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CAPITAL SENTENCING IN KENTUCKY: AN ANALYSIS OF THE FACTORS INFLUENCING DECISION MAKING IN THE POST-*GREGG* PERIOD*

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I. BACKGROUND AND PURPOSE

The reimposition of capital punishment by the United States Supreme Court in 1976 has resulted in the execution of ninety prisoners, as of September 1, 1987.[1] The use of the death penalty continues despite research evidence from several states which has consistently demonstrated that offenders who have white victims in general, and black offenders who kill whites in particular, are more likely to face a "death qualified" jury and receive a death sentence.[2] For this reason, the growing use of capital punishment and its sen-

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[1] NAACP Legal Defense Fund, "Death Row, U.S.A.," September 20, 1987.

[2] *See generally* H. BEDAU, DEATH IS DIFFERENT 182 (1987).

tencing system is a central concern in policy research.[3]

The research findings raise significant constitutional issues. Racial discrimination in capital sentencing has long been a central concern of the Court. For example, in *Furman v. Georgia*,[4] which temporarily outlawed executions, several Justices cited racial discrimination and the arbitrary use of capital punishment.[5] In *Gregg v. Georgia*,[6] the Court approved Georgia's "guided discretion" statute which outlined several procedures designed to prevent the abuse of discretion and to exclude "extra legal" factors, such as race, from the capital sentence process.[7] Yet, post-*Gregg* studies clearly and consistently demonstrate that the use of such statutorily approved guidelines "may operate to promote, rather than to curb, arbitrariness and discrimination early in the handling of potentially capital cases."[8]

In fact, research conducted by Baldus[9] became the central issue in the recent landmark decision *McCleskey v. Kemp*,[10] in which the defendant, Warren McCleskey, was a black Georgia inmate sentenced to death for the murder of a white police officer during an armed robbery.[11] The Baldus research introduced statistical proof demonstrating that the Georgia capital sentencing process was administered in an discriminatory, arbitrary, and capricious manner.[12] Justice Powell, writing for the five Justice majority, assumed the validity of the Baldus study but considered this evidence insufficient to demonstrate either unconstitutional discrimination or arbitrary and capricious sentencing.[13] He considered the research an indication of a "discrepancy" correlating with race but noted that it failed to

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3 *See, e.g.*, Cheatwood, *Capital Punishment and Corrections: Is There an Impending Crisis*, 31 CRIME & DELINQ. 461 (1985).

4 408 U.S. 238 (1972).

5 *See id.* at 241, 249-50, 251 (Douglas, J., concurring); *id.* at 364-65 (Marshall, J., concurring).

6 428 U.S. 153 (1976).

7 *Id.* at 197-98. The Georgia statute provides for a bifurcated trial, an outline of the aggravating and mitigating circumstances surrounding the offense and the offender for consideration by the jury during the penalty phase of the trial, and an automatic appeal to the state supreme court. GA. CODE ANN. § 27-2537 (1983).

8 Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1071 (1983).

9 Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983) [hereinafter Baldus].

10 107 S. Ct. 1756 (1987).

11 *Id.* at 1761-62.

12 *Id.* at 1763-64.

13 *Id.* at 1777-78.

demonstrate "major systemic defects."[14]

Despite *McCleskey*, the impact of race upon the capital sentencing process is still a profound issue. If the Baldus study is replicated in other states, either more evidence of racial discrimination will be uncovered or a state system free of such problems will be revealed. Perhaps, a refinement in the eligibility criteria of capital sentencing can produce a more racially equitable result.

This Article focuses upon the capital sentencing process in Kentucky, and examines the central questions of whether the death penalty is applied in an arbitrary or discriminatory fashion and whether such a system can operate in a manner consistent with the requirements of the United States Constitution, especially the due process clause of the fourteenth amendment. This Article extends the post-*Gregg* analysis of the factors influencing the capital sentencing decision to another location and adds to the literature on this crucial subject.

II. LITERATURE REVIEW

Using landmark Supreme Court decisions as benchmarks, studies that have examined the capital sentencing process were clearly divided into different frames of reference. The research of the pre-*Furman* period clearly revealed a pattern of discriminatory sentencing by race of the offender. This research typically focused upon the race of the death row inmate, examining the result of the capital sentencing process.

A. PRE-*FURMAN* RESEARCH

In one study, Guy Johnson investigated 220 cases from Richmond, Virginia occurring between 1930 and 1939 and 330 murders in five North Carolina counties between 1930 and 1940.[15] He discovered that only eight out of 141 black offender/black victim cases received a life sentence (5.6%), and none received a death sentence.[16] However, in twenty-two cases involving blacks who killed whites, seven defendants received life sentences (31.8%), and six were targeted for execution (27.2%).[17] Similarly, Garfinkel examined racial patterns in the charge, indictment and conviction stages of the capital sentencing process in ten North Carolina coun-

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[14] *Id.* at 1777.

[15] Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941).

[16] *Id.* at 99.

[17] *Id.*

ties over a ten year period.[18] He also determined that blacks who killed whites were more likely to be charged, indicted, and convicted of first degree murder. His conclusion was that such offenses were considered the most "heinously murderous" of the possible offender/victim combinations.[19] Elmer Johnson studied a North Carolina database of 660 offenders sentenced to death since 1909 and reported that blacks clearly accounted for the majority of death row inmates (approximately seventy-four percent).[20] This research base demonstrates that blacks who killed whites were specifically targeted for capital punishment.

Race was also a factor in the decision to commute death sentences. In an examination of 439 Pennsylvania death row inmates the years 1914 to 1958, Wolfgang, Kelly, and Nolde reported a statistically significant difference between the proportion of blacks (eleven percent) and whites (twenty percent) who had their sentences commuted.[21] They also reported the execution of ninety-four percent of the black as compared to eighty-three percent of the white Pennsylvania death row convicts.[22]

In addition, racial differences influenced the death penalty decision in crimes other than murder. The race of the offender was a significant factor in the capital sentencing of rapists. For example, Wolfgang and Riedel examined over 3,000 rape convictions obtained in 230 counties in eleven southern states over a twenty year period.[23] They discovered that blacks who raped whites were eighteen times more likely to receive a death sentence than any other offender/victim combination.[24] The authors concluded that the racial factor between the defendant and the victim resulted in a "patterned, systemic and customary imposition of the death penalty."[25]

Finally, using the first 204 homicides reported to the police in Philadelphia in 1970 as a basis, Zimring, Eigen, and O'Malley reported that blacks who killed whites were most likely to receive either a life or death sentence.[26] In fact, blacks with white victims

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18 Garfinkel, *Research Note on Inter and Intra-racial Homicides*, 27 SOC. FORCES 369 (1949).

19 *Id.* at 376.

20 Johnson, *Selective Factors in Capital Punishment*, 36 SOC. FORCES 165 (1957).

21 Wolfgang, Kelly & Nolde, *Comparisons of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L. & CRIMINOLOGY & POLICE SCI. 301, 306 (1962).

22 *Id.*

23 Wolfgang & Riedel, *Race, Judicial Discretion and the Death Penalty*, 407 ANNALS 119 (1973).

24 *Id.* at 307.

25 *Id.* at 419.

26 Zimring, Eigen & O'Malley, *Punishing Homicides in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227, 232 (1976).

accounted for all three of the death sentences administered to this group.[27] The authors viewed this outcome as a "paradox" since the black offenders with white victims accounted for only twenty percent of the total group examined.[28]

B. POST-*FURMAN* AND *GREGG* RESEARCH

This pattern of racial bias also characterized the research during the period following the *Furman* and *Gregg* decisions. With these two decisions, the Court intended to remove arbitrariness and discrimination from the death sentencing process.[29] Here, the research revealed that the race of the victim continued to play a significant role, and that the offender/victim racial combination also determined if the sentence was to be death. This research examined the factors influencing the imposition of a death sentence at different stages of the capital sentencing process. The United States Supreme Court, in *Gregg*, approved of this process as a possible method of curtailing discrimination.[30]

Riedel was the first to examine the results of post-*Furman* capital sentencing decisions.[31] He examined data from the NAACP Legal Defense Fund and the National Prisoner Statistics on 493 offenders from twenty-eight states under a sentence of death in 1971 and compared them to 142 death row inmates in six states sentenced after *Furman*, between June 29, 1972 and August, 1975.[32] He reported that a greater proportion of nonwhites were sentenced to death, sixty-two percent versus fifty-three percent following *Furman*.[33] Although the interaction between the race of the offender and that of the victim failed to yield a statistically significant result, Riedel noted that eighty-seven percent of the homicide victims were white.[34] He concluded that the disproportionality in the death sentencing in white victim cases had continued despite the intentions of the Supreme Court.[35]

Another early post-*Furman* study reached an almost identical conclusion. Lewis interviewed eighty-three Florida death row in-

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27 *Id.* at 233.

28 *Id.*

29 *Gregg*, 428 U.S. at 197, *Furman*, 408 U.S. at 241.

30 *Gregg*, 428 U.S. at 197-98. For an outline of the Georgia capital sentencing system see *supra* note 7.

31 Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 TEMP. L.Q. 261 (1976).

32 *Id.* at 275.

33 *Id.* at 276.

34 *Id.* at 282.

35 *Id.*

mates in 1977 and reported that the majority of offenders (55.4%) and victims (92.4%) were white.[36] However, using arrest data as a basis, he also determined that the probability of obtaining a death sentence was significantly higher for blacks who killed whites than for any other offender/victim racial combination.[37] He concluded that the fact that although the number of Florida death row blacks was substantially reduced after 1972, this did not indicate Florida had resolved its pre-*Furman* problems.[38]

Similarly, Bowers and Pierce conducted a study of persons indicted for first degree murder in Florida, Georgia, Ohio, and Texas during the post-*Furman* period.[39] They determined that black defendants who killed whites had the highest probability of receiving a death sentence in all four states.[40] This study examined all stages of the capital sentencing process and considered the effect of such pertinent variables as the felony circumstances surrounding the murder. Yet, the differential impact of the offender/victim racial variable was still apparent.[41] In another Florida-based study, Arkin investigated the results of 350 murder cases from Dade County during the period 1973 to 1976.[42] He detected "selectivity and arbitrariness" at every stage of the sentencing process.[43] Black killers of whites were for times more often convicted of first degree murder than blacks who killed blacks.[44] This combination accounted for half of the death sentences levied.[45]

Similarly, Zeisel examined the records of 114 Florida offenders who reached death row after 1972 and before September of 1977.[46] He determined that the death row murderers who killed whites outnumbered those who killed blacks by a ratio of thirty-one to one.[47] Zeisel also contended that after they were presented with evidence of discrimination, prosecutors tried to cover such discrimination

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36 Lewis, *Life on Death Row: A Post Furman Profile of Florida's Condemned*, in THE SUPREME COURT AND THE CRIMINAL PROCESS 948 (P. Lewis & K. Peoples, eds. 1978).

37 *Id.*

38 *Id.*

39 Bowers & Pierce, *Arbitrariness and Discrimination Under Post Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980).

40 *Id.* at 577.

41 *Id.* at 629.

42 Arkin, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post Furman Murder Cases in Dade County, Florida, 1973-1976*, 33 STAN. L. REV. 75 (1980).

43 *Id.* at 77.

44 *Id.* at 87.

45 *Id.*

46 Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

47 *Id.* at 460.

through "cosmetic" changes, which lead to a "more damaging proposition" that "their [prosecutors] discretionary power to determine the death row population is not within any legal boundaries."[48]

Using data from 637 homicide indictments in twenty counties from 1976 and 1977, Radelet also studied the Florida capital sentencing process.[49] He made a distinction between primary homicides, such as acts of passion between family members, friends, or acquaintances, and nonprimary homicides, such as instrumental, occurring during another felony, or among strangers.[50] Log linear analysis revealed a tendency to indict defendants accused of killing whites for first degree murder, although offenders whose victims were black were indicted for a lesser charge.[51] Among both white and black defendants, offenders who killed whites had a twelve percent higher probability of receiving a death sentence.[52] The major unexplained finding was that nonprimary homicides with white victims were more likely to result in an indictment for first degree murder than nonprimary homicides with black victims.[53] The race of the victim seemed to be a stronger factor in the prosecutorial decision than the nature of the homicide.

Radelet and Pierce reviewed 1382 Florida homicide cases from a proportionate random sample of twenty-one counties and compared the charges made at arrest with those eventually levied by the prosecutor.[54] Among 174 cases in which charges between the police and prosecutor differed, eighty-two were downgraded, with the felony level lowered, and ninety-two were upgraded by the prosecutor.[55] Statistical analysis revealed that cases in which a black killed a white were most likely to be upgraded, followed in order by cases in which whites killed whites, blacks killed blacks and whites killed blacks.[56] The authors also determined that upgraded cases were about twice as likely to result in a death sentence than were "consistently classified" cases.[57] Furthermore, the majority of the defendants who refused to negotiate a plea, in this case sixty-nine percent,

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48 *Id.* at 468.

49 Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981).

50 *Id.* at 921.

51 *Id.* at 923.

52 *Id.* at 924.

53 *Id.* at 925.

54 Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC. REV. 587, 595 (1985).

55 *Id.* at 598.

56 *Id.* at 604-05.

57 *Id.* at 612.

received a death sentence.[58]

In a South Carolina study, Paternoster also uncovered a "race of the victim" capital sentencing effect.[59] The data set included 1805 homicide acts committed between June 8, 1977, the effective date of the state's death penalty law, and December 31, 1981.[60] Regarding prosecutorial discretion, Paternoster reported that black offenders with white victims were over forty times more likely to have the death penalty requested than the black killers who did not cross racial lines.[61] Overall, rural prosecutors were more likely to seek the death penalty.[62] At every level of aggravation, the probability of a death sentence was higher in white victim cases.[63] Accounting for a number of independent variables through the use of the logit regression statistical procedure, Paternoster revealed that prosecutors were most likely to seek the death penalty in white victim cases.[64] He also determined that killers of whites in less aggravating circumstances were more likely to face a death penalty recommendation than were the killers of blacks in more aggravating circumstances.[65] The study concluded that the murder of a white, in and of itself, was treated as a more serious offense.[66]

Gross and Mauro provided more evidence of discrimination in capital sentencing in their study of all homicides reported to the police in Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia.[67] Again, blacks who killed whites were several times more likely to receive a death sentence, even when felony circumstances were taken into account.[68] Logit regression analysis uncovered substantial levels of racial discrimination. Killers of whites were often times more likely, four times more often in Illinois, five times more often in Florida, and seven times more likely in Georgia, to receive a death sentence.[69] This pattern held in Georgia even after a statutorily mandated "proportionality review"

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58 *Id.* at 611.

59 Paternoster, *Race of the Victim and Location of the Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983).

60 *Id.* at 762-63.

61 *Id.* at 766.

62 *Id.* at 780.

63 *Id.*

64 *Id.* at 776-77.

65 Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim Based Racial Discrimination*, 18 LAW & SOC. REV. 437 (1984).

66 *Id.*

67 Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing*, 37 STANFORD L. REV. 27, 66 (1985).

68 *Id.* at 56.

69 *Id.* at 66.

took place.[70] The rate of affirmation of the death sentence in white victim cases versus that of black victim cases was nine to one.[71]

Other studies of different states reached similar conclusions concerning the use of the death penalty. In Louisiana, Smith reviewed 504 murder cases and discovered that white victim cases were twice as likely to end in a death sentence.[72] For murders occurring between 1977 and 1984 in Texas, Henderson and Taylor reported that killers of whites were five times more likely to receive a death sentence than the killers of blacks.[73] The evidence of discrimination became even greater with the inclusion of the offender/victim racial composite variable. Over an eleven year period in Texas with 300 death sentences, blacks who killed whites were most likely to arrive on death row.[74]

In the study reviewed in *McCleskey v. Kemp*,[75] Baldus, Pulaski, and Woodworth reviewed the Georgia capital sentencing process.[76] The Georgia statute called for the use of a proportionality review in order to determine whether individual death sentences were excessively severe in comparison to the sentence imposed in factually indistinguishable cases.[77] The Baldus research task was to determine the best method of making such a determination. The authors utilized two data sets: 130 pre-*Furman* cases, with twenty resulting in death sentences; and 594 defendants tried and sentenced since *Furman*.[78] The research considered the effect of over 200 different independent variables designed to account for aggravating and mitigating circumstances.[79] Their statistical regression model revealed that, among cases with statutory aggravating factors, the death sentencing rate did not exceed sixty-two percent.[80] Thus, prosecutors and jurors used considerable discretion in selecting defendants for

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70 *Id.* at 85-86. Proportionality review is designed to determine whether the several trial courts in the state are imposing the death penalty for roughly the same sort of murder, or whether some courts have become execution-prone or otherwise aberrant in their capital sentencing practices. The United States Supreme Court has held that this procedure is not required. Pulley v. Harris, 465 U.S. 37, 44 (1984). *See* H. BEDAU, *supra* note 2.

71 Gross & Mauro, *supra* note 67, at 85.

72 Smith, *Patterns of Discrimination in Assessment of the Death Penalty: The Case of Louisiana*, 15 J. CRIM. JUST. 279, 283 (1987).

73 Witherspoon & Senderling, *Racism, Even in Death*, Dallas Times Herald, Nov. 17, 1985, at 4, col. 28-A.

74 *Id.*

75 107 S. Ct. 1756 (1987).

76 Baldus, Pulaski & Woodworth, *supra* note 9.

77 Ga. Code Ann. § 27-2537(c)(3) (1983).

78 Baldus, Pulaski & Woodworth, *supra* note 9, at 680.

79 *Id.* at n.81.

80 *Id.* at 699.

execution, resulting in a very low rate of capital sentencing in black victim cases.[81] They concluded that the level of aggravation must be "substantially great" for prosecutors to seek the death penalty,[82] that juries appeared to tolerate greater levels of aggravation in black victim cases,[83] and that "Georgia's death sentencing system has continued to impose the type of inconsistent, arbitrary death sentences that the U.S. Supreme Court condemned in *Furman v. Gergia.*"[84]

These post-*Furman* and *Gregg* studies demonstrated that the capital sentencing process in a number of states and at different stages was characterized by racial discrimination. Thus, an examination of the nature of the capital sentencing processes in other states is warranted. These findings served as the backdrop for the present study of the Kentucky capital sentencing process.

III. Capital Punishment in Kentucky

Following the last execution of a Kentucky inmate,[85] Kentucky governors routinely granted inmates a stay of execution and the legislature considered abolishing capital punishment altogether.[86] When the *Furman* decision was announced, the sentences of twenty-three Kentucky death row inmates were commuted to life imprisonment.[87]

After the *Gregg* decision, a Georgia-like capital sentencing statute was enacted by the Kentucky legislature.[88] This statute established several guidelines for the administration of the death penalty to effectively curb the abuse of discretionary power.[89] In Kentucky, one of the targets for the imposition of capital punishment are murder cases which involve another felony.[90] The aim is to reserve capital punishment for the most severe murder cases, such as killings which are accompanied by at least one of five felonies, including arson, rape, robbery, sodomy and burglary, listed in the statute.[91] Other aggravating circumstances listed in the statute are: a substan-

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81 *Id.* at 707-08.

82 *Id.* at 710.

83 *Id.*

84 *Id.* at 730.

85 On March 2, 1962, Kelly Moss was electrocuted at the Kentucky State Penitentiary at Eddyville. W. Bowers, Legal Homicide: Death as Punishment in America, 1864-1982 445 (1984).

86 Legislative Research Commission No. 218, Capital Punishment 9 (1985).

87 Vito & Wilson, *Back From the Dead: Tracking the Progress of Kentucky's Furman Commuted Death Row Population*, 5 Just. Q. 101, 103 (1988).

88 Ky. Rev. Stat. Ann. § 507.020 (Mitchie/Bobbs-Merrill 1985).

89 *See id.*

90 *See id.*

91 Ky. Rev. Stat. Ann. § 532.025 (Mitchie/Bobbs-Merrill 1985).

tial history of serious assaultive convictions; prior conviction for a capital offense; the use of a destructive device which creates a great risk of death to more than one person in a public place; offenses committed for the profit; murders involving multiple victims; and murders of "special categories" of victims, such as prison employees, state or local officials, police officers, sheriffs or deputy sheriffs, killed during the lawful performance of their duties.[92] The prosecutor is the key actor in the capital sentencing process, for if the prosecutor does not seek the death penalty, the process halts.

Once the prosecutor files a motion to proceed with capital cases, the process begins. The next step is the formation of a "death qualified" jury. The potential jurors are told that the death penalty is possible in this case. The jury consists of individuals who do not demonstrate an unwillingness to sentence a defendant to death, regardless of the circumstances of the case.[93] When this process is complete, the trial can begin.

Specifically, the Kentucky statute provides for a bifurcated trial in death penalty cases: a guilt and a penalty phase.[94] If the defendant is found guilty, the court resumes the trial and conducts a presentencing hearing. At this stage, the jury must follow specific directions provided in the statute.[95] The jury must determine that one of seven "aggravating" circumstances is present in order to sentence the defendant to death.[96] Similarly, the jury can consider one of eight "mitigating" circumstances and impose a lesser sentence.[97] The alternatives include life imprisonment, life without benefit of parole for twenty-five years or, if the jury finds the defendant guilty of a lesser offense such as manslaughter, a sentence of years defined by statute.[98] Unlike states such as Alabama, Florida, Indiana,[99] the Kentucky judges are not presently permitted to raise penalties lev-

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92 *Id.*

93 The Supreme Court has held that in order for a juror to be legitimately excluded the juror must state that he would automatically vote against the death penalty regardless of the evidence at trial or that this position would make it impossible for him to make an impartial decision concerning the guilt of the defendant. *See* Buchanan v. Kentucky, 107 S. Ct. 2906 (1987); Lockhart v. McCree, 476 U.S. 162 (1986); Wainwright v. Witt, 469 U.S. 412 (1985); Witherspoon v. Illinois, 391 U.S. 510 (1968).

94 KY. REV. STAT. ANN. § 532.025 (Mitchie/Bobbs-Merrill 1985).

95 *Id.* at § 532.075

96 *Id.* at § 532.025

97 *Id.*

98 *Id.*

99 *See* ALA. CODE § 13A-5-47(e) (1982); FLA. STAT. ANN. § 921.141(2) & (3) (West Supp. 1985); IND. CODE ANN. § 35-50-2- 9(e) (West 1978 & Supp. 1984); Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1412 (1985); Tabak, *The Death of Fairness: The Arbitrary and Caprious Imposition of the Death Penalty in the 1980's*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 820-821 (1986).

ied by the jury.[100] The judge cannot overrule the jury and impose a death sentence.

The statute also provides for an automatic review of any capital case by the Kentucky Supreme Court to determine whether the penalty was due to "the influence of passion, prejudice, or any other arbitrary factor" and to ensure that the "evidence supports the jury's or judge's findings."[101] The review also directs the court to determine that the death penalty is not "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[102] The courts determined that this bifurcated sentencing process could apply only to persons indicted for murder in Kentucky for offenses committed after December 22, 1976.[103]

This Article is as an evaluation of the effectiveness of the capital sentencing process in Kentucky. The aim of the research was to assess the ability of the policies listed in the statute to provide "super" due process in capital cases. Basically, the process works if it effectively curbs both intentional and unintentional arbitrariness and discrimination.[104]

IV. METHODOLOGY

A. RESEARCH QUESTIONS

In light of the research findings of the previous studies of capital sentencing systems,[105] it was essential to focus on certain aspects of the process in Kentucky. The first research question considers the prosecutorial decision to seek the death penalty and attempts to ascertain those factors associated with this decision. The second question focuses upon the jury's decision to sentence the defendant to death. It is essential to consider such stages in the process because the decisions at each level are dependent upon decisions made at the preceding level.

B. RESEARCH DESIGN

The universe of cases consisted of all persons, with complete data, indicted for murder in Kentucky between December 22, 1976,

100 KY. REV. STAT. ANN. § 532.025 (Mitchie/Bobbs-Merrill 1985).
101 *Id.* at § 532.075.
102 *Id.*
103 *See* Hudson v. Commonwealth, 597 S.W. 2d 610 (Ky. 1978).
104 *See* Hubbard, *Reasonable Levels of Arbitrariness in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L. REV. 1113 (1985).
105 *See supra* notes 15-84 and accompanying text.

the effective date of the statute, and October 1, 1986, who were convicted and sentenced to prison under a death or lesser sentence. This universe comprised 864 cases. However, not all of these individuals were candidates for the death penalty. In order to proceed capital, the prosecutor must determine that a least one of the previously cited statutory aggravating circumstances must be present.[106] Following this determination, the universe dropped to 557 cases. The multivariate statistical techniques used in this study require that each case be complete and contain no missing data.[107] For this reason, the universe was once again reduced to a sample of 458 cases. Finally, the cases studied consisted of individuals indicted for murder, with at least one aggravating circumstance, with complete data on the variables included in this analysis. Three cases in which the death sentence was imposed by a judge and one case in which the victim was Asian were excluded from the analysis.

Among these cases, there were 104 death qualified juries and thirty-five death sentences. Thus, the final research sample consisted of persons indicted for murder in a case with at least one statutorily prescribed aggravating circumstance and sentenced to prison, as long as a death sentence was a possibility. The universe did not include individuals indicted for murder who had the charges dropped or who were acquitted at trial.

Data on the offense and the offender were collected from institutional files compiled and maintained by the Kentucky Corrections Cabinet. The presentence investigation report (PSI) was the main source of information for the study. The PSI is a vital tool in the sentencing process. It contains a volume of information about the offense and the criminal, including a social history of the accused. In its final form, the data collection form addressed approximately ninety-seven variables on the characteristics of the offender, offense, and victim(s). Here, the conscious attempt was to replicate the methodology of the Baldus study.[108] Professor Baldus made his data collection codebook available and it served as a model for the present study.[109]

A list maintained by the Department of Public Advocacy was

106 *See* KY. REV. STAT. ANN. § 532.025 (Mitchie/Bobbs-Merrill 1985).

107 *See* S. FINEBERG, THE ANALYSIS OF CROSS CLASSIFIED CATEGORICAL DATA 142 (1980).

108 Baldus, Pulaski & Woodworth, *supra* note 9.

109 *Id.* The data collection procedure was as follows: a student collected data on the first two records on the data collection schedule involving demographic data on the offender while the professor compiled data on the circumstances of the offense, the victim(s) and made determinations about the presence of aggravating and mitigating circumstances in the case.

used to determine if a death qualified jury was used in the case. The present study conservatively underestimates the actual number of cases in which the prosecution sought the death penalty, because this list either did not contain all of the offenders who were sentenced to prison over this time period or did not have this information on every case. Another computerized list compiled by the Kentucky Administrative Office of the Courts served as a basis to verify that the offender had been indicted for murder.

The findings of this study are limited by two factors. First, complete data on the race of the victim was not obtained for all cases, except for cases of offenders on death row. Second, there are problems with the classification of aggravating and mitigating circumstances by a person without formal legal training. However, before the data collection began, the researchers consulted with the Kentucky Offices of Attorney General and Public Advocacy.

V. Research Findings

The analysis begins with a review of the frequencies of different independent variables used in the study. These variables give some initial indication of the importance of the racial variable, a breakdown of the overall presence of aggravating and mitigating circumstances, and the background of victims for the universe of cases.

Table 1 lists the presence of aggravating circumstances, as dictated by Kentucky law, within the research sample. The top aggravating circumstance present was a substantial history of violent offenses. A majority of the offenders had a "substantial history of violent offenses," as indicated by a prior conviction for a violent offense. The next highest category was homicide concurrent with robbery in the first degree (thirty-one percent of the cases), followed by burglary (12.7%) and cases involving multiple victims (12.2%).

Table 2 contains a list of the independent variables considered in the analysis. The effect of several indicators of the heinousness of the crime along with an estimate of the effect of the racial composite variable BLACK KILLS WHITE (BKW) was constructed and estimated. Of course, most of the independent variables reflect the aggravating circumstances present in Kentucky law. These specific variables were CONCUR, MDEATH, SILENCE, FEMALE VICTIM and KMAGG. CONCUR indicates whether the accused had been charged with a homicide committed in conjunction with one or more of the following offenses: Arson I, Robbery I, Rape I, Sodomy I, or Burglary I. MDEATH signifies whether the accused was being tried for more than one homicide. SILENCE demonstrates that the

TABLE 1

PRESENCE OF AGGRAVATING CIRCUMSTANCES LISTED IN THE KENTUCKY STATUTE IN THE UNIVERSE OF KENTUCKY MURDER CASES (N = 458): 12/22/76 TO 10/01/86

Aggravating Circumstance	Yes	Pct.
1. Prior conviction for a capital offense:	17	3.7
2. Substantial history of assaultive convictions:	353	77.1
3. Homicide committted in conjuction with:		
a. Arson I	6	1.3
b. Robbery I	142	31.0
c. Rape I	22	4.8
d. Sodomy I	8	1.7
e. Burglary I	58	12.7
4. Did the offense involve the use of a destructive device or weapon which created a great risk of death to more than one person in a public place?	0	0.0
5. Was the offense committed for the purpose of receiving money or any other thing of monetary value or for other profit?	17	3.7
6. Prison employee victim:	3	0.7
7. Did the offender's act of killing result in multiple deaths?	56	12.2
8. State/local official or law enforcement victim:	8	1.7

accused killed the victim in order to prevent the victim from testifying against the offender. While this factor is not an element under the Kentucky statute, it is a legal factor in several other states and it reflects a rational, instrumental motivation for the homicide.[110] Previous studies[111] have suggested that killers of females (FEMALE VICTIM) are more likely to be targeted for a death sentence. Kentucky multiple aggravating circumstances (KMAGG) indicates whether one or more of the statutory elements were present in the case.[112] KMAGG is particularly important to the analysis since it has been suggested that one possible way to avoid discrimination in death sentencing is to focus on those cases which have more than one aggravating circumstance. Such an approach "would limit the class of death eligible defendants to those that society has already shown they feel are most opprobrious, regardless of the race of the defendant or the victim."[113] The inclusion of KMAGG permits a

110 Baldus, Pulaski & Woodworth, *supra* note 9, at 693.

111 *See* Paternoster, *supra* note 59, at 781; Smith, *supra* note 72, at 283.

112 *See* KY. REV. STAT. ANN. § 532.025 (Mitchie/Bobbs-Merrill 1985).

113 Note, EIGHTH AND FOURTEENTH AMENDMENTS — THE DEATH PENALTY SURVIVES, 78 J. CRIM. L. & CRIMINOLOGY 1080, 1113 (1988)(authored by Anderson Bynam).

TABLE 2
FREQUENCY DISTRIBUTION OF INDEPENDENT VARIABLES

Independent Variable	N	Pct.
CONCUR		
Yes	188	41.0
No	270	59.0
MDEATH		
Yes	56	12.2
No	402	87.8
SILENCE		
Yes	72	15.7
No	386	84.3
KMAGG		
Yes	182	39.7
No	276	60.3
FEMALE VICTIM		
Yes	141	30.8
No	317	69.2

direct test of this hypothesis in Kentucky.

Together, these variables give some indication of the different factors present in murder cases. These are the legal factors, outlined by statute, which have been highlighted as the variables which should legitimately guide the discretionary power of decision makers in the capital sentencing process. Severity of the offense, such as the more heinous murders, and murders committed during the course of another felony, are all highlighted as the types of homicides which should draw the death penalty. However, research has determined that extralegal factors, particularly race, impinge upon capital sentencing decision making.

Table 3 gives us some indication of the pattern present in the dependent variables of this study. This initial pattern is remarkably consistent with the findings of the previously cited studies on this subject. The data reveal that a higher proportion of black offenders who murdered whites go on to receive a death qualified jury (47.7%) than is the case among other racial combinations. None of the fourteen white offenders with black victims made it to the level of a death qualified jury. Of the 140 black offenders eligible for a death qualified jury, 33.5% had white victims. Of the thirty-three blacks tried for a capital offense, 63.6% had white victims. Finally, of the eight blacks who received a death sentence approximately 87.5% had murdered whites. Blacks who killed blacks, like whites

TABLE 3
RACIAL COMBINATIONS BETWEEN OFFENDERS AND VICTIMS IN THE RESEARCH SAMPLE OF KENTUCKY MURDER CASES (N = 458): 12/22/76 TO 10/1/86*

OFFENDER/VICTIM INTERACTION	N OF CASES	PROBABILITY OF DEATH QUALIFIED JURY	PROBABILITY OF DEATH SENTENCE
Black Kills Black	93	12 (12.9%)	1 (8.3%)
Black Kills White	47	21 (44.7%)	7 (33.3%)
White Kills White**	304	71 (23.3%)	27 (38.0%)
White Kills Black	14	0 (0%)	0 (0%)
TOTALS	458	104	35

* The figures in parentheses are row percentages which reflect the probabilities of, first, facing a death qualified jury and then receiving a death sentence.
** Two of the death sentences in this group were overturned on appeal. A case in which a white raped and murdered an Asian was excluded from the analysis. In this case, the offender was tried before a death qualified jury, found guilty and was sentenced to life in prison.

who killed blacks, had a very slight chance of being sentenced to death. Only 12.9% of this subgroup faced a death qualified jury and only 8.3% received a death sentence. This type of univariate analysis does not provide a satisfactory explanation of how and why such an apparently discriminatory pattern is present.

As Kleck has indicated, blacks who kill whites may be more likely to be punished more severely for homicides due to legally relevant factors related to such offenses.[114] Thus, there may be legitimate reasons, as indicated by aggravating circumstances, why blacks who kill whites are more likely to be singled out for and sentenced to death in Kentucky. In order to approach this question, it is necessary to conduct a multivariate analysis which includes legally relevant factors and indicators of the race of the victim and the race of the offender. The issue addressed in this Article is the extent to which the overrepresentation of blacks who kill whites in the capital sentencing system is a function of their involvement in objectively more serious crimes or the extent to which such a result is due to the extralegal factor of race.

A. THE PROSECUTORIAL DECISION TO SEEK THE DEATH PENALTY

While prosecutors in Kentucky may not seek the death penalty unless at least one statutory aggravating circumstance is present, the

114 Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981).

law gives prosecutors considerable latitude in determining who is prosecuted for a capital offense. By virtue of their discretionary authority, prosecutors may consider extralegal factors in deciding who will be charged with a capital crime. The specific extralegal factors that are addressed in the Article are the race of the offender, race of the victim and the sex of the victim.

TABLE 4
LOGIT REGRESSION MODEL: FACTORS ASSOCIATED WITH THE FORMATION OF A DEATH QUALIFIED JURY

Parameter	Coefficient	Standard Error	z-Value
DQJURY	.032	.126	.25
DQJURY BY CONCUR	.271	.084	3.23**
DQJURY BY MDEATH	.324	.091	3.58**
DQJURY BY SILENCE	.263	.079	3.33**
DQJURY BY BKW	.252	.093	2.71**
DQJURY BY KMAGG	.181	.079	2.30**
DQJURY BY FEMALE VICTIM	.119	.068	1.75**

* Coefficient greater than one and one half its standard error.
** Coefficient greater than twice its standard error.

LIKELIHOOD RATIO CHI SQUARE = 43.584 DF = 50 P > .10

MEASURES OF ASSOCIATION
ENTROPY = .114
CONCENTRATION = .143

* Significant at .05 level or beyond, 2 tailed test.

The dependent variables are DQJURY, a dichotomous variable indicating whether or not the prosecutor has decided to qualify a jury to impose a death sentence in a particular trial, and LORD, a dichotomous variable indicating whether a convicted murderer actually received a death sentence from the jury. There was complete data for 432 murder cases that met the legal qualifications for being charged with a capital offense. In Table 4 is an examination of the effect of CONCUR, KMAGG, MDEATH, SILENCE, FEMALE VICTIM and BKW on DQJURY by logit regression. Due to the presence of sampling zeros, the degrees of freedom for the overall model were calculated using the formula and method suggested by Fienberg.[115] All of the predictors measuring the seriousness of the homicide were statistically significant and their signs were in the expected direction. They were all positive, indicating that prosecutors were most likely to proceed capital in those cases which met the

[115] Fineberg, *supra* note 107, at 142.

legal requirements for an accused to be charged with a capital crime: the accused had more than one aggravating circumstance, there was more than one victim; and the killer committed the crime to prevent testimony from being introduced by the victim. In addition, with female victims there was a greater likelihood of being charged with a capital crime. Even with these variables in the equation, however, the effect of BKW continued to be statistically significant and positive. Thus, blacks who kill whites have a higher than average probability of being brought before a death qualified jury. This conclusion holds even though, as Table 5 demonstrates, BKW cases are correlated with the several indicators of seriousness.

TABLE 5
PEARSON CORRELATIONS AMONG THE PREDICTORS OF DQJURY AND LORD

	CONCUR	MDEATH	SILENCE	BKW	KMAGG	FEMALE VICTIM
CONCUR	1.000					
MDEATH	.014	1.0000				
SILENCE	.420*	.077*	1.0000			
BKW	.201*	−.060*	.071*	1.0000		
KMAGG	.583*	.267*	.311*	.078*	1.000	
FEMALE VICTIM	.040	−.004	.089*	.008	−:001	1.000

* Significant at or beyond the .05 level.

In the next stage of the analysis, the effect of the various predictor variables upon the receipt of a capital sentence among those who were tried before a death qualified jury was examined. In this equation, the only statistically significant predictor is SILENCE. This finding indicates that juries regard crimes where this motivation is present to be especially serious. Therefore, among those defendants who face a death qualified jury, there is no evidence that blacks who have white victims, compared to other killers, are more likely to receive a death sentence when the seriousness of the homicide is considered.

The absence of a significant effect for BKW in the LORD equation means that this variable does not directly determine which of the eligible defendants will be sentenced to die. Rather than reacting to the combination of the race of the victim and the race of the accused in imposing a sentence, Kentucky juries may react to the objective heinousness of the murder cases brought before them.

TABLE 6
LOGIT REGRESSION MODEL: FACTORS ASSOCIATED WITH THE RECEIPT OF A DEATH SENTENCE (LORD)

Parameter	Coefficient	Standard Error	z-Value
LORD	.189	.175	1.083
LORD BY CONCUR	−.168	.167	−1.005
LORD BY MDEATH	.167	.131	1.276
LORD BY SILENCE	.353	.127	2.793*
LORD BY BKW	.010	.140	.068
LORD BY KMAGG	.197	.148	1.330
LORD BY FEMALE VICTIM	.166	.133	1.462

LIKELIHOOD RATIO CHI SQUARE = 37.012 DF = 50 P > .10

MEASURES OF ASSOCIATION
CONCENTRATION = .114
ENTROPY = .143

* Coefficient is greater than twice its standard error.

B. CONCLUSIONS

However, as demonstrated in Table 4, BKW does influence the decision of Kentucky prosecutors to proceed with a capital prosecution. Here, the pattern of effects demonstrated by the race of the victim-race of the offender combination indicates that, controlling for differences in the objective heinousness of the offense, prosecutors are more likely to seek the death penalty when a black kills a white than in other homicide cases. Table 3 demonstrates that, without controlling the seriousness of the offense, a pattern in which blacks who kill blacks have a relatively low probability of facing a death qualified jury (12.9%) and a slight chance of receiving a death sentence (8.3%) results.

Racial differences may not be the only factors which influence this prosecutorial decision. Such a determination may also reflect an instrumental orientation on the part of prosecutors. It is possible that prosecutors are more likely to proceed capital when a black kills a white because they believe that it is easier to obtain a conviction in such cases. Prosecutors may be responding to public pressure to take a hard line in such cases. It also appears that a reliance upon the use of multiple aggravating circumstances as a requirement to proceed capital offers no guarantee that racial discrimination will be prevented or eliminated. Blacks who kill whites are still more likely to be the target of a death qualified jury under such restrictions.

Regardless of the underlying motive, the fact remains that racial discrimination was present in the Kentucky capital sentencing process during the post-*Gregg* period. In Kentucky, blacks who kill whites have a generally greater risk of arriving on death row than other murderers in part because they are more likely to face a jury empowered to consider a death sentence. This result is *not* exclusively because these murders are objectively more heinous than others. When factors indicative of heinousness were considered, the BKW variable continued to have a statistically significant effect on the probability of facing a death qualified jury.

The finding that the race of the victim-race of the offender composite variable does not have a direct effect upon the final stage of the process, on who actually receives a death sentence, does not mean that race does not structure the probability of receiving a capital sentence. Race is a crucial factor in the "gatekeeping" first stage of seeking the death penalty. Once a person faces a death qualified jury, factors other than race produce the final disposition. This finding does not mitigate the evidence of racial effects, because the combination of the race of the victim and the race of the offender has significant consequences in the determination of who faces a death qualified jury. The racial element is not eliminated in the latter stages of the capital sentencing process. In this fashion, Kentucky's capital sentencing system has produced the same flawed, discriminatory result which characterizes all of the capital sentencing systems evaluated during the post-*Gregg* period to date. In Kentucky, blacks who kill whites are more likely to face a death qualified jury than other combinations of victim/offender race, even when the objective nature of the homicide is taken into account.