

# Post-McCleskey Racial Discrimination Claims in Capital Cases

John H. Blume

Theodore Eisenberg

Sheri Lynn Johnson

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

John H. Blume, Theodore Eisenberg, and Sheri Lynn Johnson, *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 Cornell L. Rev. 1771 (1998)  
Available at: <http://scholarship.law.cornell.edu/clr/vol83/iss6/7>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# POST-MCCLESKEY RACIAL DISCRIMINATION CLAIMS IN CAPITAL CASES

John H. Blume,†  
Theodore Eisenberg††  
& Sheri Lynn Johnson†††

INTRODUCTION .....	1772
I. RACE, THE DEATH PENALTY, AND NORMAL EQUAL PROTECTION STANDARDS .....	1774
A. The Road to <i>McCleskey</i> .....	1774
B. <i>McCleskey v. Kemp</i> .....	1776
C. The Limits of <i>McCleskey</i> .....	1778
D. Universally Applicable Equal Protection Principles ..	1780
II. POST-MCCLESKEY CASES IN THE LOWER COURTS .....	1780
A. Earl Matthews .....	1781
1. <i>Evidence That Race Influenced the Decision to Seek       the Death of Earl Matthews</i> .....	1781
a. “ <i>The Impact of the Official Action</i> ”: <i>Statistical         Evidence of Racial Discrimination in Seeking the         Death Penalty</i> .....	1781
b. <i>Contemporary Statements by Members of the         Decision-Making Body</i> .....	1783
c. <i>Departures From the Normal Procedural Sequence         .....</i>	1784
d. <i>Part of the Historical Background of the Decision:         Racially Discriminatory Employment Practices</i> ....	1785
e. <i>Other Examples of the Prosecutor’s Racial Bias</i> ..	1786
f. <i>A Substantive Departure: The Anomaly of Seeking         Death for Earl Matthews</i> .....	1787
2. <i>The cursory judicial review of Matthews’s Claim</i> ....	1787
B. Raymond Patterson .....	1789
1. <i>Evidence That Race Influenced the Decision to Seek       the Death of Raymond Patterson</i> .....	1789

---

† Visiting Professor of Law, Cornell Law School, Director, Cornell Death Penalty Project. Professor Blume served as counsel for capital defendants in some of the cases that this Article discusses. We would like to thank Professor Kevin Clermont for his comments on a draft of this Article.

†† Henry Allen Mark Professor of Law, Cornell Law School. Professor Eisenberg served as an expert witness on statistical analyses of racial patterns of prosecutorial decision making in some of the cases that this Article discusses.

††† Professor of Law, Cornell Law School, Co-Director, Cornell Death Penalty Project.

a.	<i>Disparate Impact: The Statistical Evidence</i> . . . . .	1789
b.	<i>Contemporary Statements by the Decision Makers</i> .	1790
c.	<i>Departures from Usual Procedures</i> . . . . .	1791
d.	<i>Substantive Departures</i> . . . . .	1793
2.	<i>Dismissive Judicial Treatment of Patterson's Claim</i> . . .	1793
C.	Other Post- <i>McCleskey</i> Cases . . . . .	1794
III.	CRITIQUE OF POST- <i>McCLESKEY</i> CASES: HAVE COURTS ACCURATELY APPLIED EQUAL PROTECTION PRINCIPLES? . . . .	1798
IV.	PROPERLY ALLOCATING THE BURDEN OF PRODUCTION: STATISTICAL AND OTHER COUNTY-LEVEL EVIDENCE AS ESTABLISHING A PRIMA FACIE CASE . . . . .	1803
A.	The Theory of Burdens of Production . . . . .	1803
B.	Allocation of Burdens of Production in Other Discrimination Cases . . . . .	1804
C.	A Modest Proposal . . . . .	1806
	CONCLUSION . . . . .	1807

#### INTRODUCTION

In federal habeas corpus proceedings, Earl Matthews, an African American, South Carolina death row inmate, alleged that his death sentence was the result of invidious racial discrimination that violated the Equal Protection Clause of the Fourteenth Amendment. To support his contention, Matthews presented statistical evidence showing that in Charleston County, where a jury convicted him and sentenced him to death, the prosecutor was far more likely to seek a death sentence for a Black defendant accused of killing a white person than for any other racial combination of victims and defendants, and also that such a Black defendant was more likely to receive a death sentence. The statistics proffered by Matthews did not stand alone. Testimony from former Charleston County police officers, prosecutors, defense lawyers, and community leaders bolstered these statistics and indicated that racial considerations affected the prosecution of capital cases in Charleston County. Matthews also presented, as is commonly done in other types of antidiscrimination suits, additional circumstantial evidence of racial discrimination, including information suggesting that certain hiring and firing practices and other prosecutorial actions in his case were motivated by racial animus.

One, of course, may disbelieve this evidence of racial animus. The court, however, did not assess the truthfulness of Matthews's allegations. Rather, the federal district court judge summarily dismissed Matthews's contentions on the ground that the Supreme Court's deci-

sion in *McCleskey v. Kemp*<sup>1</sup> precluded this type of challenge to a death sentence.<sup>2</sup> The Court of Appeals for the Fourth Circuit affirmed the district court's decision,<sup>3</sup> and the State of South Carolina executed Matthews on November 6, 1997.

Although *McCleskey* has been widely criticized,<sup>4</sup> this Article does not address its correctness. Rather, our analysis addresses flaws in the lower courts' treatment of post-*McCleskey* selective-prosecution claims. Any plausible reading of *McCleskey* suggests that Matthews's race-based claims warranted more serious treatment than the federal courts afforded them.

Our review of the published post-*McCleskey* decisions reveals that the abbreviated treatment of Matthews's claim is not unique. Many courts that face post-*McCleskey* capital-sentencing racial discrimination claims may assume that *McCleskey* dooms them all.<sup>5</sup> Although some scholars have concluded understandably that *McCleskey* precludes all statistically based attacks involving racial bias and the death penalty,<sup>6</sup> *McCleskey* does not hold on its face that selective-prosecution claims are not cognizable in capital cases. In any other equal protection context, the showings made in many post-*McCleskey* cases would have triggered, at a minimum, the opposing party's duty to rebut the prima facie case of racial discrimination. When lower courts, without examination, reject such prosecutor-specific proof of discrimination simply because a death row inmate—whose claims one might assume should receive more judicial scrutiny rather than less<sup>7</sup>—proffers it, they dis-

---

<sup>1</sup> 481 U.S. 279 (1987). The Court rejected McCleskey's Equal Protection Clause and Eighth Amendment challenges to his death sentence because the statewide statistical study, which Dr. David Baldus had conducted, did not provide specific evidence that any of the "decisionmakers in his case acted with discriminatory purpose." *Id.* at 292, 298. Part I of this Article will discuss the Court's decision in *McCleskey* in detail.

<sup>2</sup> See *Matthews v. Evatt*, No. C/A 3:95-132-3BC, slip op. at 13-14 (D.S.C. Mar. 25, 1996).

<sup>3</sup> See *Matthews v. Evatt*, 105 F.3d 907 (4th Cir. 1997).

<sup>4</sup> See, e.g., DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* 370-93 (1990); SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 159-211 (1989); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 480 (1995) (referring to *McCleskey* as a "badge of shame upon America's system of justice"); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1016 (1988); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 510 (1994). Even *McCleskey*'s author, Justice Powell, came to wish that he could change his deciding vote in that case. See David Von Drehle, *Retired Justice Changes Stand on Death Penalty*, WASH. POST, June 10, 1994, at A1.

<sup>5</sup> See *infra* Part II.

<sup>6</sup> See, e.g., David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 374 (1994).

<sup>7</sup> The Court has noted that "[b]ecause of that qualitative difference [of the death penalty], there is a corresponding difference in the need for reliability in the determina-

tort *McCleskey* in a manner that cannot be squared with generally applicable equal protection doctrine.

Part I describes the historical background of capital-sentencing racial discrimination claims and then discusses those types of discrimination claims that *McCleskey* did, and did not, foreclose. Part II presents the evidence of racial discrimination in the decision to seek death in two South Carolina capital cases, including the Matthews case, and describes the perfunctory way courts treated this evidence. It then summarizes how similar attacks have fared in other jurisdictions. Part III contrasts the adjudication of these cases with the disposition of analogous issues in other types of discrimination claims. Part IV outlines an approach to capital-sentencing racial discrimination claims that both comports with well-established equal protection standards and is consistent with *McCleskey*.

## I

### RACE, THE DEATH PENALTY, AND NORMAL EQUAL PROTECTION STANDARDS

#### A. The Road to *McCleskey*

There is no question that both the historical and the current imposition of the death penalty in this country are racially discriminatory. Nearly every study, including the federal government's General Accounting Office review of twenty-eight studies, has come to this conclusion.<sup>8</sup> The "distorting effects of racial discrimination" in the administration of the death penalty are, in truth, as old as our Republic.<sup>9</sup>

---

tion that death is the appropriate punishment." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Commentators have described this supposed heightened scrutiny as "super due process." See, e.g., Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980); cf. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 338-43 (outlining various procedural due process issues specific to capital cases).

<sup>8</sup> See GENERAL ACCOUNTING OFFICE, *DEATH PENALTY SENTENCING: RESEARCH INDICATED PATTERN OF RACIAL DISPARITIES* 3 (1990). The GAO study refers to many of the most relevant studies. See *id.* at app. I. For other studies on death penalty sentencing, see BALDUS ET AL., *supra* note 4; GROSS & MAURO, *supra* note 4; Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 U. FLA. L. REV. 1 (1991). Significant racial disparity also has been apparent in the application of the federal death penalty. See H.R. REP. NO. 103-458, at 2-4 (1994). Stephen P. Klein and John E. Rolph, however, report no statistically significant race effect. See Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 JURIMETRICS 33, 43 (1991). But they do find that white-victim cases are more likely to result in death sentences than nonwhite-victim cases. See *id.* at 37-38. This effect survives after controlling for case characteristics. See *id.* at 43. Klein and Rolph do not break down the nonwhite category into Black people and other nonwhites.

<sup>9</sup> *Godfrey v. Georgia*, 446 U.S. 420, 439 (1980) (Marshall, J., concurring).

This long history of the relationship between race and capital cases also has been well-documented elsewhere.<sup>10</sup>

By 1972, however, the Supreme Court seemed ready to face the many inequities of capital punishment. Indeed, concern that race influences who lives and who dies was perhaps the most significant factor in the Court's decision to overturn all then-existing death penalty statutes in *Furman v. Georgia*.<sup>11</sup> Justice Douglas decried the wide discretion of judges and juries in imposing the death penalty. He argued that this discretion was often responsible for "feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and [for] saving those who by social position may be in a more protected position."<sup>12</sup> Justice Marshall discussed the history of racial discrimination at length in his opinion, noting that "[n]egroes [have been] executed far more often than whites in proportion to their percentage of the population."<sup>13</sup> Even Justice Stewart noted that "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."<sup>14</sup>

Even when the Court upheld death penalty statutes in *Gregg v. Georgia*,<sup>15</sup> its reasoning was consistent with *Furman's* concerns about racial discrimination. In the plurality's view, the new statutes sufficiently channeled the sentencer's discretion to eliminate the possibility of an arbitrary or capricious imposition of the death penalty.<sup>16</sup> *Gregg* acknowledged the possibility that race may influence capital punishment, even under the new "guided discretion" statutes, but because the litigants had not presented proof that discrimination persisted, the Court upheld these statutes.<sup>17</sup> Moreover, one year after the decision in *Gregg*, the Court struck down the death penalty for rape,<sup>18</sup> which was notorious for the extremity of its racial imbalance.<sup>19</sup> Although the Court did not discuss race, observers believed that the

---

<sup>10</sup> See, e.g., Bright, *supra* note 4, at 439-42.

<sup>11</sup> 408 U.S. 238 (1972).

<sup>12</sup> *Id.* at 255 (Douglas, J., concurring); see also *id.* at 364 (Marshall, J., concurring) ("[I]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society's sacrificial lamb. . . ." (internal quotation marks omitted)).

<sup>13</sup> *Id.* at 364 (Marshall, J., concurring).

<sup>14</sup> *Id.* at 310 (Stewart, J., concurring).

<sup>15</sup> 428 U.S. 153 (1976).

<sup>16</sup> See *id.* at 206-07.

<sup>17</sup> See *id.* at 200.

<sup>18</sup> See *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

<sup>19</sup> See, e.g., *Furman*, 408 U.S. at 364 (Marshall, J., concurring) (noting that of the 455 persons executed for rape, after the Justice Department began compiling statistics, 405 were Black).

likelihood of racial discrimination was the key motivating factor in the Court's decision to invalidate the death penalty for rape.

Many litigators and academics therefore believed that *Gregg* presented them with the opportunity to demonstrate that race remained an important factor in the administration of capital punishment.<sup>20</sup> The next decade produced many statistical studies showing that race—both of the defendant and the victim—had played a significant role in the administration of the death penalty.<sup>21</sup> These studies included that of Dr. David Baldus of the University of Iowa.

### B. *McCleskey v. Kemp*

Baldus's study examined over 2,000 murders that occurred in Georgia during the 1970s. After considering 230 variables that could have explained the data on nonracial grounds, Baldus concluded that defendants charged with killing white victims were 4.3 times more likely to receive the death penalty than defendants charged with killing African Americans, and that Black defendants were 1.1 times more likely to receive the death penalty than other defendants.<sup>22</sup> Thus, a Black defendant who had killed a white victim had the greatest likelihood of receiving a death sentence.<sup>23</sup>

Warren McCleskey was just such a defendant; indeed, as Justice Brennan stated in dissent, Baldus's statistical analysis showed that "the jury *more likely than not* would have spared McCleskey's life had his victim been black."<sup>24</sup> McCleskey's case was a particularly appropriate vehicle for the Supreme Court to address racial disparities under post-*Furman* statutes, both because the case arose from Georgia (as had *Furman* and *Gregg*) and because it involved a comprehensive statistical study by a respected statistician who held no ties to the anti-death penalty community.

A bare majority of the Court, in an opinion by Justice Powell, affirmed the court of appeals's rejection of McCleskey's claim. The majority held that general statistical evidence showing that a particular state's capital punishment scheme operated in a discriminatory manner did not establish either an Eighth or a Fourteenth Amendment violation.<sup>25</sup> The Court found that Professor Baldus's study established "[a]t most . . . a discrepancy that appears to correlate with

---

<sup>20</sup> See BALDUS ET AL., *supra* note 4, at 27.

<sup>21</sup> See GENERAL ACCOUNTING OFFICE, *supra* note 8, at app. I (listing studies).

<sup>22</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987). The raw data indicate that the death-sentencing rate for all white-victim cases was 11 times greater than the rate for Black-victim cases. See *id.* at 326-27 (Brennan, J., dissenting).

<sup>23</sup> See *id.* at 286-87.

<sup>24</sup> *Id.* at 325 (Brennan, J., dissenting).

<sup>25</sup> See *id.* at 291-92, 308.

race,"<sup>26</sup> and it then refused "to assume that what is unexplained is invidious."<sup>27</sup> Because the Court previously had found that statistics alone presented sufficient proof of discriminatory intent, Justice Powell had to distinguish certain prior cases. Ordinarily, he stated, statistical disparities must be "stark" to provide sole proof of discrimination.<sup>28</sup> Thus, Powell apparently viewed *McCleskey* as presenting a less than "stark" showing. In jury selection cases, however, the Court had accepted less-extreme statistical disparities as sufficient to shift the burden of proof to the government. These cases, Powell explained, had involved less complicated decisions and fewer decision makers.<sup>29</sup> Powell reasoned that the larger number of actors and aspects involved in the capital-sentencing process would increase the likelihood that other factors were responsible for racial effects, and therefore render the jury selection precedents inapplicable.<sup>30</sup> Moreover, he noted that this complexity would have intolerably increased the rebuttal burden if the State were required to explain the statewide statistics that *McCleskey* had proffered.<sup>31</sup>

Because *McCleskey*'s proof neither constituted a stark statistical pattern nor warranted departure from the stark-pattern standard, the Court dismissed the statewide statistics as "clearly insufficient to support an inference that any of the decisionmakers in *McCleskey*'s case acted with discriminatory purpose."<sup>32</sup> The only other evidence of racial discrimination that *McCleskey* proffered was historical. Although the evidence of past race-consciousness in the Georgia criminal justice system was extensive, the Court found that because this evidence lacked recency, it had little probative value in assessing the likelihood of post-*Furman* discrimination.<sup>33</sup> Thus, *McCleskey* had "offer[ed] no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence."<sup>34</sup> He therefore failed to demonstrate a violation of either the Equal Protection Clause or the Eighth Amendment.<sup>35</sup>

---

<sup>26</sup> *Id.* at 312. The majority opinion states that "[e]ven a sophisticated 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." *Id.* at 291 n.7.

<sup>27</sup> *Id.* at 313.

<sup>28</sup> *Id.* at 293.

<sup>29</sup> *See id.* at 294.

<sup>30</sup> *See id.* at 294-95.

<sup>31</sup> *See id.* at 296-97.

<sup>32</sup> *Id.* at 297.

<sup>33</sup> *See id.* at 298 n.20.

<sup>34</sup> *Id.* at 292-93.

<sup>35</sup> *See id.* at 297. The majority opinion is somewhat unclear as to whom the relevant decisionmaker is: the jury that sentences the defendant to death, the prosecutor who makes the decision to seek the death penalty, or both. However, the passage above, *see supra* text accompanying note 32, seems to indicate that if either the jury or the prosecu-

### C. The Limits of *McCleskey*

*McCleskey* does not state precisely the limits of its holding. There are, however, compelling reasons to read it narrowly, and no legitimate reason to read it as broadly as the lower courts have done. Most probative is *McCleskey's* statement, in the very first paragraph of its analysis of the equal protection claim, that the flaw in *McCleskey's* showing turned on the absence of evidence tying alleged racial discrimination to his case: "[T]hus, 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."<sup>36</sup> *McCleskey* does not support creating insurmountable evidentiary hurdles in capital cases in which race may have played a role in the decision to seek the death penalty. It also does not reject completely statistical analyses of this issue. *McCleskey* purports to be rooted in and consistent with standard equal protection analysis.

The Court's first paragraph analyzing *McCleskey's* claim contains a second reason to limit the reach of its holding. The Court obviously and properly was concerned about the implications of accepting *McCleskey's* proof without some evidence tying the alleged discrimination to his case:

*McCleskey* argues 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.<sup>37</sup>

Thus, the Court feared that ruling for *McCleskey* on the basis of the Baldus study would threaten the validity of a large class of capital cases throughout Georgia. Because there was little reason to think that other defendants could not replicate the Baldus study in cases in other states (as likely would have been done had *McCleskey* prevailed), *McCleskey's* claim endangered at least hundreds of what might otherwise be valid capital convictions and sentences. As the Court stated in *McCleskey*, "*McCleskey's* claim, taken to its logical conclusion, throws into serious question the principles that underlie our

---

tor's decision to seek or to impose the death sentence was affected by race, an equal protection violation would have occurred. As a common-sense matter, this view must be correct. Imagine, for example, a prosecutor who announces that his policy is that he only seeks the death penalty in cases involving Black defendants and white victims. Would the fact that a nonracially biased jury imposed the death sentence insulate the sentence from constitutional challenge? To ask the question is to answer it.

<sup>36</sup> *Id.* at 292-93 (additional emphasis added).

<sup>37</sup> *Id.* at 293.

entire criminal justice system.”<sup>38</sup> Once a capital defendant offers proof tying discrimination to *his case*, this concern dramatically decreases. At most, this proof implicates the past convictions of a single prosecutor or a single prosecutor’s office.

A third reason to read *McCleskey* narrowly lies in what we now know about the Court’s consideration—and rejection—of a broad prohibition against racial discrimination challenges to death sentences. Justice Thurgood Marshall’s papers reveal a *McCleskey* case memorandum from Justice Scalia indicating that the latter would hold that *no* showing of racial discrimination in the death-sentencing process—no matter how strong or direct—would violate the Eighth or Fourteenth Amendments. Justice Scalia did not mean to say that he believed that race played no role in capital-sentencing decisions. Rather, his memorandum states that “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 by the [decisions] of this court and ineradicable, I cannot honestly say that all I need is more proof.”<sup>39</sup> Justice Scalia, it appears, might have been prepared to acknowledge the existence of racial discrimination but also would deem its presence to be of no legal consequence. Clearly, the majority eschewed this course. Indeed, only five members of the Court were of the view that *McCleskey*’s evidence itself was insufficient to establish a constitutional violation, and one of them, the author of the majority opinion, has since regretted his vote.<sup>40</sup> Thus, because *McCleskey* itself is of doubtful stability, inferring support for an expansive holding surely is unwarranted.

With respect to racial discrimination claims that focus on the actions of the prosecutor, a fourth reason indicates that *McCleskey* erects no implicit bar. In *United States v. Armstrong*,<sup>41</sup> the Court recognized that allegations of selective prosecution based on race—clearly the genus of the challenge that Earl Matthews had presented—must be evaluated in light of “ordinary equal protection standards.”<sup>42</sup> In short, no

---

<sup>38</sup> *Id.* at 314-15.

<sup>39</sup> Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia’s McCleskey Memorandum*, 45 *MERCER L. REV.* 1035, 1038 (1994) (quoting Memorandum to the Conference from Justice Antonin Scalia in No. 84-6811—*McCleskey v. Kemp* of Jan. 6, 1987, *McCleskey v. Kemp* file, in THURGOOD MARSHALL PAPERS (on file with Library of Congress, Washington, D.C.)). See generally Dorin, *supra* (discussing Scalia’s memorandum and the impact on *McCleskey*).

<sup>40</sup> See Von Drehle, *supra* note 4, at A1.

<sup>41</sup> 517 U.S. 456 (1996).

<sup>42</sup> *Id.* at 465 (internal quotation marks omitted); see also *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (discussing the standard by which to evaluate racial impact); *Wayte v. United States*, 470 U.S. 598, 608 (1985) (“It is appropriate to judge selective prosecution claims according to ordinary equal protection standards.”).

reason exists to believe that prosecutorial decisions to seek the death penalty are exempt from the dictates of the Equal Protection Clause, or that proof of racial discrimination in such decisions is subject to peculiar rules.

#### D. Universally Applicable Equal Protection Principles

Under established equal protection principles, a death-sentenced inmate need not prove discriminatory intent by direct evidence. Rather, as the Supreme Court stated in *Village of Arlington Heights v. Metropolitan Division Corporation*,<sup>43</sup> "invidious discriminatory purpose may often be inferred from the totality of the relevant facts."<sup>44</sup> Thus, the appropriate analysis "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."<sup>45</sup> Sensitive inquiry is necessary both because perpetrators do not often publicly announce race-based discrimination and because those responsible for key decisions may have "[m]ore subtle, less consciously held racial attitudes."<sup>46</sup> These attitudes become especially problematic when those responsible for the decision have broad discretion, as in the decision to seek the death penalty.<sup>47</sup>

The *Arlington Heights* Court identified several relevant factors to consider in testing for discriminatory intent: "[t]he impact of the official action," "[t]he historical background of the decision[,] . . . particularly if it reveals a series of official actions taken for invidious purposes," "[d]epartures from the normal procedural sequence," "substantive departures[,] . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," and "contemporary statements by members of the decisionmaking body."<sup>48</sup> *Arlington Heights* also makes clear that this list is not exhaustive.<sup>49</sup>

## II

### POST-*McCLESKEY* CASES IN THE LOWER COURTS

Far from conducting a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available,"<sup>50</sup> most lower courts reject post-*McCleskey* capital-sentencing racial discrimination claims

<sup>43</sup> 429 U.S. 252 (1977).

<sup>44</sup> *Id.* at 266; see also *Rogers v. Lodge*, 458 U.S. 613, 618 (1982); *Washington v. Davis*, 426 U.S. 229, 242 (1976).

<sup>45</sup> *Arlington Heights*, 429 U.S. at 266.

<sup>46</sup> *Turner v. Murray*, 476 U.S. 28, 31 (1986).

<sup>47</sup> See *id.* at 35.

<sup>48</sup> *Arlington Heights*, 429 U.S. at 266-268; see also *Hunter*, 471 U.S. at 232 (stating that *Arlington Heights* supplies the "proper analysis" for selective-prosecution claims).

<sup>49</sup> See *Arlington Heights*, 429 U.S. at 268.

<sup>50</sup> *Id.* at 266.

without any individualized analysis. Earl Matthews's and Raymond Patterson's cases present especially egregious examples. We describe these cases in some detail so that the reader may evaluate the persuasiveness of the proffered evidence that race did influence the decisions to seek death. They are, however, not isolated cases.

#### A. Earl Matthews

With *McCleskey's* strictures in mind, Matthews's attorneys eschewed state wide studies of discrimination and focused on the decision maker in Matthews's case: the Charleston County, South Carolina Solicitor's Office and, in particular, Matthews's prosecutor. Matthews supplemented his statistical showings with other evidence that *Arlington Heights* deemed relevant: recent history of official actions taken for an invidious purpose; contemporaneous racially conscious statements by the decision-making body; examples of deviations from standard procedures; and evidence of substantive departures from ordinary criteria for death prosecutions. He also adduced proof of racially motivated personnel policies and racial bias on the part of the key decision maker in his case.

1. *Evidence That Race Influenced the Decision to Seek the Death of Earl Matthews*
  - a. *"The Impact of the Official Action": Statistical Evidence of Racial Discrimination in Seeking the Death Penalty*

Matthews's statistical study revealed that the prosecution had gone to trial seeking the death penalty in twenty cases in Charleston County since 1977, the year that South Carolina enacted its post-*Furman* death penalty statute. Thirteen of these trials involved Black or minority defendants, and all but two of the trials involved one or more white victims.<sup>51</sup> The study indicated that, at the time, there were five individuals on South Carolina's death row who were tried for crimes that occurred in Charleston County. Additionally, the State recently had executed another prisoner from Charleston County. Four of these persons were African American,<sup>52</sup> one was Native American,<sup>53</sup> and only one was white.<sup>54</sup> All of these cases involved one or more white victims. The only persons to receive death sentences in single-victim cases were Matthews, Leroy Drayton, and Anthony

---

<sup>51</sup> The two trials actually involved the same defendant, Demetrius Gathers. The state supreme court reversed Gathers's death sentence, *State v. Gathers*, 369 S.E.2d 140, 144 (S.C. 1988), *aff'd*, 490 U.S. 805 (1989) and resented him to life imprisonment.

<sup>52</sup> These four were Matthews, Leroy Drayton, Frank Middleton, and Anthony Green.

<sup>53</sup> The Native American was Joseph Ernest Atkins.

<sup>54</sup> His name was Fred Kornahrens. He recently was executed.

Green, all three of whom were African Americans convicted for murdering white victims. In contrast, Fred Kornahrens, the only white person from Charleston County who was recently on death row, was convicted of killing three people. This racial pattern seems intuitively improbable given that Charleston County is about thirty-four percent Black.<sup>55</sup> The pattern seems to focus disproportionately on Black-defendant cases and white-victim cases.

Matthews presented a statistical study that tested this impression by focusing on the effect that race had on the decision to seek the death penalty and on the disposition of homicide cases in Charleston County between January 1981 and January 1990.<sup>56</sup> These years cover a period roughly five years before and five years after Matthews's first trial. The same prosecutor was in office throughout this period.

Between 1981 and 1990, the prosecutor sought the death penalty in ten of twenty-five murder cases in which the defendant was Black and the victim was white, but he only sought the death penalty in two of seventy murder cases in which the defendant and victim were both Black.<sup>57</sup> Hence, when a Black person had killed a white person, the prosecutor sought the death penalty forty percent of the time, but when a Black person had killed another Black person, the same prosecutor only sought the death penalty 2.9% of the time.<sup>58</sup> Because such a statistical discrepancy would occur by chance less than one time in one thousand, Matthews's study presents *prima facie* evidence that the race of defendants and victims played a significant role in the prosecutor's decision to seek the death penalty.<sup>59</sup>

During that same period of time, the prosecutor sought the death penalty in twenty-one of sixty-five (32.3%) murder cases in which the victim was white and only in four of seventy-seven (5.2%) murder cases in which the victim was Black.<sup>60</sup> Again, because this statistical discrepancy only could occur by chance less than one time in one thousand, the race of the victims likely played a significant factor in the prosecutor's decision to seek the death penalty.<sup>61</sup>

Matthews's study also noted a strong relation between the race of a homicide victim and whether the defendant received a "reduced outcome." A reduced outcome occurs when (1) the jury convicts a defendant of a level of homicide lower than the level of the most seri-

---

<sup>55</sup> See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1 1980 CENSUS OF THE POPULATION A-42-15 (1981).

<sup>56</sup> See 2 Joint Appendix at 526-31, *Matthews v. Evatt*, 105 F.3d 907 (4th Cir. 1997) (on file with Fourth Circuit U.S. Court of Appeals) [hereinafter Joint Appendix].

<sup>57</sup> See *id.* at 527-28.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> See *id.* at 528-29.

<sup>61</sup> See *id.*

ous charge; (2) the jury convicts a defendant of a nonhomicide offense; (3) the jury acquits the defendant; or (4) the prosecutor drops the charges.<sup>62</sup> When the victim was Black, the defendant received a reduced outcome 78.2% of the time, whereas when the victim was white, the defendant only received a reduced outcome 45.6% of the time.<sup>63</sup> Here, too, because this statistical discrepancy only could occur by chance less than one time in one thousand, the race of the victims likely played an important role in how the solicitor resolved homicide cases.<sup>64</sup> The study concluded that in the absence of a persuasive explanation for the highly suspect pattern, intentional racial discrimination existed in the administration of homicide and capital cases in Charleston County.<sup>65</sup>

b. *Contemporary Statements by Members of the Decision-Making Body*

Matthews presented evidence from former employees of the Solicitor's Office, from press accounts, and from community leaders to corroborate the statistical evidence of racial bias. A former assistant prosecutor in the Charleston County Solicitor's Office at the time of Matthews's trial declared that the office had prosecuted homicide cases in a racially discriminatory manner, treating cases involving Black victims as less important than cases involving white victims.<sup>66</sup> She worked in the prosecutor's office for six years, all during the solicitor's tenure, and only recalled one case involving a Black defendant and a Black victim in which the solicitor sought the death penalty even though there had been many such death eligible cases.<sup>67</sup> In her view, when there was an aggravated murder involving a Black defendant and Black victim, "the idea of the state seeking the death penalty did not appear to enter the calculus" at the Solicitor's Office.<sup>68</sup> Another former prosecutor also observed a significant amount of racism

---

62 *Id.* at 530.

63 *See id.* at 530-31.

64 *See id.* at 531.

65 *See id.*

66 *See id.* at 561.

67 *See id.*

68 *Id.* In fact, in many death eligible cases in which the victim was Black, the staff attorney observed the prosecutor allowing defendants to plead guilty to substantially lesser charges even if the victims' families demanded stiffer penalties. *See id.* According to this former assistant prosecutor, this racially discriminatory prosecution "reflected a perception on the part of the Ninth Circuit Solicitor's Office that the victims in cases [in which the victims were black] were worth less than victims in cases of different racial makeups." *Id.* Another employee of the solicitor's office, who was employed from 1988 to 1994, also testified that she observed discrimination in the prosecution of cases, especially in regard to sentencing. In her opinion, white defendants received "more lenient treatment," even though the facts of their cases were often worse than cases involving Black defendants. 1 *id.* at 253-54.

in the prosecutor's office during the time of both Matthews's trials.<sup>69</sup> On one occasion, she heard another prosecutor in the office say at a staff meeting that a particular case deserved less priority "because the victim was 'just a little old black man.'"<sup>70</sup>

A twenty-five year veteran of the Charleston Police Department (1966-1991) and current United States Marshall was the lead detective in the Matthews case.<sup>71</sup> He also worked numerous other homicide cases and thus had constant contact with the Solicitor's Office.<sup>72</sup> He observed that the prosecutor's office "routinely sought tougher sentences for black defendants than it did for white defendants."<sup>73</sup> He maintained that the solicitor prosecuted cases more seriously and aggressively when the victim was white than when the victim was Black:<sup>74</sup> "when the defendant was black and/or the victim was white, [the Solicitor's Office] would charge the accused with a more serious offense and seek a greater punishment than was the case when the defendant was white and/or the victim was black."<sup>75</sup>

### c. *Departures from the Normal Procedural Sequence*

Attorneys, civil rights and community leaders, and journalists provided additional corroboration of racial discrimination in the decision to seek death. Although some of this evidence tracked the statistical findings, it also added depth by providing examples of departures from the Solicitor's Office's normal procedures in seeking death. Testimony indicated that the Charleston County Solicitor's Office routinely had prosecuted cases involving white victims, especially homicide cases, more aggressively than cases involving Black victims.<sup>76</sup> Testimony also showed that the office had sought resolutions more

---

<sup>69</sup> See 2 *id.* at 548.

<sup>70</sup> *Id.*

<sup>71</sup> See 1 *id.* at 246.

<sup>72</sup> See *id.*

<sup>73</sup> *Id.*

<sup>74</sup> See *id.*

<sup>75</sup> *Id.*

<sup>76</sup> A local minister complained that "[a] black can kill a black and nothing is done, but only when a white is killed by a black is someone prosecuted." Shirley Greene & Steve Mullins, *Charges of Police Brutality Spark Groundswell of Protest*, NEWS & COURIER—EVENING POST (Charleston, S.C.), May 15, 1983, at 1-A (internal quotation marks omitted). Nelson B. Rivers III, former president of the North Charleston NAACP branch, said in reference to a case in which a black person was accused of killing a white person that "[t]he whole situation reinforces the feeling that if you are black and accused of killing a white, you can't get a fair trial in this community." *Id.* at 2-A (internal quotation marks omitted). In regard to another case in which the prosecutor filed no charges against two white people who killed a Black person, Rev. Jerry Williams protested that "[i]f you turn this around" and, under the same circumstances, two Black people kill a white person, the Blacks would "quickly be locked up." David W. MacDougall, *Ford, Others Want Investigation in Mungin Shooting to Continue*, POST & COURIER (Charleston, S.C.), May 8, 1992, at 1-B (internal quotation marks omitted). The Solicitor's Office ultimately decided not to prosecute the

quickly when the victim had been white.<sup>77</sup> Other testimony established that differences in the decision to seek death were not attributable to differences in the victims' families' preferences; in many death-eligible cases involving Black victims, the prosecutor allowed defendants to plead guilty to substantially lesser charges even though the victims' families had demanded stiffer penalties.<sup>78</sup> Moreover, the discriminatory treatment extended not only to bond issues and to plea bargaining decisions,<sup>79</sup> but also to resource allocation decisions.<sup>80</sup>

d. *Part of the Historical Background of the Decision: Racially Discriminatory Employment Practices*

Evidence of the solicitor's racially discriminatory attitude and decisions extended to the personnel policies that determined the staff who would participate in decisions about seeking death. Former employees maintained that "very few blacks [had been hired as] part of the professional staff at the Solicitor's office," but Black people "almost exclusively [had been] hired . . . as part of the support staff."<sup>81</sup> Testimony also suggested that Blacks had been "routinely fired . . . often for apparently no justifiable reason."<sup>82</sup> This routine firing, however, "was not equally practiced against whites."<sup>83</sup> Evidence also indicated that Black employees faced discrimination in the area of promotions.<sup>84</sup> One witness maintained that Black people "were almost sure not to receive any promotions."<sup>85</sup> Furthermore, evidence

---

whites involved in killing the Black victim. See Richard Green Jr., *Brothers Won't Face Charges for Shooting Suspect*, POST & COURIER (Charleston, S.C.), May 28, 1992, at 1-B.

On another occasion, five white Citadel students, dressed in Ku Klux Klan-styled robes, stormed into the room of a Black cadet, verbally harassed him, and left a burning cross on his floor. Solicitor Condon concluded that "his office believed the cadets, if found guilty, should be eligible for a program that will clear their records if they perform . . . community service." *5 Citadel Cadets Indicted over Racial Hazing*, N.Y. TIMES, Oct. 8, 1987, at A20; see also Herb Frazier, *Hazing Lawsuit Is Settled Against 5 Ex-Citadel Cadets*, NEWS & COURIER (Charleston, S.C.), Jan. 24, 1989, at 1-A (discussing the legal settlement that arose from the aforementioned racial incident).

<sup>77</sup> See 2 Joint Appendix, *supra* note 56, at 244.

<sup>78</sup> See *id.* at 561.

<sup>79</sup> See 1 *id.* at 245. The President of the local NAACP, as well as other NAACP members, noticed the pattern of discriminatory prosecutorial decisions, especially in homicide cases, and were prepared to discuss specific examples. They complained directly to Condon about his decisions, but he "showed little interest for their concerns." *Id.* at 248-49.

<sup>80</sup> See *id.* at 244-45. For example, the prosecutor's office spent more money on experts and other aspects of the investigation in homicide cases with white victims than in similar cases with Black victims. See *id.*

<sup>81</sup> 2 *id.* at 562; see 1 *id.* at 254-55.

<sup>82</sup> 2 *id.* at 562.

<sup>83</sup> *Id.*

<sup>84</sup> See 1 *id.* at 255-56.

<sup>85</sup> 2 *id.* at 562. One former assistant prosecutor filed racial discrimination claims with the Equal Employment Opportunity Commission. See *id.* at 514. This former prosecutor alleged that "[b]lack employees were treated differently than white employees and racially

showed that Black employees were forced to perform a variety of menial tasks, such as sweeping floors, even though such tasks were not in their job descriptions.<sup>86</sup>

e. *Other Examples of the Prosecutor's Racial Bias*

Other evidence demonstrated the solicitor's own racial insensitivity. For example, the solicitor blamed South Carolina's growing crime problem on moral decay and the breakdown of values in the Black community.<sup>87</sup> Counsel also presented evidence regarding the solicitor's uncompromising support for flying the Confederate Battle Flag on the Statehouse dome as indicative of his racism. The solicitor resisted efforts to reach a compromise about the divisive issue and declared that "[t]o even think about taking this flag down because it offends certain people I think is contrary to pluralism in American

---

offensive comments were made in the office." *Id.* This differential and unfair treatment that African Americans received in the Solicitor's Office prompted her to make verbal protests. The office, however, did not appreciate her complaints, and she "was expected to remain quiet and docile." *Id.* The office then asked her to resign. *See id.* Another Black attorney in the office filed a racial discrimination claim against the Solicitor's Office with the South Carolina Human Affairs Commission in 1991. *See id.* at 515. She maintained that the office commonly treated African Americans differently than whites, and it often made them feel unwanted. *See id.* She also noticed that "[w]hites employed in the solicitor's office would commonly receive promotions easier and more frequently than equally qualified blacks." *Id.* She recalled how she received a suspension without pay and earned probation for her involvement in a verbal conflict with a white employee, *see id.*, while the white employee received no disciplinary sanction. *See id.* This differential treatment was especially appalling because the white employee's racism provoked this conflict. *See id.* While on probation, the Solicitor's Office continued its disrespectful practices by requiring her to participate in offensive and degrading "counseling." *Id.* After she filed the complaint, the office terminated her employment. *See id.* The Solicitor's Office later admitted that she consistently had received excellent comments regarding her work. *See id.*

<sup>86</sup> *See* 1 *id.* at 256. One cannot dismiss these declarations as the views of several disgruntled former Black employees. A former white assistant solicitor noted the same unequal treatment and testified:

While working in the solicitor's office, I noticed that, on some occasions, black employees were treated differently than whites. I also recall that when the white attorneys in the office organized social events, blacks were sometimes excluded. I clearly remember several occasions where I was invited to office social functions while a particular fellow Assistant Solicitor was not. Since my relationship to the organizers of these social events was similar to that of this particular Assistant Solicitor's, I believed that the reason for the different treatment was because I am white and she is black. Because of this concern, I usually chose not to participate in these office social functions.

2 *id.* at 549.

<sup>87</sup> *See* Schuyler Kropf, *Condon Urges Blacks to Action*, POST & COURIER (Charleston, S.C.), Nov. 16, 1993, at 3-B.

society.”<sup>88</sup> The solicitor urged opponents of the Confederate Flag to deal with other issues and “leave this flag where it belongs.”<sup>89</sup>

f. *A Substantive Departure: The Anomaly of Seeking Death for Earl Matthews*

Although Matthews was death eligible, many of the facts and circumstances surrounding his case could have led an unbiased decision maker to decide that the death penalty was not an appropriate punishment. First, Matthews was only nineteen at the time of the offense and had a minimal prior record. In fact, one of his arresting officers even stated that he was not a “hard-nosed” criminal. Second, the only aggravator in this case—that the death occurred during an armed robbery—hardly distinguished the case from other, similar homicides that had occurred in the area and had not resulted in capital prosecutions. Finally, the killing resulted from a “botched” robbery that Matthews committed while under the influence of drugs and alcohol. The surviving victim remembered that Matthews became increasingly nervous as the robbery progressed, did not speak clearly, seemed uneducated, and acted like this was his first robbery.

2. *The cursory judicial review of Matthews’s claim*

Given the statistical evidence of discrimination, the lengthy history of the prosecutor’s antipathy toward African Americans, and the lack of any compelling reason to select this case for death penalty prosecution, one could easily have drawn the inference that racial bias influenced the decision maker in Matthews’s case. Nevertheless, a federal district court rebuffed Matthews’s claim. The judge did not discuss any of the evidence that Matthews had presented, instead he simply stated:

---

<sup>88</sup> Sid Gauden, *Condon Supports Battle Flag*, POST & COURIER (Charleston, S.C.), Oct. 20, 1993, at 1-B. During his campaign for Attorney General, Matthews’s prosecutor promised “to fight to keep the standard flying above the Statehouse.” *Id.*

<sup>89</sup> *Id.* Soon after becoming Attorney General, Matthews’s prosecutor filed a memorandum in the South Carolina Supreme Court stating that the Confederate Flag had legal authority to fly on the Statehouse dome. See Memorandum in Support of the State of South Carolina and the Attorney General’s Petition To Withdraw Its Brief at 2, *Coble v. South Carolina* (S.C. 1995), reprinted in 2 Joint Appendix, *supra* note 56, at 546. The memorandum reversed the prior policy of the Attorney General’s office. See *id.* Thus, rather than simply adopting the State’s existing position, or even supporting a compromise position as the state legislature was contemplating, Matthews’s prosecutor urged uncompromising support for the Confederate Flag.

The South Carolina Advisory Committee to the United States Commission on Civil Rights issued a report condemning the flying of the Confederate Flag at state facilities in South Carolina. According to the report, “[t]he singular issue that has recently highlighted the severity of increased racial tensions is the flying of the Confederate Flag at State facilities.” SOUTH CAROLINA ADVISORY COMM. TO THE U.S. COMM’N ON CIVIL RIGHTS, PERCEPTIONS OF RACIAL TENSIONS IN SOUTH CAROLINA 21 (1995).

The crux of the petitioner's claim is that the death penalty was applied in a discriminatory fashion against him in violation of the due process and equal protection clauses. Pursuant to [*McCleskey*], a defendant cannot question a prosecutor's discretionary decision to pursue the death penalty in his case unless he can present a *prima facie* case that discrimination has occurred. Relying on statistics will not work because the petitioner must show that the decision in his case was made for discriminatory reasons. "Thus, to prevail under the Equal Protection Clause, [the petitioner] must prove that the decisionmakers in *his* case acted with discriminatory purpose."

In this case, the petitioner has pointed to no evidence or facts that the solicitor sought the death penalty in his case for a discriminatory purpose. In addition, the [*McCleskey*] Court indicated a reluctance to question the discretionary decisions of prosecutors and stated that a legitimate explanation exists for seeking the death penalty, that is, that the petitioner committed a crime for which the laws permit the imposition of the death penalty. Such is the case here as pursuant to the South Carolina death penalty statute, S.C. Code § 16-3-20, *et seq.* (1976), a person convicted of murder shall be punished by death or imprisonment for life. Thus, in recognition of the solicitor's discretion, the violation of the statute, and the failure of the petitioner to show a *prima facie* case that discrimination was the reason for the death penalty, his claim is rejected on the merits and summary judgment should be entered for the respondents.<sup>90</sup>

Rather than discuss the evidence of discrimination that Matthews had offered, the judge denied its existence.<sup>91</sup> However, the statement that Matthews "pointed to no evidence or facts that the solicitor sought the death penalty in his case for a discriminatory purpose"<sup>92</sup> cannot be squared with reality. Furthermore, the judge also denied Matthews's motion for discovery that would have allowed a definitive exploration of the troublesome pattern of race-linked behavior by Matthews's prosecutor.<sup>93</sup>

---

<sup>90</sup> *Matthews v. Evatt*, No. C/A 3:95-132-3BC, slip op. at 13-14 (D.S.C. Mar. 25, 1996) (second alteration in original) (citations omitted) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987)), *aff'd*, 105 F.3d 907 (4th Cir.), *cert. denied*, 118 S. Ct. 102 (1997).

<sup>91</sup> The circuit court deemed Matthews's racial discrimination claim to be procedurally barred and declined to address the merits. *Matthews v. Evatt*, 105 F.3d 907, 910 (4th Cir.), *cert. denied*, 118 S. Ct. 102 (1997).

<sup>92</sup> *Matthews*, No. C/A 3:95-132-3BC, slip op. at 13.

<sup>93</sup> *See id.* at 28.

## B. Raymond Patterson

### 1. *Evidence That Race Influenced the Decision to Seek the Death of Raymond Patterson*

Raymond Patterson, an African American, received the death penalty in a Lexington County, South Carolina trial for the armed robbery and murder of Matthew Brooks, a white man from West Virginia. Evidence at trial showed that Patterson had attempted to mug Brooks and his wife, Ruth Brooks. Mr. Brooks fought to stop the robbery. In the ensuing scuffle, Patterson's gun discharged, killing Mr. Brooks.

Prior to the trial, Patterson's counsel moved to prohibit the State from seeking the death penalty because race had played a role in the State's decision to seek death in the past.<sup>94</sup> The court summarily denied the motion. After the jury sentenced Patterson to death, counsel renewed the motion because, while the jury had been deciding Patterson's fate, the trial court had accepted a guilty plea to murder from a white defendant in a more heinous case.<sup>95</sup> The court again denied his motion.<sup>96</sup> On appeal, the South Carolina Supreme Court perfunctorily rejected his claim.<sup>97</sup> Once one understands the statistical and anecdotal evidence presented by the defense counsel, however, the state Supreme Court's treatment of the claim seems especially unsatisfactory.

#### a. *Disparate Impact: The Statistical Evidence*

Counsel noted that, in the past, the prosecution had sought the death penalty in relatively unaggravated cases involving a Black defendant and white victim.<sup>98</sup> By contrast, counsel pointed out that cases with white defendants are often more aggravated in that they involve torture or multiple murder victims.<sup>99</sup> In addition to this anecdotal

---

<sup>94</sup> See *State v. Patterson*, 482 S.E.2d 760, 767 (S.C.), *cert. denied*, 118 S. Ct. 146 (1997).

<sup>95</sup> See Transcript of Record at 2353-55, *Patterson* (No. 24549). The defendant, Leroy Bolin, Jr., and an accomplice broke into a home and tied the inhabitants with duct tape. When one of the burglary victims tried to escape, the defendant shot him with a shotgun. Even though that white defendant was eligible for the death penalty or could have received a life sentence without parole, the State agreed that he would be eligible for parole after serving only 20 years.

<sup>96</sup> See *id.* at 2355.

<sup>97</sup> See *Patterson*, 482 S.E.2d at 767.

<sup>98</sup> For example, counsel indicated that the State had sought the death penalty against J.D. Gleaton and Larry Gilbert, Black men who like Mr. Patterson received convictions for killing a white man in the course of a robbery. See Motion to Prohibit Solicitor from Exercising Peremptory Strikes Against African-Americans at 6, *State v. Patterson*, No. 93-GS-32-2519 (S.C. Ct. Gen. Sess. 1993).

<sup>99</sup> For example, Tony Cooper and Robert Southerland received death sentences for the kidnaping, torture, rape, and mutilation of a white woman. See *State v. Southerland*, 447 S.E.2d 862, 865 (S.C. 1994); *State v. Cooper*, 439 S.E.2d 276, 276 (S.C. 1994). Michael

evidence, defense counsel offered a statistical study that reinforced their conclusions.<sup>100</sup> While there had been 174 homicide victims in Lexington County since 1977, the State *never* had sought the death penalty in a case involving a Black victim.<sup>101</sup> By contrast, the prosecution had issued a notice of intent to seek the death penalty in thirteen of 128 cases (10.2%) in which the homicide victim had been white.<sup>102</sup> This pattern existed despite the fact that Blacks had comprised a disproportionately higher percentage of homicide victims in Lexington County. Although African Americans had constituted only eleven percent of Lexington County's population, twenty-six percent (forty-four of 172) of the homicide cases had involved Black victims.<sup>103</sup> Thus, the statistical evidence established that "[b]lacks are almost three times as likely as whites to be the victims of homicide but prosecutors are more aggressive in seeking punishment to protect white victims"<sup>104</sup> and that "[t]he most victimized group seems to be receiving the least protection, as measured by rates at which death was sought."<sup>105</sup>

In addition to the anecdotal and statistical data about the relation between race and the solicitor's death-seeking decisions, Patterson presented other case-specific evidence of racially discriminatory behavior. The evidence included racist innuendo from the solicitor prior to trial, the racist attitudes of the victim, and the solicitor's disparate treatment of Black and white jurors.

#### b. *Contemporary Statements by the Decision Makers*

The defense noted that prior to trial the solicitor had informed the press that the victim's family was afraid to speak openly because Patterson's family also lived in the area.<sup>106</sup> There was apparently no basis to believe that the victim's family had to fear, in any way, Patter-

---

Torrence killed three people. *See* State v. Torrence, 406 S.E.2d 315, 317-18 (S.C. 1991). James Michael Charping brutally beat, raped, and tortured his victim. *See* State v. Charping, 437 S.E.2d 88, 89 (S.C. 1993). Ronald Smart stabbed two people to death. *See* State v. Smart, 299 S.E.2d 686, 687 (S.C. 1982); State v. Smart, 262 S.E.2d 911 (S.C. 1980). Robert South shot a police officer in the performance of his duties. *See* State v. South, 331 S.E.2d 775, 777 (S.C. 1985). Michael Sloan raped his victim, beat her head with an iron, and stabbed her. *See* State v. Sloan, 298 S.E.2d 92, 93 (S.C. 1982).

<sup>100</sup> *See* Defendant's Memorandum in Support of Motion to Change Venue at exhibit A, *Patterson* (No. 85-GS-32-526).

<sup>101</sup> *See id.* at 2.

<sup>102</sup> For some defendants, there was more than one trial. Professor Eisenberg, Patterson's statistical expert, however, counted multiple cases involving the same defendant as a single case.

<sup>103</sup> *See* Defendant's Memorandum in Support of Motion to Change Venue at 2, *Patterson* (No. 85-GS-32-526).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *See* Lisa Greene, *Man Goes on Trial for His Life for Third Time Since '84 Slaying*, THE STATE (Columbia, S.C.), Feb. 6, 1995, at A1.

son's family, especially since the case already had gone to trial twice without incident. The defense contended that the State obviously was playing to the possible racist attitudes of potential jurors.<sup>107</sup>

Defense counsel presented evidence that the racism of the victim's widow had influenced the decision to seek the death penalty. In a deposition in connection with her civil suit against the motel in which she and Mr. Brooks had stayed, Mrs. Brooks revealed a deep-seated antipathy toward Blacks:

Q: What did [the police] ask you about?

They asked me if it was a man, and I told them yes, it was a man, and it was a black man. And they asked me the color, you know, whether he was black, and I said yes, he was black.

A: That's what made me so afraid.

Q: Why would that make you afraid?

I am just totally afraid of them. I mean as long as they keep a distance from me, I'm all right, but I don't want their hands on

A: me; I don't want anything, you know.

Q: This is black people generally, you mean?

A: Yes.<sup>108</sup>

### c. *Departures from Usual Procedures*

Patterson's lawyers also presented evidence regarding the prosecution's use of peremptory strikes. For example, during Patterson's first trial, the state used its peremptory strikes to obtain an all-white jury.<sup>109</sup> Counsel also noted that there had been previous findings of discriminatory intent in the use of peremptory challenges in capital cases involving a Black defendant and white victim. Larry Gilbert and J.D. Gleaton were tried twice before all-white juries after the State had excluded all potential African American jurors.<sup>110</sup> In the sentencing report filed with the South Carolina Supreme Court, the trial judge

<sup>107</sup> See Motion to Impose Sanctions for Outrageous State Conduct at 1, *Patterson* (No. 93-GS-32-2519).

<sup>108</sup> Deposition of Ruth Pruett Brooks at 29-30, *Brooks v. Mid-Carolina Motor Inn*, No. 3:85-2720-0 (S.C. Ct. App. 1995). Ms. Brooks later testified in the civil suit that when she was in the hospital, she made it clear that she only wanted white people to come into her room. Her wishes extended to doctors and nurses:

A: [I] made sure there wasn't anybody come in the room, only somebody that was white.

Q: And that was the doctor and the nurse?

A: Yes.

*Id.* at 31. Later, Ms. Brooks testified about two men she saw just after her husband was shot. When asked if the men were white or Black, she answered, "White. I would have run if they had been black." *Id.* at 72.

<sup>109</sup> See *State v. Patterson*, 414 S.E.2d 155, 156 (S.C. 1992).

<sup>110</sup> One commentator has noted that "[o]ften the only member of a racial minority who participates in the process is the accused." Bright, *supra* note 4, at 443. There are few Black prosecutors, especially at the highest levels. Jeffrey Pokorak has stated that there are only 22 elected African American district attorneys in the country. See Jeffrey J. Pokorak,

noted that the solicitor systematically had excluded Blacks from the jury.<sup>111</sup>

Patterson's counsel also presented evidence from other attorneys practicing in Lexington County. This evidence included their observations of the State's use of peremptory strikes to exclude Blacks from juries in criminal trials.<sup>112</sup> Again, in addition to the anecdotal data, Patterson's counsel offered statistical evidence supporting its assertions regarding the State's use of its peremptory challenges. A statistical study by Professor William G. Jacoby of the Department of Government and International Studies at the University of South Carolina, an expert in the field of quantitative methodology, examined the solicitor's pattern of exercising peremptory strikes in Lexington County capital trials and calculated that the probability that these strikes occurred by chance was  $1.93 \times 10^{-17}$ .<sup>113</sup> That number is a decimal point followed by sixteen zeroes and then a two (with rounding). To put this in perspective, if the probability was one in a billion, that number would be a decimal point followed by eight zeroes and then a one.<sup>114</sup>

---

*Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1816 (1998).

<sup>111</sup> See Motion to Prohibit Solicitor from Exercising Peremptory Strikes Against African Americans, exhibit A at 10, *Patterson* (No. 93-GS-32-2519). Striking African American jurors in capital cases is widespread. For example, in the Chatahoocche Judicial Circuit in Georgia—which has sent more people to death row than any other circuit in Georgia—prosecutors have used 83% of their challenges against African American jurors. See Bright, *supra* note 4, at 455-56.

<sup>112</sup> For example, Richard Briebart testified as follows:

Q: Have you noticed what could be described as a usual practice on the part of the Solicitor to strike blacks?

A: Where there is a black defendant, yes, sir.

Motion to Prohibit Solicitor from Exercising Peremptory Strikes Against African-Americans, exhibit C at 131, *Patterson* (No. 93-GS-32-2519). Attorney Daniel A. Beck, another experienced Lexington County attorney, offered similar testimony as to the practice of the solicitor's office to strike blacks from juries:

Q: There were preemptory challenges systematically used by the Solicitor's office to exclude all black jurors in those cases?

A: Yes, sir. I believe very strongly that there were.

*Id.* exhibit D at 166.

H. Patterson McWhirter, the former Public Defender for Lexington County, testified:

A: No, I never had [in the fourteen years I was the public defender] a black on a jury. I mean I'm not talkin' about a death penalty trial, but I'm talkin' about [any] trial. I never had a black placed on the jury when I had a black defendant.

Q: And that was the result of the solicitor's exercising peremptory challenges.

A: Right.

*Id.* exhibit E at 5-6.

<sup>113</sup> See *id.* exhibit F at 2.

<sup>114</sup> Counsel also presented evidence that the prosecutor's reasons for challenging Black jurors in other cases were demonstrably false and thus clearly pretextual. See *id.* exhibit G.

d. *Substantive Departures*

The State accused Patterson of committing a relatively unaggravated offense. The crime did not involve torture, multiple murder victims, or even cold-blooded, calculated murder. Instead, this case involved an immature nineteen-year-old delinquent who inadvertently shot someone in the course of a mugging gone awry.

2. *Dismissive Judicial Treatment of Patterson's Claim*

Patterson's claim received no better treatment than that of Matthews. Again, the court did not discuss the substantial evidence before it. The Supreme Court of South Carolina simply stated:

Appellant contends the trial judge erred in denying his motion to bar the solicitor from seeking the death penalty on the ground of prosecutorial discrimination. Appellant contends the solicitor violated his rights under the 6th, 8th, 13th, and 14th amendments of the U.S. Constitution and article I, §§ 3, 14, and 15 of the State constitution. Appellant cited statistics on the solicitor's decision to seek the death penalty in murder cases. He argues the solicitor has sought the death penalty against white defendants only when the circumstances are highly aggravated and never when the victim was Black.

In *McCleskey v. Kemp*, the United States Supreme Court held a full evidentiary hearing should be held if a capital defendant can establish a *prima facie* case that prosecutorial discretion in capital cases has been tainted with discrimination. This claim is essentially an equal protection claim. Appellant must provide "exceptionally clear evidence" that the decision to prosecute was for an improper reason. In *McCleskey*, the Court held similar statistics did not establish discrimination. Further, as we noted above, these statistics do not take the defendant's race or the aggravating or mitigating circumstances into consideration. Appellant has not proven discriminatory purpose by exceptionally clear evidence. Therefore, we hold the trial judge did not err in denying appellant's motion.<sup>115</sup>

In neither case did the courts acknowledge that there was a difference between the statistical evidence presented in these cases and that presented in *McCleskey*. Nor did the courts discuss the substantial circumstantial evidence of discriminatory intent in the prosecutors' offices. Rather, both cases all but held that without direct evidence of intent—without an admission that the prosecutor had sought the death penalty because the defendant was Black and the victim was white—a defendant could not bring a capital-sentencing racial discrimination claim.

---

<sup>115</sup> State v. Patterson, 482 S.E.2d 760, 767 (S.C. 1997) (citations omitted) (quoting *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

### C. Other Post-*McCleskey* Cases

Post-*McCleskey* capital cases in other states, as well as other cases in South Carolina counties,<sup>116</sup> all have given little credence to claims of county-level prosecutorial discrimination. This skepticism is appropriate when the evidence supporting claims of prosecutorial discrimination is nonexistent or weak.<sup>117</sup> Unfortunately, the brevity of the lower courts' treatment of the issue often makes it difficult to discern what evidence was before the court. In early post-*McCleskey* cases, it seems fair to infer that the proof took the form of a statistical showing similar to that made in *McCleskey*.<sup>118</sup> With respect to the more recent cases, the uninformed reader might wonder: Why do these litigants persist in making the same old, tired claim?<sup>119</sup> Familiarity with the facts behind some of these cases, however, raises quite different questions. Certainly the opinions in *Matthews* and *Patterson* give the reader no hint of the substantial evidence of discriminatory intent that the defendants had proffered.

The cases that do discuss the evidence of intent proffered by the defendant uniformly dismiss that evidence as insufficient. The courts treat these efforts to comply with *McCleskey* with varying levels of disdain. Courts' reactions include seemingly misapprehending the nature of the claim, dismissing discrimination allegations by relying on general language in *McCleskey* about the need to respect prosecutorial discretion, and claiming that county-level statistical data really do not show what they purport to show—county-level discrimination. The distinction between systemic statistical showings and statistical showings focused on a single decision maker largely has been ignored, despite its central role in *McCleskey's* rationale.<sup>120</sup> Furthermore, even those

---

<sup>116</sup> Studies reveal statistically significant racial effects in Anderson, Greenwood, and Spartanburg counties, as well as in the Sixth Judicial Circuit, which consists of three counties. See Affidavit of Theodore Eisenberg, *Bell v. Evatt*, C/A No. 92-CP-04-722 (S.C. Ct. App. 1992); Testimony of Theodore Eisenberg, *Truesdale v. State*, No. 91-CP-29-318 (S.C. Ct. App. 1991); Testimony of Theodore Eisenberg, *Elmore v. Evatt*, No. 90-CP-24-1004 (S.C. Ct. App. 1990).

<sup>117</sup> See, e.g., *Lee v. State*, 942 S.W.2d 231, 237 (Ark. 1997); *Underwood v. State*, 708 So.2d 18, 37-38 (Miss. 1998); *State v. Loza*, 1997 WL 634348, at \*5 (Ohio Ct. App. Oct. 13, 1997); *State v. Keene*, 1996 WL 531606, at \*4 (Ohio Ct. App. Sept. 20, 1996); *People v. Hale*, 661 N.Y.S.2d 457, 467 (N.Y. Sup. Ct. 1997); *Cantu v. State*, 939 S.W.2d 627, 649 (Tex. Crim. App.) (en banc), cert. denied, 118 S. Ct. 557 (1997); *Bell v. State*, 938 S.W.2d 35, 51 (Tex. Crim. App. 1996) (en banc), cert. denied, 118 S. Ct. 90 (1997).

<sup>118</sup> For a substantial collection of early post-*McCleskey* cases, see Baldus et al., *supra* note 6, at 375 nn.67, 69.

<sup>119</sup> See, e.g., *Carriger v. Lewis*, 971 F.2d 329, 334 (9th Cir. 1992); *Meeks v. Singletary*, 963 F.2d 316, 318 (11th Cir. 1992); *Williams v. Cain*, 942 F. Supp. 1088, 1099 (W.D. La. 1996), *rev'd in part, aff'd in part*, 125 F.3d 269 (5th Cir. 1997), cert. denied, No. 97-9567, 1998 WL 682167 (U.S. Oct. 5, 1998); *Stewart v. Peters*, 878 F. Supp. 1139, 1148-49 (N.D. Ill. 1995); *Rogers v. Director*, 864 F. Supp. 584, 598 (E.D. Tex. 1994).

<sup>120</sup> See, e.g., *Watkins v. Angelone*, 1998 WL 2861, at \*4 (4th Cir. Jan. 7, 1998); *United States v. Davis*, 904 F. Supp. 554, 559-60 (E.D. La. 1995); see also *State v. Taylor*, 669 So.2d

cases that have taken most seriously claims based on county-wide statistical data dismissed these claims on the ground that the statistical analysis did not account for enough factors about the cases to assure positively that racial effects were at work.

Perhaps prompted by a dissent, the Florida Supreme Court conducted the most thorough analysis of any post-*McCleskey* racial discrimination claim to date. In *Foster v. State*,<sup>121</sup> a defendant presented statistical evidence of local prosecutorial discrimination by the Bay County, Florida prosecutor's office:

In support of his claim, Foster proffered a study conducted by his counsel of some of the murder/homicide cases prosecuted by the Bay County State Attorney's Office from 1975 to 1987. Analyzing the raw numbers collected, Foster concluded that defendants whose victims were white were 4 times more likely to be charged with first-degree murder than defendants whose victims were black.<sup>122</sup>

The Florida Supreme Court combined three approaches to the data to reject the claim. The court initially and incorrectly equated Foster's showing of statistical evidence that focused on one prosecutorial office's decision making with *McCleskey*'s statewide showing: "Foster's claim suffers from the same defect [as *McCleskey*'s]. He has offered nothing to suggest that the state attorney's office acted with purposeful discrimination in seeking the death penalty in his case."<sup>123</sup> Perhaps recognizing that this explanation was not reconcilable with Foster's offer of proof, the court acknowledged Foster's effort to distinguish *McCleskey*: "Foster argues that *McCleskey* does not foreclose his challenge because his evidence focuses solely on the practices of one prosecutor's office, whereas the Baldus study consisted of generalized statistics covering every aspect of Georgia's death penalty scheme."<sup>124</sup> The court responded to Foster's argument by invoking *McCleskey*'s reference to wide prosecutorial discretion and the need for "exceptionally clear proof" before inferring an abuse of dis-

---

364, unpublished app. at \*29 (La. 1996) (dimissing, with extreme brevity, defendant's statistical data as contrary to *McCleskey*, despite the fact that the statistics focused specifically on the East Baton Rouge Parish).

<sup>121</sup> 614 So. 2d 455 (Fla. 1992).

<sup>122</sup> *Id.* at 463. The defendant's evidence also show that, of those defendants facing first-degree murder charges, white-victim defendants were six times more likely to go to trial, and that, of those defendants who went to trial, white-victim defendants were 26 times more likely to be convicted of first-degree murder. *See id.* The court stated that such statistical evidence did not implicate the prosecutor's decisionmaking: "The figures . . . cannot be attributed to a decision by the Bay County State Attorney's Office and thus are not relevant here." *Id.* at 464 n.9.

<sup>123</sup> *Id.* at 463.

<sup>124</sup> *Id.* at 464.

cretion.<sup>125</sup> The court then rejected Foster's proof because his statistical showing did not account for any of the nonracial variables that could have explained the disparity.<sup>126</sup> As the court reasoned, the disparity was not "a significantly greater disparity than figures proffered by the Baldus study which had taken into account numerous nonracial variables."<sup>127</sup>

In *State v. Taylor*,<sup>128</sup> the Missouri Supreme Court indicated that county-level statistical data did not bear on the prosecutor's motive in the defendant's case.<sup>129</sup> It treated nonstatistical evidence of other acts of discrimination by the prosecutor's office as irrelevant.<sup>130</sup> The defendant relied in part on statistical evidence concerning first-degree murder cases in the relevant county during the three years preceding the imposition of his death sentence.<sup>131</sup> He also relied on allegations of bias by an assistant prosecutor involved in his original plea, allegations of discrimination by the county prosecutors in jury selection, allegations of racial slurs and employment discrimination by the prosecutor's office, the State's unusual refusal to offer life without parole in exchange for a guilty plea, and a study of racial disparity in Missouri capital punishment cases covering 1977 to 1991.<sup>132</sup>

The court imposed extremely narrow strictures on the kind of allegations that could contribute to a claim of prosecutorial discrimination, stating that the county-level study did "not show purposeful discrimination or any effect on his case, specifically."<sup>133</sup> It added that "[t]he other allegations of discrimination within the prosecutor's office were irrelevant because they did not involve decision makers, were remote in time, and did not show discriminatory purpose in his case."<sup>134</sup>

In *Lane v. State*,<sup>135</sup> the defendant presented the Nevada Supreme Court with a county-level study that allegedly established that the county intentionally had sought the death penalty in a racially discriminatory manner.<sup>136</sup> The court rejected the showing on the ground that the study did not control for enough factors about the cases:

The survey's fatal flaw is that it fails to demonstrate that black and white persons who are similarly situated are treated differently.

<sup>125</sup> *Id.* (quoting *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987)).

<sup>126</sup> *See id.*

<sup>127</sup> *Id.*

<sup>128</sup> 929 S.W.2d 209 (Mo. 1996) (en banc).

<sup>129</sup> *See id.* at 221.

<sup>130</sup> *See id.*

<sup>131</sup> *See id.*

<sup>132</sup> *See id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> 881 P.2d 1358 (Nev. 1994), *vacated on other grounds*, 956 P.2d 88 (1998).

<sup>136</sup> *See id.* at 1362.

First, Lane's statistics do not sufficiently narrow the factors which weigh into the prosecutor's decision to seek the death penalty. While the survey does tend to show that the death penalty has been sought more often for black non-felons than for white felons, the survey fails to take into consideration the relative strengths and weaknesses of those eighty-six cases, the individual characteristics of the offenses, whether aggravating or mitigating circumstances were present or absent, the nature of the aggravating and mitigating circumstances, whether plea bargains were offered and accepted, and the individual characteristics and attitudes of each capital defendant.

Without such vital information, we cannot determine whether or to what extent race may have been implicated in the capital cases involved in the survey. We therefore have no basis for holding that there was a racially discriminatory purpose behind the Washoe County District Attorney's decision to seek the death penalty in this case.<sup>137</sup>

Thus, although the court expressed a willingness at least to consider a county-level statistical showing, it dismissed the showing as insufficiently complete.

The Supreme Court of California, in *People v. McPeters*,<sup>138</sup> expressed a similar willingness to consider countywide data on race-of-victim effects, but it seemed similarly critical of the particular study proffered. *McPeters*, however, differs from most post-*McCleskey* cases in that it involved a pre-trial motion for discovery. The Fresno Public Defender Office had accumulated data and had correlated the race of the victim to death sentences. These data seemed compelling on their face: Although only one-third of all willful homicide victims were white, "all death or life-without-parole sentences were meted out in cases involving White victims."<sup>139</sup> These data coupled with the modest nature of the relief requested seemingly would have made the court more inclined to accept the defendant's statistical data. The California Supreme Court, however, denied the defendant's pretrial motion for discovery of the prosecution's records relating to capital-charging policies and criticized the study for not describing or analyzing the facts or circumstances of the cases beyond race.<sup>140</sup>

Although we have focused most of our attention on single decision maker statistical showings, courts have also dismissed another subset of post-*McCleskey* racial discrimination claims with individualized proof. Some litigants have used statewide data, combined with *undisputed* evidence that other decisions *in the defendant's case* have

---

137 *Id.* at 1362-63.

138 9 Cal. Rptr. 2d 834 (Cal. 1992).

139 *Id.* at 843 (emphasis added).

140 *See id.* at 843-44.

rested on racial criteria. In *Davis v. Greer*,<sup>141</sup> the Seventh Circuit reviewed a statistical study showing that: (1) a capital defendant in Illinois was six times more likely to receive the death penalty if his victim was white; and (2) a black defendant convicted of killing a white victim was 3.75 times as likely to receive the death penalty as a white defendant convicted of killing a white victim.<sup>142</sup> The court held that this study was insufficient to support an inference of discrimination even when the prosecutor had decided to remove all African Americans from the jury venire.<sup>143</sup> The court failed to explain why the racial cleansing was not probative of racial bias in the decision to seek death. In an even stronger case, involving statewide data, countywide data, and admitted race discrimination in jury selection, the Northern District of Illinois was less cryptic, but equally unimpressed:

[The defendant] asks this Court to make a leap of logic that cannot be made under the *McCleskey* standard: that there is a direct correlation between how the state uses its peremptories and the questions whether the state seeks the death penalty in a racially discriminatory manner or whether the jurors that ultimately serve use racial bias. Admittedly, the unconstitutionality of discrimination in the use of peremptories hinges in part on an assumption that jurors might use the race of the defendant or the victim in its decision. However, we cannot leap from that proposition to the conclusion that the prosecution decided to seek or the jury imposed the death penalty on racial grounds.<sup>144</sup>

### III

#### CRITIQUE OF POST-*McCLESKEY* CASES: HAVE COURTS ACCURATELY APPLIED EQUAL PROTECTION PRINCIPLES?

This sampling of cases addressing post-*McCleskey* county-level claims shows a range of judicial responses. The responses can be evaluated at two levels. First, at the doctrinal level, the cases raise the question whether the courts are reasonably applying *McCleskey* to county-level, prosecutor-specific discrimination claims, given the background of general equal protection doctrine. Here the answer seems clear: the courts are less hospitable to such claims than they should be. A second level of analysis, which is explored in the next section of this Article, separates the question of ultimate proof of county-level prosecutorial discrimination from the logically prior question concerning the allocation of burdens of proof and persuasion. All other

---

<sup>141</sup> 13 F.3d 1134 (7th Cir. 1994).

<sup>142</sup> See *id.* at 1143.

<sup>143</sup> See *id.* at 1143-44.

<sup>144</sup> *Williams v. Chrans*, 742 F. Supp. 472, 495 (N.D. Ill. 1990).

areas of discrimination treat these questions separately. Separating these questions in the county-level selective-prosecution area would allow a capital defendant who makes a reasonable showing of racial effects to shift the burden of production to prosecutors, who have unique knowledge of why they chose to seek death in some cases but not others.

The cases recounted above show crucial misunderstandings of what *McCleskey* does and does not hold. The most fundamental error arises when courts infer that the failure of the statistically based attack on racial effects in *McCleskey* dooms all subsequent equal protection challenges to prosecutorial capital case decision making that rely on evidence of racial patterns.<sup>145</sup> As discussed in Part I, this reading of *McCleskey* is neither accurate nor consistent with broader equal protection doctrine.<sup>146</sup>

One must also question courts that refuse to draw inferences of prosecutorial-level discrimination in one case from prosecutorial behavior in other local cases. Cases such as *Taylor* hold that county-level statistical data regarding prior cases do not bear on the prosecutor's motive in a subsequent defendant's case.<sup>147</sup> *McCleskey* by no means mandates this approach to statistical evidence. It merely holds that *statewide* data, *standing alone*, are insufficiently connected to an individual defendant's case to create an inference of racial discrimination.<sup>148</sup>

Beyond *McCleskey*, this ban on countywide data is inconsistent with the treatment of similar evidence in other contexts. Consider, for example, a government personnel officer who has refused to hire *every* Black applicant over a period of years. A current Black job applicant who offered such evidence likely would not be told that the apparent prior pattern of race-based decision making was unrelated to proving intentional discrimination in her case. The prior pattern would be probative evidence. To treat it otherwise would be inconsistent with *Arlington Heights's* instruction to conduct "a sensitive inquiry into such *circumstantial* and direct evidence of intent as may be available."<sup>149</sup> The circumstantial nature of statistical patterns of prior behavior does not disqualify them from supporting a finding of intentional discrimination. In some contexts, such as discrimination

---

<sup>145</sup> See, e.g., *United States v. Olvis*, 97 F.3d 739, 746 (4th Cir. 1996) (citing *McCleskey* as embodying a "general rule that in cases involving discretionary judgments 'essential to the criminal justice process,' statistical evidence of racial disparity is insufficient to infer that prosecutors in a particular case acted with a discriminatory purpose"); *Baldus et al.*, *supra* note 6, at 374 (stating that *McCleskey* effectively terminated statistically based claims of racial discrimination in capital sentencing).

<sup>146</sup> See *supra* Part I.C.

<sup>147</sup> See *supra* text accompanying notes 122-28.

<sup>148</sup> See *supra* Part I.B-C.

<sup>149</sup> *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (emphasis added).

in jury panels, courts *only* require statistical evidence from other cases.<sup>150</sup> When statistical evidence—even statewide statistical evidence, but certainly countywide evidence—is combined with direct evidence of other discriminatory acts by prosecutors and their offices, it is difficult to see why additional kinds of evidence would be necessary.

Courts that recognize the relevance and probity of county-level evidence rely on yet another misapprehension to reject capital defendants' claims of prosecutorial discrimination. For example, while the state supreme courts in *Foster* and *Lane* expressed willingness to consider statistical evidence of county-level discrimination, they both found the statistical showings to be inadequate because the showings did not control for enough factors about the cases.<sup>151</sup> Stark racial effects, even though statistically improbable, would not suffice.

Under this view, defendants may need to analyze each homicide case in the relevant county for the presence of racial factors, for the presence of statutory aggravating and mitigating factors, and for the presence of other factors that legitimately might influence prosecutorial decision making. But such an analysis would be impossible. Because a capital defendant enjoys a constitutional right to proffer in mitigation "any aspect of [his] character or record and any of the circumstances of the offense,"<sup>152</sup> defendants would have to hypothesize, in each case, about all of the features that the prosecutor might have found to be mitigating. Moreover, they would have to do so with the minimal amount of information about cases that exists in sources reasonably available to them.

As a preliminary matter, the post-*McCleskey* courts' insistence on more detailed statistical showings may stem in part from the proof in *McCleskey*. The comprehensive, sophisticated showing that *McCleskey* rejected may have raised unrealistic expectations about the depth of statistical evidence that one should expect in the mass of capital cases.<sup>153</sup> Some courts have commented that the county-level showings in their cases controlled for fewer factors than the statewide showing in *McCleskey*.<sup>154</sup> However, it is not feasible to expect a typical, individual defendant to control for *hundreds* of factors about a case—*McCleskey* was an exceptional defendant in this regard. In addition, one

---

<sup>150</sup> See *Castaneda v. Partida*, 430 U.S. 482, 500-01 (1977).

<sup>151</sup> See *supra* text accompanying notes 120-21, 131.

<sup>152</sup> *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *accord* *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990); *Mills v. Maryland*, 486 U.S. 367, 374-75 (1988); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987).

<sup>153</sup> As Justice Brennan noted in *McCleskey*: "McCleskey presents evidence that is far and away the most refined data ever assembled on any system of punishment, data not readily replicated through casual effort." *McCleskey v. Kemp*, 481 U.S. 279, 341 (1987) (Brennan, J., dissenting).

<sup>154</sup> See, e.g., *Foster v. State*, 614 So. 2d 455, 464 (Fla. 1992).

reasonably cannot expect county-level attacks, particularly outside populous urban areas, to include hundreds of variables in the analysis. To include hundreds of variables in a multiple-regression analysis similar to that in *McCleskey* requires thousands of cases.<sup>155</sup> The Baldus study in *McCleskey* included over 2,000 cases,<sup>156</sup> but could do so only because it was a statewide study in a state with many capital cases. To insist that prosecutorial discrimination studies control for many factors about a case, while requiring that they be conducted at the county level and yield statistically significant results, asks the impossible of most defendants, and of all defendants outside large urban areas. Moreover, in urban areas where the numbers might be large enough for such controls, more than one decision maker would be the norm; so in another sense, these studies would be less probative of the likelihood that racial motivation affected the decision to seek the death penalty for an individual defendant.

Insistence on massive controls of factors about cases is not the norm in other discrimination areas. In *McCleskey* itself, the Court cited with approval *Bazemore v. Friday*<sup>157</sup> for the proposition that the 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."<sup>158</sup> *Bazemore* took a reasonable attitude towards the comprehensiveness of statistical analysis required to establish discrimination. Indeed, it expressly eschewed requiring a plaintiff to include all relevant variables in a statistical model and stated:

The Court of Appeals erred in stating that petitioners' regression analyses were "unacceptable as evidence of discrimination," because they did not include "all measurable variables thought to have an effect on salary level." The court's view of the evidentiary value of the regression analyses was plainly incorrect. While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors "must be considered unacceptable as evidence of discrimination." Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.

Importantly, it is clear that a regression analysis that includes less than "all measurable variables" may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove dis-

---

<sup>155</sup> HELENA CHMURA KRAEMER & SUE THIEMANN, HOW MANY SUBJECTS? STATISTICAL POWER ANALYSIS IN RESEARCH 65 (1987).

<sup>156</sup> See *McCleskey*, 481 U.S. at 286.

<sup>157</sup> 478 U.S. 385 (1986).

<sup>158</sup> *McCleskey*, 481 U.S. at 294 (citing 478 U.S. 385, 400-401 (1986) (Brennan, J., concurring in part)).

crimination by a preponderance of the evidence. Whether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant. However, as long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail.<sup>159</sup>

One court has extended *Bazemore's* willingness to consider statistical analyses that do not account for all relevant variables to statistical showings other than regression analysis.<sup>160</sup>

Perhaps most importantly, those studies that have been able to control for many factors in capital cases suggest that even when all feasible factors are controlled, the racial effects usually do not disappear. The Baldus study in *McCleskey*, the detailed study of Philadelphia cases in this Symposium,<sup>161</sup> state-sponsored studies in New Jersey,<sup>162</sup> and studies by Samuel Gross and Robert Mauro<sup>163</sup> all controlled for factors that are beyond the ability of capital defendants faced with analyzing only dozens or hundreds of homicide cases. Yet racial effects do not disappear in these most comprehensive studies. Instead, these effects may even increase in strength.<sup>164</sup> Thus, it is reasonable to treat statistically significant showings of racial effects seriously even when these effects have not controlled for all potentially relevant factors about capital cases. Of course, that does not mean that in any individual case, there will never be factors that have caused spurious racial effects. The question is only whether to *presume* that greater controls would eliminate racial effects, and to that query, the older, more comprehensive studies offer a clear answer: No.

---

<sup>159</sup> *Bazemore*, 478 U.S. at 400-01 (footnote and citations omitted).

<sup>160</sup> See *Salazar v. District of Columbia*, 954 F. Supp. 278, 288 n.24 (D.D.C. 1996) ("While the regression analyses considered in *Bazemore* do differ from Plaintiffs' statistical sample study in this case, the Supreme Court's discussion is still helpful, because it directly addresses the validity of an expert statistical analysis that fails to incorporate all relevant information.").

<sup>161</sup> See 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 (1998).

<sup>162</sup> See *State v. Marshall*, 613 A.2d 1059, 1063-65 (N.J. 1992); Baldus et al., *supra* note 6, at 405-13.

<sup>163</sup> See GROSS & MAURO, *supra* note 4, at 43-92. This study also contains a useful discussion of the likely effect of omitted variables. See *id.* at 97.

<sup>164</sup> See Baldus et al., *supra* note 161, at 1675.

## IV

PROPERLY ALLOCATING THE BURDEN OF PRODUCTION:  
STATISTICAL AND OTHER COUNTY-LEVEL EVIDENCE  
AS ESTABLISHING A PRIMA FACIE CASE

One oversight that exacerbates problems with existing judicial analyses of county-level discrimination claims is the failure to separate the burden of production from the ultimate burden of persuasion. Courts tend to act as if the capital defendant alleging discrimination must establish the existence of discrimination. They rarely discuss the concept of a prima facie case that shifts the burden of production to the alleged wrongdoer. Regardless of the strength of his initial showing, courts are making the capital defendant bear the full burden of producing evidence, as well as the burden of persuasion traditionally allocated to a civil movant. In *Matthews*, *Patterson*, and *McPeters*, the courts deemed the defendants' strong statistical and other showings insufficient—even to warrant discovery that would have provided useful, and perhaps definitive, information about prosecutorial decision making. This one-sided approach to the capital defendant's burdens is inconsistent both with the theory of how burdens of production normally are allocated and with how the Supreme Court has allocated these burdens in other areas of discrimination.

## A. The Theory of Burdens of Production

Edmund Morgan's classic discussion of presumptions notes that some presumptions "have their origin in considerations of the comparative convenience with which the parties can produce evidence of the fact in issue."<sup>165</sup> This approach to presumptions squares both with common sense and with more modern notions of efficiency. The litigant with easier access to information ought in general to be responsible for producing that information. The capital defendant who makes a prima facie case of discrimination should be entitled to a favorable presumption until the prosecutor offers evidence to rebut the prima facie case.

In county-level discrimination cases, the prosecutor's office clearly enjoys easier access to the most accurate information available. To make a colorable showing of prosecutorial discrimination a capital defendant must search public records and construct a list of homicide cases that might have been death eligible. After constructing the list, the defendant must ascertain, as best he can, information about each case. Such information, although fundamental to the defendant's claim, is not always readily available from the public record. Some-

---

<sup>165</sup> Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 926 (1931).

times counsel must gather even the most basic facts, such as the race of the defendant or victim, from other sources. Thus, even to make a simple statistical statement, such as "the prosecutor's office never has sought the death penalty in this county in a Black-victim case," can involve enormous amounts of intensive archival work. Systematically extracting other pertinent information—the presence of aggravating and mitigating circumstances, the relation between the defendant and the victim, the defendant's prior criminal record, and the details of the crime—can be extremely difficult. Furthermore, because defendants may offer, and prosecutors may consider, nonstatutory mitigating factors, one reasonably cannot expect the capital defendant to know precisely what moved a prosecutor in other homicide cases to seek or not to seek death.

In contrast to the sometimes insurmountable burdens that capital defendants face in constructing colorable claims of discrimination, county-level prosecutors that face discrimination charges have personal knowledge of all relevant factors influencing the decision whether to seek death. Capital defendants who make showings as strong as those made in *Patterson*, *Matthews*, and other cases should benefit from a production-shifting presumption that requires the prosecutor to come forward with evidence about the factors influencing his decision making.

#### B. Allocation of Burdens of Production in Other Discrimination Cases

A reasonable prima facie standard for county-level prosecutorial discrimination claims would be a standard consistent with other discrimination jurisprudence. In both constitutional and statutory cases, the Supreme Court allows reasonable initial showings of racial effects to shift the burden of production to the alleged discriminator. This burden shifting is found in the constitutional areas of jury selection<sup>166</sup> and peremptory challenges,<sup>167</sup> as well as in the statutory Title VII context.<sup>168</sup>

*McCleskey* did distinguish the nature of the capital-sentencing decision from prior holdings that accepted statistical proof in jury selection and Title VII cases.

---

<sup>166</sup> See *Castaneda v. Partida*, 430 U.S. 482, 497-98 (1977).

<sup>167</sup> See *Batson v. Kentucky*, 476 U.S. 79, 94 (1986).

<sup>168</sup> See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509-10 (1993); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576-77 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973); see generally Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 324-34 (1997) (discussing burdens of proof in employment discrimination).

[T]he capital sentencing decision, and the relationship of the statistics to 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.<sup>169</sup>

The basis upon which *McCleskey* distinguished these other areas from capital sentencing, however, is inapplicable to county-level attacks on prosecutorial discrimination. In county-level discrimination claims, the Court's concerns about attacks on decentralized decision making are irrelevant. An inference from statistics about the prior behavior of the same prosecutor or prosecutor's office is not the same as the inference needed in *McCleskey*, which was from statewide general statistics to a local decision not necessarily related to those statistics. As in the jury venire selection and Title VII cases, county-level statistics relate to fewer entities. In fact, they relate to only one person or entity.

The smaller number of decision makers creates two crucial differences. First, the inference that the defendant himself experienced racial discrimination becomes stronger if we know that *his* prosecutor, at least some of the time, engaged in racial discrimination. Second, when the challenged decision focuses on one person or entity, that person or entity may rebut incorrect inferences about the decision. This type of rebuttal is not possible with statewide data because no one person or entity is privy to the information that could rebut the inference.

Thus, the concern about death-seeking decision making involving more variables is all that remains of *McCleskey's* uniqueness. If one assumes that the decision to seek death involves more factors than the decision employed in Title VII cases, then this concern remains at least partially intact. But the studies discussed above,<sup>170</sup> which do contain many variables, suggest that controlling for multiple variables does not eliminate racial effects. So it is unlikely that racial effects in

---

<sup>169</sup> *McCleskey v. Kemp*, 481 U.S. 279, 294-95 (1987) (citation and footnote omitted).

<sup>170</sup> See *supra* notes 161-63 and accompanying text.

simpler studies are merely artifacts of failing to control for more variables. Further, there is no support for a contrary presumption. Given the available data, courts should not shield discrimination from effective review simply because it occurs in a more complex setting than heretofore encountered.

### C. A Modest Proposal

Decades of Supreme Court jurisprudence in virtually all other areas of discrimination, as well as intimations in county-level selective-prosecution cases, support ruling that a reasonable prima facie case of discrimination shifts the burden of production to the alleged discriminator. In *Washington v. Johnson*,<sup>171</sup> the Fifth Circuit describes a process in which the prosecutor was forthcoming with evidence about the bases for his decision to seek death in the defendant's case:

In his state petition for habeas relief, Petitioner raised the claim of purposeful racial discrimination. The State responded with an affidavit of Bill Turner, the Brazos County district attorney, who made the decision to charge Washington with capital murder. Turner affirmed that race does not play a role in charging decisions, and that in Washington's case, capital murder and the death penalty were sought because of the nature of the murder, committed in the course of a robbery, and because of Washington's past violence and statements warning of possible future violence. Additionally, the affidavit set forth the capital murder cases in which Turner had been involved and the sentences imposed. Washington, though afforded the opportunity to cross examine Turner at the state habeas hearing on the contents of the affidavit, declined to question him.<sup>172</sup>

After a prima facie case is established, the prosecutor could furnish similar evidence about relevant homicide cases in which death had and had not been sought. In *Foster v. State*,<sup>173</sup> Chief Justice Barkett, in a concurrence and dissent, suggested the following standard<sup>174</sup> for capital cases:

A party asserting racial discrimination in the State's decision to seek the death penalty should make a timely objection and demonstrate on the record that the discrimination exists and that there is a strong likelihood it has influenced the State to seek the death penalty. Such discrimination conceivably could be based on the race of the victim or on the race of the defendant. Once the trial court

---

<sup>171</sup> 90 F.3d 945 (5th Cir. 1996), cert. denied, 117 S. Ct. 1259 (1997).

<sup>172</sup> *Id.* at 954.

<sup>173</sup> 614 So.2d 455 (Fla. 1992).

<sup>174</sup> Chief Justice Barkett proposed this standard for determining violations of the Florida State Constitution, but we think it aptly describes the standard that federal equal protection law as a whole mandates.

determines that the initial burden has been met by the defendant, the burden then shifts to the State to show that the practices in question are not racially motivated. If the trial court determines that the State does not meet that burden, the State then is prohibited from seeking the death penalty in that case.<sup>175</sup>

A burden-shifting rule is not inconsistent with the Supreme Court's ruling against *McCleskey*. In a statewide challenge, as in *McCleskey*, one cannot expect meaningful rebuttal evidence because the challenged decision makers are so diffuse. At the county level, however, there is little reason not to require rebuttal evidence. Moreover, if a prosecutor failed to rebut a defendant's showing, that would not jeopardize the death penalty in masses of cases, but only would require the reversal of the death sentences that he had sought.

Interestingly enough, even though Foster had not proffered county-level evidence, Chief Justice Barkett explained the kind of evidence that a *prima facie* case would include: statistical evidence in a particular jurisdiction and "other information that could suggest discrimination, such as the resources devoted to the prosecution of cases involving white victims . . . , and the general conduct of a state attorney's office, including hiring practices and the use of racial epithets and jokes."<sup>176</sup> This type of evidence, of course, is exactly the kind of information proffered in the cases discussed in this Article and uniformly dismissed by lower courts as insufficient. It is also the kind of evidence routinely accepted in other kinds of equal protection cases.

To be specific, we propose that if the defendant establishes a *prima facie* case of discrimination, by which we mean a showing by statistical or other evidence that discrimination is more likely than not to have occurred, then the burden of production shifts to the prosecutor, who must then articulate some legitimate, nondiscriminatory reason for seeking death. If the prosecutor fails to assert such a reason, the defendant prevails. If the prosecutor produces evidence creating a genuine issue of fact, then the defendant, retaking the burden of persuasion, must establish discrimination by a preponderance of the evidence.

#### CONCLUSION

It is remarkable that in ten years of post-*McCleskey* litigation, not a single claimant has prevailed. In any discrimination case, judges are reluctant to find intentional discrimination by state officials.<sup>177</sup> Nevertheless, in other classes of race cases, courts do find intentional dis-

---

<sup>175</sup> *Foster*, 614 So. 2d at 468 (Barkett, C.J., concurring in part and dissenting in part).

<sup>176</sup> *Id.* at 467.

<sup>177</sup> See Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1181 (1991).

crimination with less evidence than has been accumulated in some of these cases. Why are courts so hostile to post-*McCleskey* county-level claims?

One might wonder if reluctance to find intentional discrimination is especially strong in the case of prosecutors, whose race-neutral exercise of discretion should be a lynchpin of our criminal justice system. While this reluctance may explain the post-*McCleskey* cases in part, courts have not exhibited nearly the same reluctance to find prosecutors guilty of *Batson* violations. In other contexts as well, courts have not treated prosecutors as if they were above the law.<sup>178</sup>

Nor is the suggestion that there have been no post-*McCleskey* winners because there has been no racial discrimination in the decisions to seek the death penalty a plausible hypothesis. Many studies show capital case racial effects. Moreover, if prosecutors commonly use race to select juries, why would we expect that they are somehow more colorblind in their decisions to seek the death penalty?

Whatever the source of the lower courts' reluctance, one manifestation of this reluctance is their focus on statements in *McCleskey* about high evidentiary standards for race-based claims in capital cases, and their corresponding inattention to the context of these statements. After holding that *McCleskey* had presented no evidence of discrimination in his case, the Court in *McCleskey* emphasized the broad discretion of prosecutors and the need for solid proof.<sup>179</sup> Although courts rely on this emphasis to reject post-*McCleskey* claims,<sup>180</sup> the Supreme Court's expressed concern does not preclude race-based attacks on prosecutorial decision making.

Thus, the question in *Matthews*, *Patterson*, and cases from other states is not whether *McCleskey* precludes their form of the race-based challenge, but rather what level of proof should trigger the imposition of a burden on county-level decision makers.

<sup>178</sup> See *Kalina v. Fletcher*, 118 S. Ct. 502 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 272-76 (1993); *Burns v. Reed*, 500 U.S. 478, 492-96 (1991).

<sup>179</sup> The Court in *McCleskey* states:

[T]he 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." 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.

. . . 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.

*McCleskey v. Kemp*, 481 U.S. 279, 296-97 (1987) (citations omitted).

<sup>180</sup> See, e.g., *Foster*, 614 So. 2d at 464.

A final reason for hostility to post-*McCleskey* claims, in both South Carolina and elsewhere,<sup>181</sup> is that courts often are reluctant to discuss or even describe evidence of racial bias in criminal cases. For example, the South Carolina Supreme Court recently reversed the conviction and death sentence in *State v. Manning*.<sup>182</sup> Manning is African American, and the victim, a state-trooper, was white.<sup>183</sup> After a mistrial (at which the jury hung 10-2 for acquittal), the prosecution requested and obtained a change of venue, arguing in effect that there were too many potential Black jurors in Dillon County for the State to obtain a fair trial.<sup>184</sup> The trial judge, a former police officer, granted the motion and transferred the case to a county with a significantly smaller Black population than Dillon County.<sup>185</sup> The state court reversed, finding the trial judge's decision to grant the change of venue an abuse of discretion.<sup>186</sup> However, the court never mentioned the racial basis of the State's request. The South Carolina Supreme Court has avoided other thorny racial issues in capital cases,<sup>187</sup> and as *Coker v. Georgia*<sup>188</sup> suggests, the Supreme Court sometimes may do the same.<sup>189</sup>

Fear of labeling state officials racist, the need for prosecutorial discretion, and general reluctance to address racial claims all may fuel the doctrinal missteps in post-*McCleskey* county-level cases. An understanding of courts' reluctance is not, however, a reason to condone such action. Judges, especially federal judges, enjoy constitutionally protected independence precisely because they must make unpopular and difficult decisions. In the proud modern history of the judiciary, judges' finest hours have come by challenging discrimination rather

---

<sup>181</sup> Other state courts have shown a similar reluctance to address similar issues. See Bright, *supra* note 4, at 471. For example, in *Isaacs v. State*, 355 S.E.2d 644 (Ga. 1987), the court held that the trial judge should have recused himself because of his involvement in a motion to disqualify. See *id.* at 646. The court, however, failed to mention that the motion was motivated by the judge's record of racial discrimination. See Bright, *supra* note 4, at 471. As another example, the Missouri Supreme Court reversed two capital cases without mentioning that the prosecutors had used racial slurs to refer to Black citizens, systematically excluded Blacks from juries, and refused to plea bargain in Black-defendant/white-victim cases. See *id.*

<sup>182</sup> 495 S.E.2d 191 (S.C. 1997).

<sup>183</sup> See Final Brief of Appellant at 3, *Manning* (No. 95-CP-0629).

<sup>184</sup> See *id.*

<sup>185</sup> See *id.*

<sup>186</sup> See *Manning*, 495 S.E.2d at 195-96.

<sup>187</sup> See *State v. Arthur*, 374 S.E.2d 291 (S.C. 1988). The trial judge made the comment that the mentally retarded defendant, who was African American, would have been "better off under slavery, because at least then he would have had somebody to take care of him." Brief of Appellant, *Arthur* (No. 22924).

<sup>188</sup> 433 U.S. 584 (1977).

<sup>189</sup> Cf. *Dobbs v. Kemp*, 790 F.2d 1499 (11th Cir. 1986), *modified and reh'g denied*, 809 F.2d 750, *cert. denied*, 481 U.S. 1059 (1987).

than sheltering it.<sup>190</sup> It would be ironic if they now were to afford racial discrimination its greatest shelter, through heightened burdens of proof, in cases involving life and death.

---

<sup>190</sup> See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 495 (1954); JACK BASS, *UNLIKELY HEROES* (1981).