more aggravating features in the group of white-victim cases than in the group of black-victim cases. Conversely, there were more mitigating circumstances in which black-victim cases had a higher proportion of that circumstance than in white-victim cases." \* \* \*

The State did not test its hypothesis to determine if white-victim and black-victim cases at the same level of aggravating circumstances were similarly treated. McCleskey's experts, however, performed this test on their data. They demonstrated that the racial disparities in the system were not the result of the differences in the average aggravation levels between white-victim and black-victim cases. The State's meager and unsophisticated evidence cannot withstand the extensive scrutiny given the Baldus evidence. \* \* \*

### III \* \* \*

\* \* \* The Court's statement that the decision to impose death is made by the petit jury also disregards the fact that the prosecutor screens the cases throughout the pretrial proceedings and decides to seek the death penalty and to pursue a capital case to the penalty phase where a death sentence can be imposed. \* \* \*

The Court's other reason for treating this case differently from venire-selection and employment cases is that in these latter contexts, "the decisionmaker has an opportunity to explain the

statistical disparity," but in the instant case the State had no practical opportunity to rebut the Baldus study. \* \* \*

I agree with the Court's observation as to the difficulty of examining the jury's decisionmaking process. There perhaps is an inherent tension between the discretion accorded capital sentencing juries and the guidance for use of that discretion that is constitutionally required. \* \* \* The Court's refusal to require that the prosecutor provide an explanation for his actions, however, is completely inconsistent with this Court's longstanding precedents. [In] *Imbler v. Pachtman*, [w]e recognized that immunity from damages actions was necessary to prevent harassing litigation and to avoid the threat of civil litigation undermining the prosecutor's independence of judgment. We clearly specified, however, that the policy considerations that compelled civil immunity did not mean that prosecutors could not be called to answer for their actions. \* \* \*

\* \* \* I agree with the Court's observation that this case is "quite different" from the *Batson* case. The irony is that McCleskey presented proof in this case that would have satisfied the more burdensome standard of *Swain v. Alabama*, 380 U.S. 202 (1965), a standard that was described in *Batson* as having placed on defendants a "crippling burden of proof." As discussed above, McCleskey presented evidence of numerous decisions impermissibly affected by racial factors over a significant number of cases. The exhaustive evidence presented in this case certainly demands an inquiry into the prosecutor's actions.

\* \* \*

### IV A

One of the final concerns discussed by the Court may be the most disturbing aspect of its opinion. Granting relief to McCleskey in this case, it is said, could lead to further constitutional challenges. That, of course, is no reason to deny McCleskey his rights under the Equal Protection Clause. If a grant of relief to him were to lead to a closer examination of the effects of racial

considerations throughout the criminal justice system, the system, and hence society, might benefit. Where no such factors come into play, the integrity of the system is enhanced. Where such considerations are shown to be significant, efforts can be made to eradicate their impermissible influence and to ensure an evenhanded application of criminal sanctions.

### B

Like Justice STEVENS, \* \* \* I agree that narrowing the class of death-eligible defendants is not too high a price to pay for a death penalty system that does not discriminate on the basis of race. Moreover, the establishment of guidelines for Assistant District Attorneys as to the appropriate basis for exercising their discretion at the various steps in the prosecution of a case would provide at least a measure of consistency. \* \* \* As Justice WHITE stated for the plurality in *Turner v. Murray*, I find “the risk that racial prejudice may have infected petitioner’s capital sentencing unacceptable in light of the ease with which that risk could have been minimized.” I dissent.

**Justice STEVENS**, with whom Justice BLACKMUN joins, dissenting.

\* \* \*

In this case it is claimed – and the claim is supported by elaborate studies which the Court properly assumes to be valid – that the jury’s sentencing process was likely distorted by racial prejudice. The studies demonstrate a strong probability that McCleskey’s sentencing jury, which expressed “the community’s outrage – its sense that an individual has lost his moral entitlement to live,” – was influenced by the fact that McCleskey is black and his victim was white, and that this same outrage would not have been generated if he had killed a member of his own race. This sort of disparity is constitutionally intolerable. It flagrantly violates the Court’s prior “insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all.”

The Court’s decision appears to be based on a

fear that the acceptance of McCleskey’s claim would sound the death knell for capital punishment in Georgia. If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder “for whites only”) and no death penalty at all, the choice mandated by the Constitution would be plain. But the Court’s fear is unfounded. One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated. As Justice BRENNAN has demonstrated in his dissenting opinion, such a restructuring of the sentencing scheme is surely not too high a price to pay.

\* \* \*

### **Justice Scalia’s Memorandum Regarding the Statistics in *McCleskey***

Three months before *McCleskey* was decided, Justice Scalia, who did not write an opinion in the case, circulated to the Court a short memorandum expressing disagreement with Justice Powell’s suggestion that the outcome of McCleskey’s case might have been different if his statistical evidence had been stronger:

Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof.

Justice Scalia also took issue with Justice Powell’s methodological justification for discounting the statistical evidence: “I disagree with the argument that the inferences that can be

drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue.” Justice Scalia’s memorandum surfaced in Justice Marshall’s papers, which were opened to the public by the Library of Congress following Justice Marshall’s death.

### **Justice Powell’s Reflections After Retiring from the Supreme Court**

Justice Powell later expressed regret about his role in *McCleskey v. Kemp*. John C. Jeffries Jr., Powell’s biographer and former law clerk, writes that he asked during a 1991 interview if Powell would change any of his votes if he could.

“Yes,” Powell answered, “*McCleskey v. Kemp*.” He said that he had “come to think that capital punishment should be abolished.” Observing that the vast majority of death sentences are never carried out, Powell said the death penalty “brings discredit on the whole legal system.”<sup>5</sup>

#### ***For further reading***

For a thorough description of the study considered offered on behalf of Warren McCleskey, see David Baldus, George Woodworth & Charles A. Pulaski, Jr., *EQUAL JUSTICE AND THE DEATH PENALTY; A LEGAL AND EMPIRICAL ANALYSIS* (Northeastern U. Press 1990).

Ten years after *McCleskey*, Professor Baldus and his colleagues reported that racial discrimination continued to be found in various studies. David C. Baldus *et al.*, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 *CORNELL L. REV.* 1638, 1742-45 (1998). In a later analysis of existing studies, Professors Baldus and Woodworth reported, “in a

number of jurisdictions, but clearly not all, \* \* \* the pre-*Furman* pattern of race-of-victim discrimination persists in the post-*Furman* period, principally the product of prosecutorial charging decisions.” David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 *DEPAUL L. REV.* 1411, 1479 (2004).

See also G. Ben Cohen, *McCleskey’s Omission: The Racial Geography of Retribution*, 10 *Ohio St. J. Crim. Law* 65 (2013); Anthony G. Amsterdam, *Race and the Death Penalty Before and After McCleskey*, 39 *COLUM. HUM. RTS. L. REV.* 34 (2007) Sheri Lynn Johnson, *Litigating for Racial Fairness after McCleskey v. Kemp*, 39 *COLUM. HUM. RTS. L. REV.* 178 (2007); Jeffrey Fagan & Mukul Bakhshi, *McCleskey at 20: New Frameworks for Racial Equality in the Criminal Law*, 39 *COLUM. HUM. RTS. L. REV.* 1 (2007); Charles J. Ogletree, Jr. & Austin Sarat, *FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* (NYU Press 2006); essays and articles collected in 53 *DEPAUL L. REV.* 1403-1895 (2004); Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 *HAR. L. REV.* 1388 (1988); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 *CORNELL L. REV.* 1016 (1988); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 *MICH. L. REV.* 1611 (1985).

Racial bias in the criminal justice system is also addressed in David Cole, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (New Press Rev. ed. 2011), William J. Stuntz, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 103-04 (2011), and Randall Kennedy, *Race, Crime and the Law* (Pantheon 1997).

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5. John C. Jeffries, Jr., *JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY* 451 (1994).

## Is there a remedy after *McCleskey*?

Wilburn DOBBS, Petitioner,

v.

Walter D. ZANT, Warden, Georgia  
Diagnostic and Classification Center,  
Respondent.

United States District Court  
for the Northern District of Georgia  
720 F. Supp. 1566 (1989)

HAROLD L. MURPHY, District Judge.

Wilburn Dobbs is a Georgia inmate currently under a death sentence. He was convicted in 1974 in the Superior Court of Walker County of two counts of aggravated assault, two counts of armed robbery, and one count of murder. All the convictions arose from an incident at a convenience store in Chickamauga, Georgia in 1973. \* \* \*

\* \* \*

Before analyzing the claims, the Court notes that during discovery \* \* \*, the Court permitted Dobbs to depose the jurors in his case. \* \* \* The Court decided to permit the depositions solely because one of Dobbs' claims was that race was a factor in his sentencing decision, and the recent Supreme Court opinion in *McCleskey v. Kemp* requires that Dobbs demonstrate actual prejudice in his case. Although the Court permitted the depositions to be taken for discovery purposes, it reserved ruling on the admissibility of the evidence until it decided the merits of Dobbs' claims. For the reasons provided in this order, the jurors' statements are admissible for some purposes but not for others. \* \* \*

\* \* \*

Dobbs claims that the jurors' decision to impose the death penalty in his case was based on racial prejudice, in that he is black and the victim was white, as well as other arbitrary factors, in violation of his constitutional rights to an

impartial jury under the Sixth Amendment, to be free of cruel and unusual punishment under the Eighth Amendment, and to equal protection of the laws under the Fourteenth Amendment. \* \* \*

The Court's analysis of the racial prejudice issue is shaped in large part by the recent Supreme Court opinion in *McCleskey v. Kemp*. Similar to the situation in Dobbs' case, *McCleskey*, a black man whose victim was white, was sentenced to death. \* \* \*

Dobbs' claims differ from *McCleskey*'s in that Dobbs is challenging the constitutionality of his death sentence in particular as opposed to the death penalty process in general. Nevertheless, *McCleskey* discloses two standards for the instant case. \* \* \*

\* \* \*

Under Dobbs' Equal Protection claim \* \* \* Dobbs must show that the jurors acted with discriminatory purpose when they decided to impose the death penalty. Under Dobbs' Eighth Amendment claim, the standard is less stringent: Dobbs must show that the jurors possessed racial biases that created an "unacceptable risk" that race affected the sentencing decision.<sup>6</sup>

The application of these standards presents a difficult evidentiary issue concerning the admissibility of juror testimony. Under Federal

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6. For all practical purposes, the distinction between the Equal Protection claim and Eighth Amendment claim is not significant in a capital case: if the evidence shows an "unacceptable risk" that race affected the sentencing decision under the Eighth Amendment standard, then the petitioner would be entitled to relief whether or not he went further and proved that race was actually a motivator in the decision, in violation of the Equal Protection Clause. The "unacceptable risk" standard, however, applies to capital cases only. See *Turner v. Murray*, (distinguishing *Ristaino v. Ross* as a noncapital case). A petitioner in a noncapital case could not rely on the Eighth Amendment standard, but would have to show that race was actually a factor in his sentencing. The distinction between the two types of claims must therefore be drawn.



Rule of Evidence 606(b) \* \* \* “post-decision statements by a judge or juror about his mental processes in reaching [a] decision may not be used as evidence in a subsequent challenge to the decision.” However, a juror can testify concerning “any mental bias in matters unrelated to the specific issues that the juror was called upon to decide and whether extraneous prejudicial information was improperly brought to the juror’s attention.”

Racial prejudice is a “mental bias . . . unrelated to the specific issues that the juror was called upon to decide.” A habeas petitioner in a capital case, therefore, may take testimony from a trial juror to show that the juror possesses racial biases that, under the Eighth Amendment standard, created an “unacceptable risk” that race affected the death penalty decision.<sup>7</sup> However, under the Equal Protection claim, Dobbs must go further and show that the sentencing decision was actually motivated by racial prejudice. A conflict emerges between these two rules: whereas the McCleskey standard requires a petitioner to show actual bias in the sentencing decision, Rule 606(b) precludes inquiry into the decision making process.

In resolving that conflict, the Court initially notes that “Rule 606(b) strikes a balance between the defendants’ right to a fair trial free from substantial juror misconduct, while protecting harassment of jurors, supporting the finality of verdicts, and preserving the community’s trust in a system that relies on the decisions of lay

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7. Arguably, a habeas petitioner should not be allowed to bypass the *voir dire* process and investigate the racial prejudices of the jurors after the verdict has been received. However, the State has not made that argument, and evidence of mental bias is admissible under Rule 606(b)[.] \* \* \* In any event, evidence that the sentencing decision was based on race, which the Supreme Court has said is required to show an Equal Protection violation, could not be obtained until the verdict has been rendered. Post-verdict evidence is essential in that context because although the *voir dire* process could reach evidence of an Eighth Amendment violation, it would not yield evidence needed to show an Equal Protection violation.

people.” The Court is aided further in its analysis by the Supreme Court’s decision in *Tanner v. United States*, 483 U.S. 107 (1987), where a juror stated, post-verdict, that several of the jurors consumed alcohol, smoked marijuana and ingested cocaine during the trial.<sup>8</sup> The Supreme Court first decided that the evidence was inadmissible under Rule 606(b) because juror intoxication is not an outside influence on the deliberations. The Court then determined that the defendant’s Sixth Amendment right to a fair trial before an impartial and competent jury was not violated by the application of Rule 606(b) because the defendant’s interest is “protected by several aspects of the trial process.” The Court reasoned as follows:

The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*. Moreover, during the trial the jury is observable by the court, by counsel, and by court personnel. . . . Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict. . . . Finally, after

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8. The evidence in *Tanner* was summarized by the Supreme Court as follows:

[Juror] Hardy stated that he “felt like . . . the jury was one big party.” Hardy indicated that seven of the jurors drank alcohol during the noon recess. Four jurors, including Hardy, consumed between them “a pitcher to three pitchers” of beer during various recesses. Of the three other jurors who were alleged to have consumed alcohol, Hardy stated that on several occasions he observed two jurors having one or two mixed drinks during the lunch recess, and another juror, who was also the foreperson, having a liter of wine on each of the three occasions. Juror Hardy also stated that he and three other jurors smoked marijuana quite regularly during the trial. Moreover, Hardy stated that during the trial he observed one juror ingest cocaine five times and another juror ingest cocaine two or three times. One juror sold a quarter pound of marijuana to another juror during the trial, and took marijuana, cocaine, and drug paraphernalia into the courthouse. Hardy noted that some of the jurors were falling asleep during the trial, and that one of the jurors described himself to Hardy as “flying.”

the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct. .

..

In light of these other sources of protection of petitioners' right to a competent jury, we conclude that the District Court did not err in deciding, based on the inadmissibility of juror testimony and the clear insufficiency of the nonjuror evidence offered by petitioners, that an additional post-verdict evidentiary hearing was unnecessary.

Dobbs' case is distinguishable from *Tanner* in that racial bias is not as observable as intoxication. Nevertheless, the law does permit evidence of racial bias to be admitted in several ways: during *voir dire*, by juror testimony about another juror's statements or conduct prior to the verdict, and by post-verdict evidence of a juror's bias. Given these methods of showing that race influenced the sentencing decision, Rule 606(b)'s prohibition ordinarily would not impair a defendant's ability to show an Equal Protection or Eighth Amendment violation.

\* \* \* [T]estimony of racial bias based on a juror's conduct or statements during the deliberations may become admissible notwithstanding Rule 606(b) if the admissible evidence of a juror's racial prejudice is so strong that the death penalty appears to have been imposed on the basis of the defendant's race. In the face of strong evidence that the defendant's constitutional rights, under the standards articulated in *McCleskey*, may have been violated, the statutory Rule 606(b) privilege would have to yield. In such a case, the balance between the defendant's rights and the society's interest in protecting the jury system would not be met by enforcing Rule 606(b).

Having resolved that conflict, the Court turns to the evidence that Dobbs presents of racial prejudice. The case law makes clear, however, that only certain types of prejudice entitle a habeas petitioner to relief from his sentence. In *Turner v. Murray*, the Supreme Court decided that a defendant in a capital case where the defendant is black and the victim was white has a

constitutional right to question the jury venire on their racial prejudices. \* \* \*

\* \* \*

The *Turner* Court concluded that the petitioner had shown a constitutional violation because the trial judge's refusal to permit *voir dire* on racial attitudes created an unacceptable risk that "racial prejudice may have infected petitioner's capital sentencing."

In the instant case, therefore, Dobbs must establish that the jurors were influenced by racial prejudices, akin to the types described in *Turner*, that would make them more likely to impose the death penalty when the defendant is black than when the defendant is white. If the evidence of their biases in that regard is particularly strong, then the Court will examine the juror's testimonies concerning their mental processes during the deliberations.

Dobbs relies on several factors to show that racial prejudice tainted the sentencing decision. He first argues that the procedural safeguards outlined in *McCleskey* for eliminating the effects of racial biases from criminal trials in Georgia did not function in Dobbs' case. Specifically, Dobbs asserts that his attorney did not effectively conduct *voir dire* to discover racial prejudice and prevent it from infecting the proceedings.

The *voir dire* in Dobbs' case was by no means comprehensive. However, the fact that Dobbs' attorney did not conduct an exhaustive *voir dire* examination does not mean that racial prejudice affected Dobbs' sentencing decision. The *McCleskey* Court discussed the *existence* of procedural safeguards to refute *McCleskey*'s argument that his statistics, standing alone, showed an unacceptable risk that race was a factor at his particular sentencing. The Court did not find it necessary to determine whether those safeguards *actually functioned* in *McCleskey*'s case.

In any event, the attorney's failure to conduct an exhaustive *voir dire* examination on racial views is cured by the lengthy deposition

questioning on that topic that has been undertaken in connection with the instant habeas corpus proceeding. \* \* \*

The other evidence Dobbs relies on include statements made during the trial, the depositions of the jurors, the judge, and the defense attorney, and the racial climate of Walker County at the time of the trial. That evidence shows that Dobbs was tried in Walker County, a primarily rural area of Northwest Georgia where approximately 4% of the population is black. For many years, the public institutions and business establishments were segregated racially. Desegregation efforts were not undertaken until they were compelled by the federal government in the 1960's.

The statements of the trial jurors reflect the segregated history of Walker County. Ten of the eleven deposed jurors<sup>10</sup> are white, and most were raised in segregated schools and social environments. Only a few of the jurors had social contacts with blacks when they were growing up,<sup>11</sup> and many of their contacts with blacks as adults are through work only.<sup>12</sup> The jurors' children did attend integrated schools, and some of them did have black playmates. Many jurors attend segregated churches, but also believe that blacks should be allowed to become members.<sup>13</sup> All the jurors expressed reservations about interracial dating and marriage, ranging from complete disapproval to respect for another

person's choices.<sup>14</sup>

Most of the jurors understand the goals of Martin Luther King, Jr. insofar as they perceived him as trying to obtain equal rights for blacks. Although several jurors were bothered by his methods and found him intrusive,<sup>15</sup> some were

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14. *Compare*

[deposition of one juror] ("I believe in blacks marrying blacks and whites marrying whites.... It's because of the children that come forth of those marriages. I do not believe that they really have a place with whites or blacks. But I mean, if she was a sweet little ol' girl I probably would love her just like a white one");

[deposition of another juror] ("I hope that it wouldn't bother me a lot");

[deposition of another juror] (interracial dating by her children would give her pause but she would not try to talk them out of a long term relationship);

[deposition of another juror] (her thoughts about interracial dating "would be according to the person.... It would have been who it was, not the color of the skin");

*with*

[deposition of another juror] ("I just don't believe in mixing people. Now, you can have them as friends. But I don't – I think that that child somewhere down the line is going to suffer because of it. And it's not just because of the black child, it's the black people having the white child. I just don't – I just don't agree with that");

[deposition of another juror] (would not have allowed her daughters to date a black man).

15. *See* [deposition of juror] ("I didn't particularly care for Martin Luther King. But the things he stood for in terms of helping the coloreds to come out and to make themselves known, I think that's right");

[deposition of another juror] (Martin Luther King was "pushy and it seemed like everywhere he went there was a riot or something bad to happen. He was a preacher and should have stayed in the church. He was out of his place");

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10. The twelfth trial juror is deceased.

11. See [depositions of four jurors] (white jurors who had black playmates when they were children).

12. But see [depositions of four jurors] (white jurors who have black friends).

13. See [depositions of four jurors] (white jurors who believe blacks should be allowed in their churches); but see [deposition of another juror] (white juror who would feel uncomfortable in an all black church and who believes blacks would not be comfortable in an all white church).

outspoken in their support for King's goals.<sup>16</sup> None of the jurors said that they agreed with the principles espoused by the Ku Klux Klan, although several said that they had no knowledge of the Klan, its ideas, or its activities.<sup>17</sup>

Several of the jurors referred to blacks as "colored," and none of them said whether it had negative connotations. Most indicated the word "nigger" was insulting and disrespectful, although two jurors admitted using the word on occasion. One of those jurors said he uses the word when he intends to be negative, and the other juror said she uses the word when she is with blacks who use the word themselves, and that the word is not negative anymore.

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[deposition of another juror] (Martin Luther King did things he believed in but was forward and disruptive).

16. *See* [deposition of juror] (Martin Luther King has "done the black people a lot of good as far as being leaders and being able to – maybe gave them confidence in themselves to try for these better things");

[deposition of another juror] (Martin Luther King "was doing a good job. And I think what he was doing was right.... [H]e was making it a better place for his people as well as for other people.... [His tactics were needed] to get their attention").

17. Dobbs cites the depositions of two of the jurors as expressing support for the Klan's activities. One of those jurors said that she heard that the Klan does "some good sometimes at Christmas time and all," but also added that "then I hear terrible things." She said further that "I have heard that they hate – I don't know if it's just black groups of people – unjust groups of people [too]." She said that she would not go to a Klan barbecue because she doesn't know what their beliefs are.

In the other deposition cited by Dobbs, the juror said that she knew nothing about the Klan and that she has heard people say they do some good things, but that she has not heard specifically what those good things are. Petitioner's Exhibit 8 at 21.

The Court concludes that neither of these jurors expressed agreement with the Klan's outspoken hatred of blacks, as well as other classifications of people.

When asked directly, none of the jurors stated that they viewed blacks as more violence prone than whites, or as morally inferior to whites.<sup>21</sup> Two of the jurors did express a fear of blacks.<sup>22</sup> To varying degrees, all the jurors said that their opinion of a black person depends on the qualities of the individual and/or that skin color does not determine those qualities.<sup>23</sup>

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21. Dobbs cites the depositions of two of the jurors as showing a belief that blacks are inferior morally to whites. One of those jurors stated that in her estimation, the morals of Dobbs' family in particular were low, not those of blacks as a race. The other juror stated that she would not have allowed a black man to date her daughter. Although that statement evinces a view of blacks as different from whites, it does not necessarily mean that she views blacks as morally inferior.

22. Dobbs cites the depositions of three of the jurors as expressing fear of blacks. One of those jurors said that she would fear a black on the street, but added that she would not want to be "out there in the dark" with some whites either. Another juror said that a lot of people she knew are more afraid of blacks than whites and that she "guessed" she felt a little bit the same way.

The third juror cited by Dobbs did not express the same sentiments. She stated that Dobbs in particular looked "eerie" during the trial, not that blacks in general are scary. The Court therefore concludes that only two of the jurors said that blacks are scarier than whites.

23. *See* [deposition of a juror] (blacks are not lazier by nature than whites); (blacks deserve to be given a job over whites if they are qualified);

[deposition of another juror] ("There's good whites and there's bad whites. There's good blacks and there's bad blacks"); ("color would be the only difference [between blacks and whites]. I mean, they're all human beings. They're no different than Mexicans. Of course, some people don't like Mexicans or the Jews, I don't have anything against Jews. We're all created by God, we're created in his image. We are somebody, we are a living soul");

[deposition of another juror] ("there's good white folks and there's good black folks"); ("there's blacks that have got a lot more than I've got that's born in this world and they are not underdogs. And there's blacks that have got a lot less than I've got that are born in this

The trial judge, who was also deposed, grew up

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world and I guess they're underdogs. There's whites that have got a lot less than I've got that are underdogs. The whites that have more than I have, they've got an advantage. I don't see where you can say black and white, black and white, it's people");

\* \* \* the deposition of the only black juror, ("I just have never been on a black or white issue, I think of people as being people.");

[deposition of another juror] ("I don't think that it's just the black communities that has the problems.... Where they're thickly settled, I guess. There's always problems going on where there's a lot of people"); ("morals don't have anything to do with black or white.");

[deposition of another juror] (the main difference between black people and white people is "their color ... that's all.");

[deposition of another juror] (doesn't know what the main difference between black people and white people is, but doesn't believe blacks are lazier or more prone to violence);

[deposition of another juror] ("some black people are inferior and some white people are inferior. We all have some of that complex"); (some blacks "are more intelligent [than whites] and some of them they have more knowledge of their job, their position. And some of them - I've been in some [business] meetings where I had black leaders that I felt because they were black they were in that position and they were really not qualified. And I have been in meetings with whites that were not qualified for their jobs. So it works both ways.");

[deposition of another juror] (how people decide to lead their lives, including being ambitious, "comes back to the individual.");

[deposition of another juror] ("I respect [blacks] for the simple reason that they' can't help the color of their skin more than I can help the color of my skin.");

[deposition of another juror] ("there are good blacks and there are good whites. There are bad blacks and there's bad whites." The less fortunate people, whether they are black or white, need help through government programs).

in Walker County during the segregation era. His contacts with blacks as a child were limited to housekeepers. The judge worked with blacks after he graduated from college and had a close black friend in the military. As a state legislator from 1951 to 1962, the judge voted consistently for bills that renounced the Supreme Court's integration decisions. As a state court judge, he presided over cases where both blacks and whites were given the death penalty for killing whites.

The trial judge referred to blacks as "colored" during his deposition, and called Dobbs "colored" at the trial. In his deposition, he stated that his mother had taught him to use the word "colored" because "black" did not sound good, and that he has never used the word "nigger." At one point, he said "let's call them blacks."

Dobbs' trial attorney was outspoken about his views. He said that many blacks are uneducated and would not make good teachers, but do make good basketball players. He opined that blacks are less educated and less intelligent than whites either because of their nature or because "my granddaddy had slaves." He said that integration has led to deteriorating neighborhoods and schools, and referred to the black community in Chattanooga as "black boy jungle." He strongly implied that blacks have inferior morals by relating a story about sex in a classroom. He also said that when he was young, a maid was hired with the understanding that she would steal some items. He said that blacks in Chattanooga are more troublesome than blacks in Walker County. He did say, however, that Martin Luther King, Jr. was "a great man."

The attorney stated that he uses the word "nigger" jokingly. He testified further that, in his experience as a criminal defense lawyer, a black accused of killing a white is more likely to be convicted than a black charged with killing a black, although he did not know why. He also said that he found Dobbs to be arrogant and uncooperative during the trial, and he believes that Dobbs would have been given the death penalty regardless of his degree of cooperation.

The trial transcript reveals that the judge and

defense lawyer referred to Dobbs as “colored” and “colored boy” and that the prosecutor called Dobbs by his first name at one point.

Alex Willingham, a political scientist, testified that he investigated the history of racial attitudes in Walker County, including those that existed when Dobbs was tried, by reading local newspaper articles, interviewing black residents of the county, and examining voting patterns. Based on his research, Willingham concluded that race relations were on the minds of the people in the area during the time of the trial, as reflected in the struggle over ending segregation. Willingham also reviewed the depositions, and believed race was a factor at Dobbs’ trial. He highlighted various portions of the depositions, such as the use of the word “colored” and the defense attorney’s views of blacks. He said that the word “colored” reveals a view of blacks as different from, and ultimately inferior to, whites. He opined that because value systems are so ingrained, the jurors could not “effectively conceive of Dobbs as an individual free of their racial stereotypes.”

Based on the evidence presented, the Court finds that Walker County’s history of racial segregation appears to have had some influence on the values of the players in Dobbs’ case. The jurors, the trial judge and the defense attorney were raised in segregated environments and continue to interact primarily with individuals of their own race. The attorney expressed beliefs, often in pointed ways, that blacks in general are inferior to whites morally and intellectually. As the Supreme Court stated in *Turner v. Murray*, one with his beliefs might be inclined to favor the death penalty when the defendant is black. Further, the references at trial to Dobbs as “colored” may have had an influence on the jury’s view of Dobbs as an individual. Although “colored” may have been an acceptable term when the judge and attorney were growing up, their continued use, especially in a courtroom setting, evinces a degree of insensitivity to black concerns.

The personal views of the defense attorney, however, were not expressed at trial, and the attorney himself did not decide Dobbs’ penalty.

The personal views of the judge and prosecutor, which have not been shown to be racist, similarly were not related to the jurors. The evidence therefore does not show that these individual’s racial attitudes, apart from the trial references discussed above, affected the sentencing deliberations.

Without a doubt, many of the jurors believe that the races should mix to a limited extent only. In a subtle way, a belief that blacks are inferior to whites may underlie segregated beliefs insofar as blacks may be seen as a threat to the stability of the white society. Also, many of the jurors used the word “colored,” which as discussed shows insensitivity to racial matters. On the other hand, though, the jurors said that their opinion of a black person is based on his characteristics as an individual and not on his race.

The testimony of Willingham regarding the history of race relations in Walker County and the significance of race in the minds of the county’s residents at the time of the trial is interesting from a social science perspective. Under the Supreme Court’s reasoning in *McCleskey*, however, the likelihood of race being a factor in a particular case is insufficient standing alone to show that race was actually a factor in a particular case. Given the requirement for specific evidence of the biases of the decision makers in Dobbs’ case, Willingham’s testimony of race relations in general is of little relevance to the resolution of the issues presented for decision. His interpretations of the depositions, on the other hand, are helpful to the Court in making its independent judgment about the mental biases of the decision makers.

After considering all the evidence, the Court concludes that Dobbs has not shown a risk of racial prejudice affecting the sentencing decision to the extent that the death penalty was given unconstitutionally. Although the jurors possess some racial prejudices, and some more so than others, Dobbs has not shown that the jurors, either individually or as a whole, were influenced by prejudices that would make them favor the death penalty for a black person who murdered a white person.

Based on these findings, the Court concludes that Dobbs has not shown an Eighth Amendment violation, that an unacceptable risk existed that racial considerations affected the jurors' decision to impose the death penalty. Further, the evidence does not reach the level, described above, that would permit inquiry into the jury's deliberations. The Court therefore concludes additionally that Dobbs has not shown that the issuance of his death verdict violated the Equal Protection Clause. \* \* \*

\* \* \*

*The district court's opinion was upheld on appeal. Dobbs v. Zant, 963 F.2d 1403 (11th Cir. 1991). The Supreme Court vacated and remanded on other grounds due to the discovery of a transcript of the defense lawyer's closing argument at the penalty phase that had not previously been available. Dobbs v. Zant, 506 U.S. 357 (1993). Ultimately, the case was remanded to the district court which found, based on the transcript, that Dobbs had been denied effective assistance of counsel at the penalty phase of his trial and vacated his death sentence.*

**Dominique Jerome GREEN, Appellant,**

**v.**

**STATE of Texas, Appellee.**

Court of Criminal Appeals of Texas  
934 S.W.2d 92 (1996)

**MALONEY, Justice.**

Appellant was convicted of capital murder \* \* \*. The jury made findings on the three special issues and the trial court imposed the sentence of death. Direct appeal to this Court is automatic. \* \* \*.

\* \* \*

In his eleventh point of error, appellant argues that this Court should remand this case to the trial court for an evidentiary hearing to determine whether the prosecution's decision to seek the

death penalty against appellant was tainted by invidious racial discrimination. Appellant claims the evidence shows that in addition to appellant, three other accomplices were integrally involved in the capital murder of the African-American victim. Appellant, also an African-American, was charged with capital murder and two other accomplices, both African-Americans, plea bargained for prison sentences on aggravated robbery charges for their participation in the crime. The fourth accomplice, a Caucasian-American, was not charged with any crime in connection with the murder even though he was also implicated. Appellant asserts that this evidence, which he introduced prior to trial, establishes a *prima facie* showing of racial discrimination in the exercise of prosecutorial discretion. Appellant relies upon *McCleskey v. Kemp* for the proposition that if a capital defendant can establish a *prima facie* case that prosecutorial discretion in capital cases has been tainted with discrimination, a full evidentiary hearing should be conducted to determine the prosecutor's racial motivations, if any.

The State correctly notes that appellant's argument is in essence an equal protection claim. The United States Supreme Court has stated that "[t]he decision to prosecute may not be deliberately based upon unjustifiable standards such as race, religion, or other arbitrary classification, . . . ." *Wayte v. United States*, (1985). In applying the above standard, this Court has recognized that an appellant who raises the issue of equal protection has the burden of proving what the Supreme Court has termed "the existence of purposeful discrimination." *County v. State*, (Tex.Crim.App.1989). To succeed on such claim, an appellant must provide "exceptionally clear evidence" that the decision to prosecute was for an improper reason.

Appellant has not satisfied his burden. He has not shown discriminatory intent on the part of the prosecutor. The record reflects that the decision of whom to prosecute was based on evidence of each individual's culpability as well as the State's ability to prove its case, rather than the individual's race. The proof against each individual varied indicating different degrees of

involvement in the crime. Appellant's point of error eleven is overruled.

In points of error twelve and thirteen, appellant argues that the trial court erred in allowing the State to introduce into evidence at the punishment phase a letter written by appellant, while he was in jail, to an accomplice to the murder. The letter reads as follows:

Shank, ..

STUMPA, ..

What's up damn fool? When I had talked to you in court I was trying to tell you how to get all our case dropped are at least dropped down. See what I was telling you was to tell Paul that I went to the club. \* \* \* When we arrived I was talking to a girl in the parking lot of New Jack because I was to young to get in. But a man confronted me with intentions to fight because I was talking to his girlfriend. So my friends broke it up and we drove off before it became something bad. \* \* \* [While driving] we saw the niggas I got into it with when they saw us though they tried to run us off the road. I told Paul stopped the car I got out to go confront the nigga. And they drove around the block of the store location to pull up in the driveway. Because the curb is to high to just pull up without tearing your car up. So anyway when we came back around we seen the niggas I was gone squabble running to theyre car but you'll didn't see me. And that how they gone lift them cases off you'll (meaning Mike and Paul) back. They then told the laws that they committed four robberies with me that night. And the laws aint charged me with none and talking about probation. I never really cared to much about the niggas but Paul really alright nigga. And I want him to get out to. I dont know if he gone be down like we was. But if he do that cool with me. It will be me, you, and him now rolling. But tell him do that so them robberies be gone. Cause them laws gone try to hide him and he to young. So fuck it let all get another chance at the game. I dont care if a nigga with me or not 'I forever be a trigga

happy nigga.'

If you talk to them niggas are them hoes tell them I say whats up.

/s/ STUMPA

(errors in original). The letter appears to reflect appellant's plan to avoid conviction by testifying that some other individuals wrongfully blamed him for the robberies they actually committed. At trial, appellant objected to admission of the letter on the grounds that it was highly prejudicial and had no probative value. The trial court overruled appellant's objection and the letter was offered as evidence of appellant's future dangerousness. During closing argument, the prosecutor identified the letter as "the most important piece of evidence" demonstrating appellant's future dangerousness. She further stated that "[t]here is not a more compelling piece of evidence as a person is awaiting the trial of a capital murder that [sic] he tells you he will forever be trigger happy." The prosecution urged the jury to:

[r]ead the letter. He wants to be back out there doing it again and he is the person who described himself as a trigger happy nigger. No one else described him that way. This is a letter written while he was waiting for you to decide his fate. That is how serious he is. That is what he thinks of the process and that is what he thinks of you.

Focusing in particular on the phrase "trigga happy nigga," appellant argues that the trial court should have excluded the letter because its racially inflammatory nature was "excessively prejudicial." He argues that young African-American males are frequently perceived as being the most violent segment of society and appellant's letter was reinforcing that negative stereotype.

An amicus brief filed on behalf of appellant argues that introduction of the letter permitted the prosecution to unjustifiably use appellant's race and youth to heighten racial prejudice, create fear, and reinforce stereotypes which characterize young African-American men as violent and



prone to criminal behavior. This strategy, amicus claim, invited the jury to base their verdict on racially prejudicial grounds. The amicus identify the phrase “I forever be a trigga happy nigga” as lyrics from a popular “gangsta” rap song by the musical group “Geto Boys” and explain that by placing the phrase in quotes in his letter, appellant did not intend to express a personal statement of his criminal intentions.

An appellate court reviewing the trial court’s decision as to whether the probative value of the evidence was outweighed by the danger of unfair prejudice may reverse only for an abuse of discretion; that is, only when the trial court’s decision was outside the zone of reasonable disagreement. \* \* \* Under the facts of this case, we do not agree that the trial court abused its discretion in concluding the introduction of the letter was not unfairly prejudicial. Appellant’s race and youth were not the focus of the State’s argument. Instead, the State introduced the letter to show appellant’s continuing threat to society as indicated by his description of himself as trigger happy, as well as his desire to dodge responsibility for the murder and to get back in “the game.” The evidence was probative of appellant’s future dangerousness and the trial court did not abuse its discretion by allowing its admission.<sup>5</sup>

\* \* \*

The judgment of the trial court is affirmed.

[Judge Morris Overstreet, the only African American on the court, dissented without opinion.]

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5. Appellant further claims that the letter was merely “street talk” and did not advocate violence, but instead was a constitutionally protected expression under the First Amendment. Citing *Dawson v. Delaware*, 503 U.S. 159 (1992), appellant claims that since his letter was a constitutionally protected expression, the State had the burden to establish a close nexus between the letter and a legitimate penological factor. The State did this by demonstrating that the letter related to appellant’s future dangerousness.

### ***Further Developments Regarding Dominique Green***

Because Green was the only one of the four people involved in the in the murder of Andrew Lastrapes sentenced to death (two other black defendants pled guilty to aggravated robbery in exchange for testifying against Green and the fourth person, who was white, was not charged at all), the widow and two sons of Lastrapes asked the Texas Board of Pardons and Paroles to commute Green’s death sentence to life imprisonment. “All of us have forgiven Dominique for what happened and want to give him another chance at life. Everyone deserves another chance,” wrote Bernatte Lockett Lastrapes, the victim’s wife, to Texas Governor Rick Perry and the Texas Board of Pardons and Paroles. The request was denied. Texas executed Green by lethal injection on October 26, 2004.

Historian Thomas Cahill, author of *HOW THE IRISH SAVED CIVILIZATION, THE GIFTS OF THE JEWS*, and other books about formative moments in Western civilization, wrote *A SAINT ON DEATH ROW: THE STORY OF DOMINIQUE GREEN*, published in March 2009, about Green and a visit to Green on death row by his hero, Archbishop Desmond Tutu.

### **UNITED STATES**

**v.**

**John BASS.**

Supreme Court of the United States  
536 U.S. 862, 122 S.Ct. 2389 (2002).

### **PER CURIAM.**

A federal grand jury sitting in the Eastern District of Michigan returned a second superseding indictment charging respondent with, *inter alia*, the intentional firearm killings of two individuals. The United States filed a notice of intent to seek the death penalty. Respondent, who is black, alleged that the Government had determined to seek the death penalty against him because of his race. He moved to dismiss the death penalty notice and, in the alternative, for

discovery of information relating to the Government's capital charging practices. The District Court granted the motion for discovery, and after the Government informed the court that it would not comply with the discovery order, the court dismissed the death penalty notice. A divided panel of the United States Court of Appeals for the Sixth Circuit affirmed the District Court's discovery order. We grant the petition for a writ of certiorari and now summarily reverse.

In *United States v. Armstrong*, 517 U.S. 456, 465 (1996), we held that a defendant who seeks discovery on a claim of selective prosecution must show some evidence of both discriminatory effect and discriminatory intent. We need go no further in the present case than consideration of the evidence supporting discriminatory effect. As to that, *Armstrong* says that the defendant must make a "credible showing" that "similarly situated individuals of a different race were not prosecuted." The Sixth Circuit concluded that respondent had made such a showing based on nationwide statistics demonstrating that "[t]he United States charges blacks with a death-eligible offense more than twice as often as it charges whites" and that the United States enters into plea bargains more frequently with whites than it does with blacks. (citing U.S. Dept. of Justice, *The Federal Death Penalty System: A Statistical Survey (1988-2000)*, p. 2 (Sept. 12, 2000)).<sup>1</sup> Even assuming that the *Armstrong* requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decisionmakers in respondent's case), raw statistics regarding overall charges say nothing about charges brought against *similarly situated*

*defendants*. And the statistics regarding plea bargains are even less relevant, since respondent *was* offered a plea bargain but declined it. Under *Armstrong*, therefore, because respondent failed to submit relevant evidence that similarly situated persons were treated differently, he was not entitled to discovery.

The Sixth Circuit's decision is contrary to *Armstrong* and threatens the "performance of a core executive constitutional function." For that reason, we reverse.

**In re: UNITED STATES of America,  
Petitioner.**

United States Court of Appeals,  
Fifth Circuit.  
397 F.3d 274 (2005),  
*cert. denied*, 125 S.Ct. 1611 (2005)

Before JONES, BARKSDALE and PRADO,  
Circuit Judges.

**PER CURIAM:**

In this case, the Government has requested a writ of mandamus to prevent the federal district court from enforcing discovery orders in a federal death penalty case \* \* \* poisoning the jury's consideration of that option with an impermissible punishment phase instruction. The court also threatened to delay the scheduled start of the proceedings for a year. For the following reasons, we grant the writ, and expect proceedings to resume promptly.

*Background*

Defendant Tyrone Mapletoft Williams ("Williams") is awaiting trial for his alleged role in an illegal alien smuggling conspiracy that resulted in the deaths of nineteen undocumented aliens. According to the indictment, on or about May 13, 2003, after several co-conspirators loaded seventy-four illegal aliens into an enclosed trailer at or near Harlingen, Texas, Williams and co-defendant Fatima Holloway, the only two African-American participants, drove the tractor-trailer rig to a prearranged destination at or

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1. In January 1995, the Department of Justice (DOJ) instituted a policy, known as the death penalty protocol, that required the Attorney General to make the decision whether to seek the death penalty once a defendant had been charged with a capital-eligible offense. See Pet. for Cert. 3 (citing DOJ, *United States Attorneys' Manual* § 9-10.010 *et seq.* (Sept. 1997)). The charging decision continued to be made by one of the 93 United States Attorneys throughout the country, but the protocol required that the United States Attorneys submit for review all cases in which they had charged a defendant with a capital-eligible offense.

near Victoria, Texas. Williams was the driver and Holloway was sitting in the passenger seat.

As alleged, during the trip, several aliens began to bang on the locked trailer, begging to be released from the oppressive heat inside. As the aliens screamed for mercy, Holloway allegedly told Williams to turn on the refrigeration device in the trailer, or, alternatively, to let the aliens out. Williams allegedly rejected these requests and continued to drive. The Government alleges that as a direct result of this decision nineteen of the aliens died from heat exhaustion and/or suffocation.

On March 15, 2004, a grand jury in the Southern District of Texas returned a sixty-count superseding indictment charging all fourteen co-defendants with various alien smuggling offenses \* \* \*. Because of the deaths of some of the illegal aliens, nearly all defendants involved in the transportation were death penalty-eligible. On the day the grand jury returned the superseding indictment, the United States filed a Notice of Intent to Seek the Death Penalty only against Williams.<sup>1</sup> Two days later, Judge Vanessa Gilmore severed Williams's case<sup>2</sup> and set his trial for January 5, 2005.

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1. Before filing the Notice, the Government went through the protocol required by the Department of Justice (DOJ) before a United States Attorney may seek the death penalty in the case. This requires the U.S. Attorney to seek the opinion of the Capital Crimes Unit in Washington, D.C., and final approval from the United States Attorney General. \* \* \*

2. The status of the co-defendants varies. Some have pled guilty, others have apparently fled the country and have not yet been served with arrest warrants, and still others have been found guilty at trial. One co-defendant, Claudia Araceli Carrizales-Gonzales, was ordered immediately released by Judge Gilmore on the last day of trial based on the judge's ruling that the Government failed to prove one of the elements of its case. This order was entered despite the Government's vociferous objection. Another co-defendant awaits trial after being severed from the original co-defendants upon Judge Gilmore's willingness to suppress her confession. \* \* \*

On October 22, 2004, Williams filed a Motion to Dismiss the Notice of Intent to Seek the Death Penalty, or alternatively, for Discovery of Information Relating to the Government's Capital-Charging Practices. Williams's motion substantively states:

\* \* \*.

According to the original and superceding [sic] indictment returned in this case, TYRONE MAPLETOFT WILLIAMS is the only person of African-American descent, other than FATIMA HOLLOWAY, who was indicted for activity relating to the facts and circumstances charged in the indictment. \* \* \* All of the other persons mentioned in the indictment are of Hispanic descent and none are African-American. Of the persons who are alleged to have concocted the conspiracy, profited greatly from the conspiracy and who undertook a leadership role in the conspiracy, none are African-American. Of all the persons named in the indictment, the Government is seeking the death penalty only as to TYRONE MAPLETOFT WILLIAM [sic].

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that the Notice of Intent to Seek the Death Penalty be dismissed, that the Notice of Special Findings be stricken, or, in the alternative, that the Court provide an evidentiary hearing at which time the Defendant will make a credible showing that all of the similarly situated individuals in this indictment are of a different race and not subjected to the death penalty, and the Defendant further prays that the Court grant this Motion for Discovery of Information Relating to the Government's Capital-Charging Practices, and for such other relief to which he may show himself entitled.

Williams also filed a Memorandum of Points and Authorities in Support of his motion, which states \* \* \*:

In *United States v. Armstrong*, 517 U.S. 456, 465 (1996), the United States Supreme

Court held that a defendant who seeks discovery on a claim of selective prosecution must show some evidence of discriminatory effect and discriminatory intent. *United States v. Bass*, 536 U.S. 862 (2002). The Defendant in this case will not rely upon a statistical showing based upon nationwide information relating to the way the United States charges blacks with death-eligible offenses in comparison to the way that they charge whites. In this case, the discriminatory effect and discriminatory intent are clear to the naked eye. Similarly situated persons are treated differently and they are named in the same indictment with this Defendant. A prima facie [sic] case is made by the indictment itself.

\* \* \* The Court, in *Armstrong*, ruled that a defendant must produce credible evidence that similarly-situated defendants of other races could have been prosecuted, but were not. In the *Armstrong* case, the Court held that the required threshold was not met. In this case, that threshold is met on its face. It is abundantly clear that TYRONE MAPLETOFT WILLIAMS is black and is the only person for whom the death penalty is being sought. It is abundantly clear that all of the other Co-Defendants are not black, with the exception of FATIMA HOLLOWAY.

After summarily declaring that Williams had made a prima facie case under *Armstrong*, Judge Gilmore granted Williams's vague "Motion for Discovery of Information Relating to the Government's Capital-Charging Practices." After a series of clarifications, Judge Gilmore declared that the Government was required to produce information that "relates generally to the capital charging practices of the Attorney General of the United States including but not limited to the charging practices that were employed in this specific case." Judge Gilmore noted that her order did "not, however, prohibit the Government from raising any *legitimate* objections based on privilege or work product." (emphasis in original).

Attempting to comply with Judge Gilmore's order, the Government on November 24, 2004, filed a "Notice of Discovery in Response to Court

Order," which discussed the United States Attorney's protocol for federal death penalty prosecutions, including how the determination to seek the death penalty is made. The filing included statistical information about the capital charging practices of the Attorney General. At a November 29, 2004, status hearing, Judge Gilmore rejected the Government's filing as non-responsive, and expressed anger at the Government's lack of compliance and refusal to assert privilege with specificity. The United States then filed an Addendum, in which it formally asserted privilege as to all other information rendered discoverable by Judge Gilmore. The Government specifically asserted privilege under the theories of deliberative process, work product, and attorney-client privilege.

On December 16, Williams responded by filing a Motion for Contempt, and moved in the alternative to dismiss the Death Notice. Williams attached a "report" of about sixty-eight other cases involving alien smuggling and asserted that the defendants in those cases were "similarly situated" with Williams. At a status hearing the next day, Judge Gilmore praised the information, commenting to the Government that "[t]he information that he got from this other guy is exactly the kind of stuff y'all should have been giving. That's better information than what y'all gave." When the Government attempted to refute the information contained in the exhibit, Judge Gilmore stopped the Government attorneys and instead asked why they had not complied with her discovery order. After additional attempts by the Government attorneys to explain that they were asserting privilege, based on their own analysis and after consultation with Department of Justice officials in Washington, the following exchange occurred:

The Court: Well, then you tell them [the DOJ officials in Washington] to write me a letter, because if they don't you're getting held in contempt. I want a letter on my desk this afternoon from them saying, from the Attorney General that needs to be signed saying that they are refusing to comply with the Court's order, and that the reason that you can't do it is because the Attorney General of the United

States has ordered you not to do so.

Mr. Roberts: Okay, well, Your Honor, I am here as a representative of them; and I am advising you that we are not going to comply with this order.

The Court: No. That is not good enough. Otherwise you are going to be in contempt this afternoon. I need it in writing; it needs to be signed by the Attorney General saying that the reason that you as an Assistant United States Attorney in Houston cannot comply with my order is because the Attorney General of the United States is prohibiting you from doing so based on separation of powers theory; that you will not disclose to this Court the basis upon which you chose in this case to indict the only black defendant for a death penalty crime in a case in which 14 defendants were involved in this smuggling and in which he was not the leader or the organizer or manager of this smuggling operation. I need it in writing, and I need it today. And if I don't have it by the end of the day, then you are going to be held in contempt. Do you understand me?

Mr. Roberts then attempted to bring up sanctions. Judge Gilmore refused to address sanctions at that time, and then stated, "But presumably, you are going to just go back and get a letter from the Attorney General telling me to kiss their butt basically." As we discern, Judge Gilmore's order, with a threat of contempt behind it, required the Government to allow Williams access to its internal, privileged data concerning its use of its discretion in seeking the death penalty, or a letter from the Attorney General of the United States himself asserting privilege. Rather than supply this discovery, the Government continued to assert privilege and to explain why Attorney General Ashcroft would not be personally participating in the case.

On December 29, Judge Gilmore entered an order refusing to dismiss the Notice of Intent to Seek the Death Penalty, which the Government had proffered as an appropriate sanction. \* \* \* Instead, Judge Gilmore crafted a "sanction": a jury instruction which she intended to read to the

jury during the punishment phase of the trial if Williams were found guilty:

[The Government] failed and refused to obey an order of this Court that [it disclose to the Defendant information relating to the Government's capital charging practices and to the issue of whether the Government is seeking the death penalty against the Defendant because of his race.]

The Court's order was a lawful one [ ].

The refusal to obey the order is not sufficient to [dismiss the Government's Notice of Intent to Seek the Death Penalty.] You may consider the failure and refusal of [the Government] to obey a lawful order of the Court, however, and may give it such weight as you think it is entitled to as tending to prove [that the Government is seeking the death penalty against the Defendant for discriminatory reasons.]

\* \* \* \*

If it is peculiarly within the power of [the Government] to produce [evidence relating to the Government's capital charging practices], failure to [produce that evidence] may give rise to an inference that this [evidence] would have been unfavorable to [the Government]. No such conclusion should be drawn by you, however, with regard to [evidence that] is equally available to both parties or where the [admission of the evidence] would be merely repetitive or cumulative.

The jury must always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

Order, Dec. 29, 2004 [*brackets original in Fifth Circuit decision*]. \* \* \*

On December 31, the Government petitioned this court for a brief stay to enable the filing of a writ of mandamus concerning the discovery orders and sanctions imposed by Judge Gilmore. We stayed proceedings in the trial court pending our

review of the Government's petition.

### *Jurisdiction*

\* \* \*

Relevant to this case, various courts of appeals have found mandamus appropriate in all three issues intertwined in this petition: jury instructions, discovery orders, and assertions of privilege. Both the Second and Third Circuits have permitted the Government to obtain writs of mandamus when a proposed criminal jury instruction clearly violated the law, risked prejudicing the Government at trial with jeopardy attached, and provided the Government no other avenue of appeal. Further, this court, in accord with other circuits, has considered and issued writs of mandamus over discovery orders implicating privilege claims. \* \* \*

### *Discussion*

As the petitioner, the Government must first show that it has no alternative means of relief. \* \* \*  
\* If Williams were acquitted of the death penalty, double jeopardy would preclude the Government from appealing Judge Gilmore's unusual jury instruction. Thus, the Government's only recourse was through a writ of mandamus. \* \* \*

Next, the Government must show that its right to issuance of the writ is "clear and indisputable." The Government asserts that Judge Gilmore clearly erred in two principal, related ways: (1) by incorrectly applying *United States v. Armstrong*, and thus improperly ordering discovery against the United States; and (2) by styling a discovery "sanction" that contravenes the Federal Death Penalty Act and creates an unauthorized defense against the death penalty. We agree as to both claims.

\* \* \* A court's consideration of an Equal Protection-based claim of selective prosecution necessarily begins with a presumption of good faith and constitutional compliance by the prosecutors. To overcome this presumption, a defendant must prove both discriminatory effect and discriminatory purpose by presenting "clear evidence." Before a criminal defendant is entitled to any discovery on a claim of selective prosecution, he must make out a prima facie case. The prima facie case of selective prosecution

requires the criminal defendant to bring forward some evidence that similarly situated individuals of a different race could have been prosecuted, but were not. More specifically, a defendant must first present evidence of *both* discriminatory effect *and* discriminatory intent.

In concluding that Williams had made a prima facie case of selective prosecution, Judge Gilmore ignored Supreme Court precedent and the plain facts *as stated by the defendant himself*. First, Williams's counsel admits in his Memorandum that he needs discovery so "that he may make a prima facia [sic] case on the allegations" of selective prosecution. Williams thus concedes that he cannot make out a prima facie case, which is what he must do prior to receiving any discovery.

Equally important, Williams's scant court filings acknowledge that the Government declined to pursue the death penalty against a similarly situated, black co-defendant.<sup>9</sup> To adopt the language of Williams's counsel, it is "clear to the naked eye" that Williams has not made the requisite showing under *Armstrong* to warrant discovery on a selective prosecution claim. As the Government continually argued to Judge Gilmore, only Williams and Holloway – both of whom are African-American – were in the truck at the time of the alleged events, making them the only "similarly situated" co-defendants. In stark contrast, no other co-defendants, although part of the conspiracy and ultimately responsible for the acts (if proven at trial), were on the scene during the lethal interval. Only Williams, the driver of the truck, was allegedly able to prevent the victims' deaths; for this reason, the Government is pursuing the death penalty against Williams alone. The Notice of Intent to Seek the Death Penalty emphasizes this distinction. Because Williams could not demonstrate that similarly situated, non-African-American co-defendants were treated differently, he could not sustain his

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9. By contrast, Williams now asserts that Holloway was not similarly situated because she cooperated with the Government. This does nothing to help his claim of selective prosecution.

burden even as to this prong of *Armstrong*.<sup>10</sup>

Finally, the “study” submitted by Williams is exactly the type of evidence that warranted summary reversal of a court of appeals when used to justify discovery in a selective prosecution claim. See [*United States v.*] *Bass*, Although Williams’s “study” does involve defendants charged with alien smuggling, sharing a charge alone does not make defendants “similarly situated” for purposes of a selective prosecution claim. A much stronger showing, and more deliberative analysis, is required before a district judge may permit open-ended discovery into a matter that goes to the core of a prosecutor’s function and implicates serious separation of powers concerns. Judge Gilmore’s misapplication of *Armstrong* represents clear legal error.

Nevertheless, under the second prong of mandamus review, the writ should not issue unless Judge Gilmore’s discovery orders and sanction also represented a clear abuse of discretion. This they did.

First, the court continually expanded the breadth of permissible discovery. Initially, she permitted broad and vague discovery of the Government’s “capital-charging practices.” Next, after the Government provided significant, generalized information, Judge Gilmore ordered the Government to reveal its capital-charging practices “inclusive of this case but not this case exclusively.” The Government repeatedly asserted work product, attorney-client, and deliberative process privileges against these orders.

In the ordinary case, a party must claim

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10. Further, the indictment, coupled with the Government’s rationale offered to Judge Gilmore after Williams raised a selective prosecution claim, offered a valid, non-discriminatory explanation for seeking the death penalty against Williams. Cf. *Webster*, 162 F.3d at 335 (finding a non-discriminatory explanation where the Government’s determination to pursue the death penalty against one defendant and not others “is justified by the objective circumstances of the crime and the sufficiency and availability of evidence to prove the required elements under the law”).

privilege with specificity, and a court can ultimately demand *in camera* review of privileged documents. In this extreme situation, however, the Government’s assertion of privilege was sufficient. The court’s ever-changing and inspecific orders afforded no boundaries on discovery, and in effect compelled the Government to volunteer information (as opposed to responding to a request by Williams), contrary to *Armstrong* and to Federal Rule of Criminal Procedure 16. Moreover, turning over any further information – even *in camera* – would require documents, affidavits, or perhaps even depositions from several levels of the Department of Justice, all of which could engender various privilege claims, and as a precedent, could be subject to abuse in this and in future cases. Based on the minimal showing made by Williams, Judge Gilmore clearly abused her discretion in granting wide-ranging discovery.

The nature of the “sanction” imposed by the trial court is also relevant to whether the trial court abused its discretion. A severely disproportionate penalty may well indicate whether the court objectively considered protection of the Government’s prosecutorial privilege or reacted emotionally to a superficially questionable indictment. Racially selective prosecution is a challenge to the prosecution, not a defense to the crime charged. Accordingly, the Federal Death Penalty Act affords no mitigation of penalty based on selective prosecution.<sup>14</sup> The court’s “sanction” instruction would, however, place the burden on the Government to prove that it had not engaged in discriminatory selective prosecution of Williams; this would turn on its head the *Armstrong* requirement that the *defendant* carry the high burden of proof of selective prosecution. In this way, the instruction would create an extra-statutory, wholly unauthorized defense of selective prosecution. Judge Gilmore’s jury instruction appears

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14. Further, the premise of Judge Gilmore’s proposed instruction is false. The proposed instruction states that the order the Government declined to follow was “lawful”; as our previous analysis has discussed, this was not the case.

simultaneously to be preventing the Government from enforcing the death penalty against Williams, while prohibiting any ordinary appellate review of the court's determination. This combination of legislating from the bench and acting as a quasi-defense attorney vis-a-vis the jury is unprecedented and ultra vires.<sup>16</sup>

\* \* \* While we are loath to interfere with the manner in which a district court runs its cases, mandamus is demanded in this death penalty case where over two hundred venirepersons are poised to be impanelled, where the consequence of the court's instructional error could deprive society of a lawful punishment, and where the trial court has disregarded controlling law and in a gross abuse of discretion, prejudiced the Government's case and stymied orderly appellate review. We grant the Government's writ of mandamus and vacate both the discovery orders and the sanctions.

#### *Conclusion*

On remand, we expect the case to proceed as expeditiously as possible while advancing the legitimate goals of the federal judicial system and protecting the rights of both parties. \* \* \*

#### ***Further Developments in Williams***

After this decision, the District Court granted Williams' motion to empanel a non-death-qualified jury for the guilt innocence phase of the trial on a case management rationale. The Fifth Circuit reversed. *United States v. Williams*, 400 F.3d 277 (5th Cir. 2005). Williams was tried in March, 2005 on 58 counts of smuggling. The jury convicted on 38 counts and failed to reach a verdict on 20.

The prosecution sought to retry Williams on all 58 counts because the jury, in convicting him on 38 counts, did not answer special questions about the extent of his responsibility. Nineteen of the 38 counts carried a possible death sentence. District

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16. We will not devote much effort to Judge Gilmore's demand that the Attorney General of the United States himself sign a letter asserting privilege. This request was obviously inappropriate. \* \* \*

Judge Vanessa D. Gilmore ruled that the death penalty was "off the table" as a result of the verdict of the jury. The prosecution again appealed to the Fifth Circuit, which reversed and ordered that the case be assigned to another district judge. *United States v. Williams*, 449 F.3d 635 (5th Cir. 2006).

After trial before a different judge, a jury in Houston sentenced Williams in January 2007 to life imprisonment without possibility of parole on each of 19 convictions for murder.

#### **STATE of Louisiana v. Felton Dejuan DORSEY.**

Supreme Court of Louisiana.  
74 So.3d 603 (2011).

On Appeal from the First Judicial District Court, for the Parish of Caddo, Honorable John D. Mosley, Jr., Judge.

#### **KIMBALL, C.J.**

On May 17, 2006, Felton Dejuan Dorsey and Randy Wilson were indicted by a Caddo Parish grand jury for the first degree murder of Joe Prock and attempted first degree murder of Bobbie Prock. \* \* \* In the week proceeding trial, Wilson entered a plea agreement with the state, agreeing to testify at defendant's trial in exchange for pleading guilty to murder, thereby avoiding a capital murder trial, and receiving a sentence of life imprisonment without benefit of probation, parole, or suspension of sentence.

\* \* \*

Trial began on May 19, 2009, and was completed on May 26, 2009. The jury deliberated for forty-five minutes before unanimously finding defendant guilty of first degree murder. \* \* \* At the conclusion of the penalty phase, the jury recommended defendant be sentenced to death.

[D]efendant contends the presence of a confederate flag [memorial](#) outside of the



courthouse in Caddo Parish injects an arbitrary factor – race – into the capital sentencing decision. Defendant argues this Court should, as a matter of greater protection afforded by state law, reject the burden of proof in *McCleskey v. Kemp*, which requires a defendant to establish specific evidence of discriminatory intent beyond discriminatory effect before being entitled to relief. Defendant admits he cannot prove the confederate flag memorial was placed outside the courthouse with the intent to interpose racial considerations, to both intimidate prospective black jurors and prime white jurors to impose the death penalty, into his specific case. However, he argues it was placed there to remind all persons who approach the courthouse of an era when lynching and enslavement of blacks was permitted by law.

Defendant emphasizes one prospective juror, Carl Staples, indicated he could not serve on a jury in a courthouse with a confederate display nearby. Finally, defendant asserts his Fourteenth Amendment right to equal protection of law was violated by state and parish sponsorship of this display. Defendant alleges the land on which the display currently sits and an additional \$10,000 was donated to the Daughters of the Confederacy in 1903 by the Caddo Parish Police Jury, and the property and display is currently maintained by the parish. Defendant argues a discriminatory intent may be inferred from: (1) the display of the confederate battle flag; (2) the ideology of the Daughters of the Confederacy, which defendant characterizes as an all-female, white supremacy group with close ties to the Ku Klux Klan; and (3) the timing of the addition of the flag to the memorial in 1951 at the dawn of the civil rights movement. The state argues there was no objection made at trial on this basis and therefore, defendant has made numerous allegations that are outside the record, have not been tested by the adversarial process, and which the state has had no opportunity to rebut in the district court.

Although this Court can likely take judicial notice that the display of a confederate flag would

be offensive to some,<sup>10</sup> defendant did not raise an objection on this or any other related basis in the court below and is raising these concerns for the first time on appeal. \* \* \*

[T]his Court noted, “[t]he general rule is that appellate courts will not consider issues raised for the first time on appeal.” \* \* \*

Since defendant failed to raise an objection regarding the confederate flag memorial in the district court, we find his claims regarding endemic racism are not properly before the Court. Moreover, defendant virtually concedes his claim must fail under *McCleskey v. Kemp*. \* \* \*

According to the Court [in *McCleskey*], \* \* \* [i]n light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system and the benefits that discretion provides to criminal defendants, the Court found the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process. \* \* \* Moreover, the Court held “[b]ecause discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.” \* \* \*

More pertinent to the present case, *McCleskey*

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10. See *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246, 1249 (11th Cir.2003), *cert. denied*, 540 U.S. 824 (2003) (observing the confederate flag has multiple “emotionally charged” meanings and is viewed by some as a symbol of white supremacy and racism, while others view it as a symbol of heritage); *United States v. Blanding*, 250 F.3d 858, 861 (4th Cir.2001) (*per curiam*) (“It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, the flag is identified with racial separation. Because there are citizens who not only continue to hold separatists views, but who revere the confederate flag precisely for its symbolism of those views, it is not an irrational inference that one who displays the confederate flag may harbor racial bias against African-Americans.”)

argued the state of Georgia as a whole had acted with a discriminatory purpose by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. The Supreme Court, however, held discriminatory purpose implies the decision maker selected or reaffirmed a particular course of action at least partly “because of,” not merely “in spite of” its adverse effects on an identifiable group. Thus, for McCleskey’s claim to prevail, McCleskey had to prove the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect. To the contrary, the Court found no evidence the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose.

Similarly, in the present case, even conceding Caddo Parish placed the confederate memorial outside the district courthouse at the turn of the century, refurbishing and reaffirming it half a century later with the confederate battle flag, defendant has made no showing the parish currently maintains the memorial because of the adverse affect it would have on the administration of the criminal justice system with respect to black defendants. Defendant also failed to show the memorial creates an environment giving rise to a constitutionally significant and unacceptable risk that one or more of the jurors in his case acted with discriminatory intent in returning his or her verdict, particularly at the sentencing stage of the proceedings, on the basis of his color and not on the moral culpability of his acts and his individual character.

\* \* \*

## Legislation

### Kentucky Racial Justice Act

Effective July 15, 1998

#### Kentucky Revised Statutes

#### **§ 532.300 Prohibition against death sentence being sought or given on the basis of race – Procedures for dealing with claims.**

(1) No person shall be subject to or given a sentence of death that was sought on the basis of race.

(2) A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought.

(3) Evidence relevant to establish a finding that race was the basis of the decision to seek a death sentence may include statistical evidence or other evidence, or both, that death sentences were sought significantly more frequently:

(a) Upon persons of one race than upon persons of another race; or

(b) As punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.

(4) The defendant shall state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case. The claim shall be raised by the defendant at the pre-trial conference. The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties. If the court finds that race was the basis of the decision to seek the death sentence, the court shall order that a death sentence shall not be sought.

(5) The defendant has the burden of proving by clear and convincing evidence that race was the basis of the decision to seek the death penalty.

The Commonwealth may offer evidence in rebuttal of the claims or evidence of the defendant.

### **North Carolina Racial Justice Act**

Version signed into law August 11, 2009  
amended in 2011, and repealed in 2013.

#### **North Carolina General Statutes Annotated**

#### **§ 15A-2010. North Carolina Racial Justice Act**

No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.

#### **§ 15A-2011. Proof of racial discrimination**

(a) A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.

(b) Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:

(1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.

(2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.

(3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

A juror's testimony under this subsection shall be consistent with Rule 606(b) of the North Carolina Rules of Evidence, as contained in G.S. 8C-1.<sup>1</sup>

(c) The defendant has the burden of proving that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed. The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence. The court may consider evidence of the impact upon the defendant's trial of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death.

#### **§ 15A-2012. Hearing procedure**

(a) The defendant shall state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.

(1) The claim shall be raised by the defendant at the pretrial conference required by \* \* \* the General Rules of Practice for the Superior and

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1. Rule 606 (b) provides: Inquiry into validity of verdict or indictment. – Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

District Courts or in postconviction proceedings pursuant to [the applicable] Statutes.

(2) The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties.

(3) If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.

(b) Notwithstanding any other provision or time limitation contained in [the statute regarding post-conviction relief] of the General Statutes, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by filing a motion seeking relief.

(c) Except as specifically stated in subsections (a) and (b) of this section, the procedures and hearing on the motion seeking relief from a death sentence upon the ground that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed shall follow and comply with [provisions regarding pleading, appointment of counsel and filing for post-conviction review].

This act is effective when it becomes law and applies retroactively. For persons under a death sentence imposed before the effective date of this act, motions under this act shall be filed within one year of the effective date of this act; for persons whose death sentence is imposed on or after the effective date of this act, motions shall be filed as provided in this act.

## **Litigation Under and Repeal of North Carolina's Racial Justice Act**

Judge Gregory A. Weeks of the Cumberland County Superior Court granted relief under the Racial Justice Act on April 20, 2012, finding that race had been a significant factor in the prosecution of Marcus Reymond Robinson based on the prosecution's use of peremptory strikes against blacks in cases throughout the state. *State v. Robinson*, Cumberland Co., NC, Superior No. 91-CRS-23143 (April 20, 2012). The Court resentenced Robinson to life imprisonment without the possibility of parole.

The North Carolina legislature effectively repealed the Act in response by amending the law in July, 2012 to limit the use of statistics to the county or prosecutorial district where the defendant was sentenced. The legislature overrode a veto by Gov. Beverly Perdue by a votes of 31-11 in the Senate and 72-48 in the House of Representatives.<sup>1</sup> The legislature had failed to override an earlier veto of amendments to the Act by Gov. Perdue.

Judge Weeks granted relief to three other defendants under the Act on December 13, 2012. He summarized his findings as follows:

The Court is called upon to issue a decision today because of the Racial Justice Act, which the North Carolina General Assembly enacted to achieve fairness and equality in the way our state approaches the most serious matter a court can adjudicate: whether the State may execute a prisoner. \* \* \* The legislature determined that historically and under prior capital law, we have not achieved the fairness for which our system has long strived. The Racial Justice Act is the embodiment of the legislative conclusion that more can be done.

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1. Wade Rawlins, [\*North Carolina lawmakers override race-bias death-row veto\*](#), Reuters, July 2, 2012.

The enterprise proposed by the RJA is a difficult one. When our criminal justice system was formed, African Americans were enslaved. Our system of justice is still healing from the lingering effects of slavery and Jim Crow. In emerging from this painful history, it is more comfortable to rest on the status quo and to be satisfied with the progress already made. But the RJA calls upon the justice system to do more. The legislature has charged the Court with the challenge of continuing our progress away from the past.

The Court has now heard nearly four weeks' worth of evidence concerning the central issue in these cases: whether race was a significant factor in prosecution decisions to strike African-American venire members in Cumberland County at the time the death penalty was sought and imposed upon Defendants Tilmon Golphin, Christina Walters, and Quintel Augustine. For the reasons detailed in this order, the Court concludes that it was. This conclusion is based primarily on the words and deeds of the prosecutors involved in Defendants' cases. In the writings of prosecutors long buried in case files and brought to light for the first time in this hearing, the Court finds powerful evidence of race consciousness and race-based decision making. A Cumberland County prosecutor met with law enforcement officers and took notes about the jury pool in Augustine's case. These notes described the relative merits of North Carolina citizens and prospective jurors in racially-charged terms, and constitute unmistakable evidence of the prominent role race played in the State's jury selection strategy.

Another Cumberland County prosecutor, involved in all three Defendants' cases, had previously been found by a trial court to have violated the constitutional prohibition against discrimination in jury selection under *Batson v. Kentucky* by giving a pretextual explanation and incredible reason for her strike of an African-American venire member. Despite her testimony to the contrary, the evidence

was overwhelming that this prosecutor relied upon a "cheat sheet" of pat explanations to defeat *Batson* challenges in numerous cases when her disproportionate and discriminatory strikes against African-American venire members were called into question. Her testimony overall – rife with inconsistencies, frequently contradicted by other evidence, and often facially unbelievable – constituted additional evidence that Cumberland County prosecutors relied upon race in its jury selection practices.

The State overwhelmingly struck African-American venire members in capital cases from Cumberland County, removing African-American venire members purportedly for reasons such as reservations about the death penalty, or connections to the criminal justice system, while accepting comparable white venire members. This disparity was turned on its head in \* \* \* [two] capital cases [involving white defendants accused of murders of black victims] in which the State sought, for tactical reasons, to seat African Americans as jurors. Comparing the prosecution's jury selection in [those two cases] to Defendants' cases, the Court finds compelling empirical evidence that race, not reservations about the death penalty, not connections to the criminal justice system, but race, drives prosecution decisions about which citizens may participate in one of the most important and visible aspects of democratic government.

The Court's conclusion that race was a significant factor in prosecution decisions to strike jurors in Cumberland County at the time of Defendants' cases is also informed by the history of discrimination in jury selection and the role of unconscious bias in decision-making. The criminal justice system, sadly, is not immune from these distorting influences.

In addition, Defendants' evidence shows that prosecutors across the State, including prosecutors in Cumberland County and in Defendants' own individual cases, frequently

exclude African Americans for reasons that are not viewed as disqualifying for other potential jurors. The many examples Defendants presented of disparate treatment of black and non-black venire members is unsurprising in light of prosecutors' history of resistance to efforts to permit greater participation on juries by African Americans. That resistance is exemplified by trainings sponsored by the North Carolina Conference of District Attorneys where prosecutors learned not to examine their own prejudices and present persuasive cases to a diverse cast of jurors, but to circumvent the constitutional prohibition against race discrimination in jury selection.

Defendants' documentary and anecdotal evidence, their evidence rooted in history and social science research, and the many case examples of discrimination are fully consistent with Defendants' statistical evidence. That evidence shows that in Defendants' cases, in Cumberland County, and in North Carolina as a whole, prosecutors strike African Americans at double the rate they strike other potential jurors. This statistical finding holds true even when controlling for characteristics that are frequently cited by prosecutors as reasons to strike potential jurors, including death penalty views, criminal background, employment, marital status, hardship, and so on.

Significantly, the State's evidence, including testimony from prosecutors, two expert witnesses, and a volume of documents, rather than causing the Court to question Defendants' proof, leads the Court to be more convinced of the strength of Defendants' evidence.

The Court finds no joy in these conclusions. Indeed, the Court cannot overstate the gravity and somber nature of its findings. Nor can the Court overstate the harm to African Americans and to the integrity of the justice system that results from racially discriminatory jury selection practices. [citations omitted] \* \* \*

\* \* \* The Court takes hope that acknowledgment of the ugly truth of race discrimination revealed by Defendants' evidence is the first step in creating a system of justice that is free from the pernicious influence of race, a system that truly lives up to our ideal of equal justice under the law.

*State v. Golpin*, Cumberland Co., NC, Superior Nos. 97 CRS 42314-15, 98 CRS 34832, 35044, 01 CRS 65079, at 2-6 (Dec. 13, 2012). Judge Weeks' exhaustive opinion addresses the use of a "cheat sheet" of race neutral reasons in four capital cases, *id.*, at 77-81, ¶¶ 79-93; racially-disparate treatment of venire members, *id.* at 83-85, ¶¶ 99; unconscious bias, *id.* at 87, ¶¶ 105-106, 92-95, ¶¶ 117-125; statewide instances of discrimination, *id.* at ¶¶ 112-136, ¶¶ 171-202; and the statistical evidence of discrimination, *id.* at ¶¶ 136-201, 203-393.

The Court found that prosecutors statewide struck 52.8% of eligible black venire members and 25.7% of all other eligible venire members. The probability of such a disparity occurring in a race-neutral process is less than one in ten trillion. *Id.* at 153, ¶ 254.

### The Instruction and Certificate Required in Federal Cases

18 U.S.C. § 3593 (f) provides as follows:

**Special Precaution To Ensure Against Discrimination.** In a hearing held before a jury, the court, prior to the return of a finding [concerning a sentence of death], shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that

consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.