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CONSTITUTIONAL LAW—RACIAL DISCRIMINATION WITHIN A DEATH PENALTY SYSTEM— THE PETITIONER'S HEAVY BURDEN

McCleskey v. Kemp,

481 U.S. 279 (1987)

TABLE OF CONTENTS

I. INTRODUCTION

In *McCleskey v. Kemp*, McCleskey, a black man, offered statistical evidence (the Baldus study) to prove that racial discrimination exists in the Georgia death penalty system. Assuming the validity of the study, the Court nevertheless refused to accept the Baldus study as proof of discrimination in McCleskey's case. This paper proposes that statistics evidencing racial discrimination that relate to the prosecutor's role in seeking the death penalty should be analyzed within the framework established by previous cases where statistics have been accepted as proof of discrimination.

II. FACTS

Warren McCleskey was tried in the Superior Court of Fulton County, Georgia, for armed robbery and for the murder of a white police officer which occurred during the robbery.[1] The jury, comprised of eleven whites and one black,[2] recommended the death sentence for McCleskey. Subsequently, the Superior Court of Fulton County, Georgia, sentenced Warren McCleskey to death.[3] Unsuccessful in his attempt to seek post-conviction relief in state courts, McCleskey filed a petition for a writ of *habeas corpus*[4] in the federal District Court of the Northern District of Georgia.[5]

In this petition, McCleskey claimed that the Georgia death penalty statute allowed for value judgments within the system, and as a result it was being applied arbitrarily and in a racially discriminatory manner in violation of the eighth and fourteenth amendments of the Constitution.[6]

In support of his claim, McCleskey presented statistical evidence produced by multiple regression analysis.[7] This statistical evidence (the Baldus study)[8] was compiled by Professors David Baldus, George Woodworth and Charles Pulanski. It demonstrated that prosecutors sought the death penalty in 70% of the cases involving a black defendant and a white victim, 32% of the cases where both the defendant and victim were white, 15% of the cases where defendant and victim were black, and 19% of the cases involving a white defendant and a black victim.[9] One of Baldus' models, which took into account 39 nonracial variables, concluded that "defendants charged with killing white victims were

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1. McCleskey v. State, 245 Ga. 108, 263 S.E.2d 146 (1980).

2. Brief for Petitioner at 3, McCleskey v. Kemp, 481 U.S. 279 (1987).

3. On automatic appeal to the Supreme Court of Georgia, McCleskey's death sentence was affirmed. McCleskey v. State, 245 Ga. 108, 263 S.E.2d 146 (1980). McCleskey argued that the Georgia death penalty violates the due process and equal protection clauses of the state and federal Constitutions because prosecutorial discretion permits its discriminatory application. Citing Gregg v. Georgia, 428 U.S. 153 (1976), as precedent, the Georgia Supreme Court found McCleskey's argument without merit.

4. A writ of *habeas corpus* is instituted to initiate a proceeding to command the defendant to produce the prisoner and to show by what authority he restrains or detains him. BLACK'S LAW DICTIONARY (5th ed. 1979).

5. McCleskey v. Zant, 580 F. Supp. 338 (N.D. Ga. 1984).

6. *Id.* McCleskey specified two areas where this occurred: one, when prosecutors decide whether to seek the death penalty, and two, when jurors decide whether to impose the death penalty. *Id.* at 346.

7. When using multiple regression analysis, a theoretical statistical model of reality is built, then an attempt is made to control for all possible independent variables while measuring the effect of the variable of interest upon the dependent variable. McCleskey v. Zant, 580 F. Supp. 338, 350 (N.D. Ga. 1984). See generally for further explanation of regression analysis, R. HEATH, BASIC STATISTICAL METHODS, 129-39 (1970).

8. The study analyzed sentences imposed in homicide cases to determine the level of disparity attributable to race in the number of death sentences imposed. McCleskey v. Kemp, 753 F.2d 877, 887 (11th Cir. 1985). Each case was examined from indictment through sentencing. *Id.* Baldus examined over 2,000 Georgia cases, then subjected the data he collected to extensive analysis, accounting for 230 variables which could have explained the sentencing disparity on grounds other than racial bias. McCleskey v. Kemp, 481 U.S. at 287.

9. 481 U.S. at 287. Similarly, the study showed that the death penalty was assessed in 22% of the cases involving black defendants and white victims, 8% of the cases where both the defendant and victim were white, 1% of the cases where both the defendant and victim were black and 3% of the cases involving white defendants and black victims.

4.3 times as likely to receive a death sentence as defendants charged with killing blacks."[10] After an extensive evidentiary hearing, the district court concluded that McCleskey's statistics did not demonstrate a *prima facie* case in support of his contention.[11]

The United States Court of Appeals for the Eleventh Circuit reviewed the district court's opinion and found that, even assuming the validity of the Baldus study, it was "insufficient to demonstrate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context [as well as] insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis."[12] The Supreme Court of the United States granted certiorari, and in a five-to-four decision affirmed the dismissal of McCleskey's petition for a writ of *habeas corpus*.[13]

III. BACKGROUND: STATISTICS AS PROOF OF AN EQUAL PROTECTION VIOLATION

The Court analyzed McCleskey's equal protection claim[14] by relying on the basic principle that McCleskey must show the existence of purposeful discrimination,[15] and further, must show that this purposeful discrimination had a discriminatory effect on him.[16] McCleskey did not offer specific evidence to show racial discrimination in his particular case, but instead contended that a statistical study (the Baldus study) "compel[led] an inference that his sentence rest[ed] on purposeful discrimination."[17] To evaluate the Court's analysis in McCleskey's case, previous cases in which statistics have been accepted as proof of intent to discriminate must be examined.

In the 1976 case of *Washington v. Davis*,[18] the Court found that a law or official act is not unconstitutional solely because it has a racially disproportionate impact when no other evidence is presented to warrant a finding of pur-

10. *Id.* at 287. In addition, black defendants were found to be 1.1 times as likely to receive the death sentence as other defendants. *Id.*

11. McCleskey v. Zant, 580 F. Supp. 338, 379 (N.D. Ga. 1984). The district court stated that to prove this claim McCleskey would have had to establish a specific act or acts that showed he was intentionally chosen for the imposition of the death penalty because of his race or the race of his victim. *Id.*

12. McCleskey v. Kemp, 753 F.2d 877, 891 (11th Cir. 1985).

13. 481 U.S. at 279-82.

14. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

15. 481 U.S. at 292; *accord* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) and Washington v. Davis, 426 U.S. 229 (1976); *see infra* notes 39-59 and accompanying text.

16. 481 U.S. at 292 (citing Wayte v. United States, 470 U.S. 598 (1985); *see* Hunter v. Underwood, 471 U.S. 222 (1985); Rogers v. Lodge, 458 U.S. 613 (1982); Mobile v. Bolden, 446 U.S. 55 (1980); Personnel Adm'r. of Mass. v. Feeney, 442 U.S. 256 (1979).

17. 481 U.S. at 292-93.

18. 426 U.S. 229 (1976) (In this case, two black men applied for jobs with the Washington D.C. police department. When they were not accepted, the two men contended that the department's recruiting procedures were discriminatory because all applicants were required to take a language skills test "which excluded a disproportionately high number of [black] applicants." *Id.* at 246.).

poseful discrimination.[19] However, the Court made clear that discriminatory racial purpose need not be express and that a law's disproportionate impact on individuals in similar situations is relevant in an equal protection analysis.[20] Citing numerous jury selection cases as examples, the Court stated that "the systematic exclusion of [blacks from juries] is itself such an 'unequal application of the law . . . as to show intentional discrimination.'"[21]

A. Jury Selection Cases

It is in jury selection cases that statistics have often been used to show a pattern of racial discrimination within the criminal justice system. For example, in the case of *Whitus v. Georgia,*[22] Whitus alleged racial discrimination in the selection of the grand and petit juries which respectively indicted him and found him guilty of murder.[23] To support his claim, Whitus offered statistical proof which showed that while blacks made up 27.1% of the tax digest (from which jury members are selected), only 9.1% of the grand jury venire and 7.8% of the petit jury venire were blacks.[24] Noting that the burden rested with Whitus to prove the existence of purposeful discrimination, the Court found the statistical evidence to constitute "a prima facie case of purposeful discrimination."[25] The burden then shifted to the state to rebut this presumption. The state offered no explanation for the statistical disparity between the number of taxpaying blacks and those on jury venires, nor did the state offer any evidence indicating that these blacks were unqualified.[26] In light of this, the Court found the state failed to meet its burden of rebutting Whitus' *prima facie* case; therefore, Whitus' murder conviction was reversed and the state was directed to take the necessary steps to reindict and retry him.[27]

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19. *Id.* at 247.

20. *Id.* at 241. *But cf.* Palmer v. Thompson, 403 U.S. 217 (1971) (In this case, the Court did not accept the argument that the seemingly permissible ends served by a city ordinance could be impeached by a showing that racial motivations prompted city council action.).

21. *Id.* (quoting Akins v. Texas, 325 U.S. 398 (1945)); *see* Peters v. Kiff, 407 U.S. 493 (1972); Alexander v. Louisiana, 405 U.S. 625 (1972); Carter v. Jury Comm'n, 396 U.S. 320 (1970); Smith v. Texas, 311 U.S. 128 (1940); Pierre v. Louisiana, 306 U.S. 354 (1939); Norris v. Alabama, 294 U.S. 587 (1935); Neal v. Delaware, 103 U.S. 370 (1881).

22. 385 U.S. 545 (1967).

23. *Id.* at 546-47.

24. *Id.* at 552.

25. *Id.* at 551.

26. *Id.* at 552.

27. *Id.* Other jury selection cases involving the use of statistics include: Casteneda v. Partida, 430 U.S. 482 (1977) (2 to 1 disparity between Mexican-Americans in county population and those summoned to grand jury duty); Turner v. Fouche, 396 U.S. 346 (1970) (*prima facie* case established where blacks comprised 60% of general population and 37% of jury lists); Swain v. Alabama, 380 U.S. 202 (1965) (Blacks constituted 26% of those eligible for jury service and comprised 10-15% of the grand jury list. The Court held that this did not establish a *prima facie* case by merely showing underrepresentation by "less than 10%."). *See generally* Comment, *The Civil Petitioner's Right to Representative Grand Juries and a Statistical Method of Showing Discrimination in Jury Selection Cases Generally*, 20 UCLA L. REV. 581 (1973) (suggesting a statistical methodology to assist courts in determining whether a presumption of discrimination should be found).

In *Casteneda v. Partida*[28] the following statistics were presented to support Partida's claim of discrimination within the Hildago County jury selection system: "[T]he population of . . . [Hildago] county was 79.1% Mexican-American, but . . . over an 11-year period, only 39% of the persons summoned for grand jury service were Mexican-American."[29] In analyzing this claim, the Court set forth three steps a defendant must take in order to show that the "procedure employed [in the jury selection process] resulted in substantial underrepresentation of his race or the identifiable group to which he belongs."[30] First, the defendant must establish that his group is a distinct class that has been "singled out for different treatment under the laws, as written or as applied."[31] Second, he must prove the degree of underrepresentation.[32] Third, he must establish that the discriminatory procedure used is "susceptible of abuse or is not racially neutral."[33] In applying this test to the specific facts of this case, the Court found that the statistics offered established a *prima facie* case of discrimination against Mexican-Americans in the Hildago County grand jury selection process. The burden was then shifted to the state to rebut the case.[34] The state did not offer evidence that racially neutral qualifications for grand jurors resulted in the low proportion of Mexican-Americans.[35] This, in combination with the highly subjective nature of the Texas jury selection system[36] and the ease in which Mexican-Americans could be identified by their Spanish surnames,[37] led the Court to the conclusion that Partida had been denied equal protection under the law by the jury selection process in his case.[38]

B. Title VII Cases

The second line of cases in which the Court has accepted statistics as *prima facie* proof of purposeful discrimination are those where a claimant has attempted to establish a statutory violation under Title VII.[39] While the case of *McDonnell Douglas Corp. v. Green*[40] did not involve the use of statistics as proof of racial discrimination, it did establish the basic order and allocation

28. 430 U.S. 482 (1977).
29. *Id.* at 495.
30. *Id.* at 494.
31. *Id.; see* Hernandez v. Texas, 347 U.S. 475, 478-79 (1954).
32. 430 U.S. at 494; *see* 347 U.S. at 480; *see also* Norris v. Alabama, 294 U.S. 587 (1935).
33. 430 U.S. at 494; *see* Washington v. Davis, 426 U.S. at 241; Alexander v. Louisiana, 405 U.S. at 630.
34. 430 U.S. at 496.
35. *Id.* at 498.
36. *Id.* at 485; the qualifications of a jury member are as follows: "A grand juror must be a citizen of Texas and of the county, be a qualified voter in the county, be of 'sound mind and good moral character,' be literate, have no prior convictions, or be under pending indictment 'for any felony.'"
37. 430 U.S. at 497.
38. *Id.* at 501.
39. Title VII of the Civil Rights Act of 1964 was passed to proscribe discrimination in employment. *See* 42 U.S.C. § 2000e-2(a)-(c) (1976).
40. 411 U.S. 792 (1973).

of proof in a Title VII case. Initially, the complainant must establish a *prima facie* case of racial discrimination.[41] Then, if the complainant is successful in this, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the [complainant's] rejection."[42] Finally, if the employer meets this burden, the complainant is then given the opportunity to show that the employer's reasons were, in fact, a pretext for discrimination.[43] The Court noted that statistics relating to an employer's hiring policy and practice may be helpful in determining whether the employer's refusal to hire the complainant conformed to a general pattern of discrimination.[44]

After reviewing the burdens of proof as set forth in *Green*, the Court in *International Brotherhood of Teamsters v. United States*[45] examined statistics offered by the government to establish a *prima facie* case under Title VII.[46] The Court stated that previous cases have made it clear that "'[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue."[47] Referring to the repeated approval of statistical proof in jury selection cases, the Court declared that "statistics are equally competent in proving employment discrimination."[48] The Court found a violation of Title VII because the government had proved a *prima facie* case of purposeful employment discrimination which had been inadequately rebutted by the company.[49]

The recent case of *Bazemore v. Friday*[50] involved the use of multiple regression analysis to demonstrate that blacks within the North Carolina Agricultural Extension Service were paid less than similarly situated whites.[51] The United States' expert used four independent variables, namely race, education, tenure

41. 411 U.S. at 802 (While facts will vary from case to case, a *prima facie* case of racial discrimination is generally established where the complainant can show that (1) he belongs to a racial minority; (2) he applied and met the qualifications for a job in which the employer was seeking applicants; (3) complainant, despite his qualifications was rejected; and (4) after complainant's rejection, the employer continued to seek applicants with the same qualifications as complainant.).

42. 411 U.S. at 802.

43. *Id.* at 804.

44. *Id.* at 805.

45. 431 U.S. 324 (1977); *see also* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Davis v. Cook, 80 F. Supp. 443 (N.D. Ga. 1948), *rev'd*, 178 F.2d 595 (5th Cir. 1949).

46. *Id.* at 337. The government alleged that a trucking company had engaged in a pattern or practice of discrimination against blacks and Spanish-surnamed Americans. 431 U.S. at 326. In support of their contention, the government offered proof that of the company's 6,472 employees, only 314 (5%) were Negroes and 257 (4%) were Spanish-surnamed Americans. *Id.* at 337.

47. *Id.* at 339 (quoting Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1976)).

48. 431 U.S. at 339.

49. *Id.* at 342. In Hazelwood School District v. United States, 433 U.S. 299 (1977), the Court again noted the importance of statistics as a source of proof in employment discrimination cases, and found that the statistics offered established a *prima facie* case of purposeful discrimination. *Id.* at 307-13. In this case, the government alleged that the St. Louis School District was engaged in a "pattern or practice" of teacher employment discrimination in violation of Title VII. That statute became applicable to the School District in March of 1972. *Id.* at 301. In support of this contention, the government offered statistics showing that in 1972-73, the percentage of blacks on Hazelwood's teaching staff was 1.4% in contrast to a percentage of 5.7% qualified black teachers in the area.

50. 478 U.S. 385 (1986).

and job title, to prepare multiple regression analysis relating to salaries in the years 1974, 1975 and 1981.[52] The district court refused to accept this statistical evidence and entered judgment for the Extension Service.[53] The Eleventh Circuit Court of Appeals affirmed, stating that the district court was correct in rejecting the statistical evidence because "[a]n appropriate regression analysis of salary should . . . include *all* measureable variables thought to have an effect on salary level."[54] Because the multiple regression analysis offered by the government did not consider all variables, the court of appeals concluded that the analysis could not be considered acceptable as evidence of discrimination.[55]

The Court found that the lower court was plainly incorrect in its view of the evidentiary value of regression analysis.[56] While failure to include variables may make the analysis less probative, the Court noted that "it could hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.'"[57] Further, the Court noted that clearly "a regression analysis that includes less than 'all measureable variables' may serve to prove a plaintiff's case . . . . [A]s 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."[58] The case was remanded with instructions to examine the entire evidence in the record relating to salary disparity.[59]

The above cases illustrate the areas where the Court is willing to accept statistical evidence as *prima facie* proof of discrimination. In successful Title VII cases, the Court enforces a statute enacted to eliminate racial discrimination in public and private employment. Therefore, a high degree of scrutiny is applied to suspect practices.[60] In jury selection cases, the Court applies an equally high degree of scrutiny in examining facially neutral jury selection procedures.[61]

IV. INSTANT CASE EQUAL PROTECTION RATIONALE

In *McCleskey* the Court assumed the validity of the Baldus study, but found it insufficient to create a *prima facie* case of purposeful discrimination.[62] The

51. *Id.* at 398-99.
52. *Id.* The variables were used because during discovery testimony an Extension Service official stated that education, tenure, job title and job performance were used to determine salary levels. *Id.*
53. *Id.* at 386.
54. 751 F.2d 662, 672 (11th Cir. 1984).
55. *Id.*
56. 478 U.S. at 400.
57. *Id.*
58. *Id.*
59. *Id.* at 404.
60. J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 550 (3d ed. 1986).
61. *Id.* at 544-47.
62. 481 U.S. at 297.

Court distinguished the Baldus study from the type of statistical research used in Title VII and jury selection cases[63] by observing that the statistical research in those cases involved: 1) fewer decision-makers;[64] 2) fewer variables that were "relevant to the challenged decisions;"[65] and finally, 3) decision-makers in those cases had an opportunity to explain any statistical discrepancy.[66] The Court further emphasized the importance of prosecutorial discretion in the criminal justice process, and stated that it "would demand exceptionally clear proof before [inferring] that the discretion had been abused."[67] Justice Blackmun, in his dissent, stated that the Court treated McCleskey's claim as if it only challenged the acts of the jury and the state legislature.[68] The dissent thought the majority was incorrect because the majority distinguished this case from Title VII and jury selection cases without considering the role the prosecutor plays in the capital sentencing process.[69] By recognizing the prosecutor's role, the Court could have easily examined the issues raised by the Baldus study using the same standard of review found in Title VII and jury selection cases.[70]

V. BACKGROUND: EIGHTH AMENDMENT JURISPRUDENCE

In the second part of the opinion, the Court examined McCleskey's allegation that the Baldus study demonstrated that the Georgia death penalty system violated the eighth amendment prohibition of "cruel and unusual punishment."[71] In addressing this claim, the Court delineated the "constitutionally permissible range of discretion in imposing the death penalty"[72] which has developed. A state must set forth rational criteria which sufficiently narrow a decision-maker's judgment as to whether the circumstances of a particular defendant's case warrants imposition of the death penalty.[73] The state, however, may not limit the

63. *Id.* at 296.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 297 (The Court noted two additional concerns underlying their decision. Acceptance of McCleskey's claim, based on the Baldus study, could open the door to claims based on a statistical study indicating *any* arbitrary variable as influential in the jury's decisionmaking process. *Id.* at 1779-81. Further, McCleskey's arguments constituted legislative and not judicial concerns. *Id.* at 1781.

In response to the Court's "slippery slope" concerns, Justice Brennan, in his dissent, stated that the majority disregarded the sophistication of the Baldus study and overlooked the moral and constitutional ramifications of racial discrimination as compared with any other arbitrary variable that may be brought into question. *Id.* at 1792. He also responded to the Court's statement that McCleskey's claims ought to be presented to the legislature. Justice Brennan observed that the relatively few who face the possibility of receiving the death penalty are not in the position to be heard above the majority of the population's demand for punishment. *Id.* at 1793.).
68. *Id.* at 350 (Blackmun, J., joined by Justices Marshall, Stevens, and Brennan, dissenting).
69. *Id.*
70. *Id.*
71. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
72. 481 U.S. at 305.
73. *Id.*; *see also* Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

consideration of any circumstances which may cause the decision-maker to refrain from imposing the death penalty.[74] Further, a state may not impose the death penalty where society would consider it disproportionate to the crime committed.[75] To understand this standard, it is important to review the decisions which led to its development.[76]

A. Statutory Limitation on Juror Discretion

In the 1971 case of *McGuautha v. California*,[77] petitioners claimed that permitting the jury to impose the death penalty without any set criteria to govern their decision violated the due process clause of the fourteenth amendment.[78] The Court rejected this contention and stated that "the States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human being will act with due regard for consequences of their decision and will consider a variety of factors."[79]

One year later, in *Furman v. Georgia*,[80] the Court seemed to have retreated from this view when directly faced with the issue of whether imposition of the death penalty constituted 'cruel and unusual' punishment in violation of the eighth and fourteenth amendments.[81] A five-to-four majority, per curiam, held that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wan-

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74. 481 U.S. at 306. *See also* Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Gregg v. Georgia, 428 U.S. 153 (1976).

75. 481 U.S. at 306; *see* Coker v. Georgia, 433 U.S. 584 (1977) (where the Court invalidated a death sentence for the crime of rape); *see also* Enmund v. Florida, 458 U.S. 782 (1982) (where Enmund waited in the car while his two co-defendants robbed a home. In the course of the robbery the victims resisted and both were shot. Enmund, found to be a constructive aider and abettor under Florida law, was sentenced to death. The Court invalidated the death sentence, stating that it was "an excessive penalty for the robber, who, as such, does not take human life." *Id.* at 797.). *But see* Tison v. Arizona, 107 S. Ct. 1676 (1987) (where the Court held that the eighth amendment does not ban imposition of the death penalty on a defendant who did not inflict the fatal wounds, but whose participation in the felony resulting in the murder was major and his mental state was one of "reckless indifference to human life." *Id.* at 1688.).

76. In the earliest cases, the issue was not whether the sentence of death itself was unconstitutional, but rather whether a particular method of punishment was "too cruel to pass constitutional muster." 107 S. Ct. at 1770 (quoting Gregg v. Georgia, 428 U.S. 153 (1976)); *see In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1879). In Weems v. United States, 217 U.S. 349 (1910), the Court addressed the constitutionality of a punishment involving 12 years hard labor in chains for the crime of falsifying an official document. Finding the punishment unconstitutional, the Court stated that the eighth amendment not only reaches punishments that are "inhuman and barbarous," but also extends to punishment that is disproportionate to the particular offense involved. *Id.* at 366-67. Later, in Trop v. Dulles, 356 U.S. 86 (1958), Chief Justice Warren pointed out that the "evolving standards of decency" within a society are important in assessing the challenged punishment in an eighth amendment claim. *Id.* at 101.

77. 402 U.S. 183 (1971).

78. *Id.* at 185.

79. *Id.* at 208.

80. 408 U.S. 238 (1972).

81. Each of the three black defendants in *Furman* had been sentenced to death under statutes which gave the judge or jury the discretion to impose the death penalty. *Id.* at 239.

tonly and so freakishly imposed,"[92] and thus invalidated the death penalty laws of thirty-nine states and various federal provisions. The dissenting justices' main concerns were the lack of trust in jurors, who are the "keystone in [the] system of criminal justice,"[83] and also the lack of deference to legislative judgment found in the concurring opinions.[84]

In *Gregg v. Georgia,*[85] the Court was faced with the issue of whether "the punishment of death for the crime of murder is, under all circumstances, 'cruel and unusual' in violation of the Eighth and Fourteenth Amendments."[86] The Court began analysis of this issue by noting that at least thirty-five states and Congress had created new death penalty statutes since *Furman*, and found this to clearly show that capital punishment had not been rejected by the people.[87] In the majority's opinion the utilization of capital punishment by juries also supported society's approval of the death penalty in appropriate cases.[88]

Additionally, the Court considered the value of the death penalty as serving principal social purposes, namely, retribution and deterrence.[89] In light of these considerations, "as well as respect for the ability of a legislature to evaluate in terms of its particular State, the moral consensus concerning the death penalty . . . [we] conclude . . . that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."[90]

The new Georgia death penalty statute was found constitutional because it provided for a bifurcated proceeding, it allowed the jurors to examine all relevant circumstances in each particular case, and it required the jury to find and identify at least one statutory aggravating factor before imposing the death penalty.[91] As an added precaution, every case involving a death sentence was

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82. 408 U.S. at 310 (opinion of Justice Stewart). Each justice gave a separate concurring or dissenting opinion in the *Furman* case, with the question being left open whether *any* death penalty, as opposed to a randomly administered one, would be unconstitutional. While racial discrimination was not proven in *Furman*, Justice Douglas, in his concurring opinion, stated that the discretionary statutes "are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." *Id.* at 257. *But see* C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE, 67-68 (1974) (Stating that capital sentencing statutes will never effectively restrict jury discretion, for "no society is going [to impose the death penalty] on everybody who meets certain present verbal requirements.").

83. *Id.* at 402 (Burger, C.J., dissenting).

84. *Id.* at 418 (Powell, J., dissenting).

85. 428 U.S. 153 (1976). Gregg was sentenced to death under the post-*Furman* Georgia death penalty statute for murder in the course of an armed robbery. *Id.* at 159.

86. *Id.* at 168.

87. *Id.* at 179-80 (A decade after *Furman*, 72% of the general public favored the death penalty. An ABA poll further revealed that 69% of ABA member lawyers took the same position. Streib, *Executions Under the Post-Furman Capital Punishment Statutes*, 15 RUTGERS L.J. 443, 483-84 n.413 (1984).).

88. *Id.* at 181-82.

89. *Id.* at 186-87.

90. *Id. But see* Black, *Due Process For Death*, 26 CATH. U.L. REV. 1 (1976) (Where the author states that to say that a legislature can effectively evaluate results of complex statistical studies is "nothing but sheer fiction!" *Id.* at 14.).

91. 428 U.S. at 207.

automatically reviewed by the Georgia Supreme Court.[92]

When Gregg pointed out the opportunities for discretionary action allowed decision-makers "in the processing of any murder case under Georgia law,"[93] the Court chose to view these discretionary stages as opportunities for a decision-maker to show mercy and to remove a defendant from consideration for the death penalty.[94] There was no reference in the Court's opinion to the possibility that these stages may also provide an opportunity for impermissible biases to enter the decision-making process.

B. Consideration of Mitigating Circumstances

In *Lockett v. Ohio*,[95] the issue was the validity of a death sentence imposed under a statute which did not allow the jury to consider all mitigating circumstances surrounding a particular case.[96] The Court found that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as *a mitigating factor*, any aspect of a defendant's character . . . and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[97]

C. Comparative Review

A different constitutional challenge was raised in *Pulley v. Harris*[98] when the defendant, Harris, contended that the California death penalty system was invalid because there was no provision for the California Supreme Court to compare Harris' sentence with the sentences in similar cases to determine whether the relative sentences were proportionate.[99] The Court disagreed with this contention, stating that "comparative proportionality review" is not a requirement

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92. *Id.* (While Georgia, Texas and Florida enacted new death penalty statutes designed to channel and guide sentencing discretion, other states responded to *Furman* by enacting mandatory death penalties in lieu of discretionary jury sentencing. On the same day *Gregg* was decided, the Court invalidated North Carolina's and Louisiana's mandatory death statutes. In Woodson v. North Carolina, 428 U.S. at 280 (1976), the Court noted: "N.C.'s mandatory death statute provides no standards to guide the jury. Furthermore, the statute contains no provision allowing for the judiciary to check arbitrary and capricious exercise [of the jury's discretionary power] through a review of death sentences." *Id.* at 303); *see also* Stanislaus Roberts v. Louisiana, 429 U.S. 325 (1976).

93. *Id.* at 199.

94. *Id.*

95. 438 U.S. 586 (1978).

96. *Id.* at 597 (Specifically, Lockett alleged that the Ohio death penalty statute did not permit the sentencing judge to consider, as mitigating factors, "her character, prior record, age, lack of specific intent to cause death and relatively minor part in the crime." *Id.*).

97. *Id.* at 604; *see also* Eddings v. Oklahoma, 455 U.S. 104 (1982) (where a 16 year old was tried as an adult for murder. The trial judge would not consider evidence relating to the boy's harsh upbringing. The Court stated that while the sentencer and the state appellate court "may determine the weight to be given relevant mitigating evidence," it is improper for them not to give it any weight by excluding such evidence from their consideration. *Id.* at 129.).

98. 465 U.S. 37 (1984).

99. *Id.* at 39-40.

when other procedures within the sentencing system provide adequate protection from the risk of an arbitrarily imposed sentence.[100]

D. Imposition of the Death Penalty by a Judge

In 1984, another constitutional challenge was raised in *Spaziano v. Florida*.[101] In that case, the trial judge imposed a death sentence, disregarding the jury's recommendation of a life sentence for the defendant.[102] The Court rejected the contention that this was in violation of the eighth amendment, stating that the death sentence may be imposed by either the jury or a judge because the "community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined,"[103] as when the community voice is evidenced by a jury decision.

VI. INSTANT CASE EIGHTH AMENDMENT RATIONALE

Under eighth amendment analysis, the Court in the instant case rejected McCleskey's claim that his sentence was disproportionate and had been imposed in an arbitrary manner.[104] Instead, the Court found that the Baldus study "did not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process."[105] While conceding that some risk of racial bias may enter jury decisions, the Court pointed out that the discretion allowed jurors and prosecutors within the system often benefitted a defendant.[106] The Court stated further that the value of trial by jury underlies the entire administration of criminal justice, for it is the jury who speaks as the "conscience of the community."[107] Finally, the Court held that safeguards have been developed to "minimize racial bias in the [sentencing] process."[108]

Justice Brennan, in his dissent, responded to the Court's statement that juror discretion is fundamental to our criminal justice system.[109] He explained that while jurors must consider each defendant as a unique human being, the consideration of *race* as a factor in decision-making strikes against the very reason for granting sentencing discretion.[110] In this situation, the sentencer is not viewing

100. *Id.* at 50-54.
101. 468 U.S. 447 (1984).
102. *Id.* at 551-52.
103. *Id.* at 462.
104. 481 U.S. at 306-13.
105. *Id.* at 313.
106. *Id.*
107. 481 U.S. at 310 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).
108. 481 U.S. at 313.
109. *Id.* at 311-12.
110. *Id.* at 336 (Brennan, J., joined by Justices Blackmun, Marshall and Stevens, dissenting).

the defendant as a unique human being, but rather is categorizing the individual according to his color.[111] Justice Brennan thought that the majority could not simply assume that Georgia's statutory safeguards were sufficient to channel the sentencer's discretion, for it was the very effectiveness of these safeguards that the Baldus study called into question.[112] In this context, "[the] Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of a 'sober second thought.'"[113]

VII. ANALYSIS

While conceding the validity of the Baldus study, the Court nevertheless emphasized that the study did not prove the existence of purposeful discrimination in McCleskey's particular case.[114] In contrast to the decision in *McCleskey*, the Court has accepted statistical evidence in jury selection and Title VII cases.[115] Further, the Court has consistently found such statistics to create a *prima facie* case of purposeful discrimination.[116] This is true even in jury selection cases where the Court is not enforcing a statute specifically enacted to prohibit racial discrimination, as it is in Title VII cases.[117] The subjective nature of the jury selection procedures is a major factor explaining the high degree of scrutiny the Court employs in these situations.[118] Even more important is that the Court has used the same standard of review where a *prosecutor* was alleged to have been exercising his right to peremptory challenges in a racially discriminatory manner.[119]

Considering the discretion allowed both prosecutor[120] and jury[121] in the death penalty process, the acts of these decision-makers should be scrutinized just as closely as the acts of administrators in jury selection procedures or Title VII situations. However, in *McCleskey*, the Court was unwilling to accept the Baldus study as sufficient *prima facie* proof of discrimination. In support of this decision, the Court noted that the study challenged Georgia's criminal justice system—laws which are necessary to protect the citizens of Georgia. Believing

111. *Id.*
112. *Id.* at 338.
113. *Id.* at 343 (quoting Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936)).
114. 481 U.S. at 292-93.
115. *See supra* notes 22-59 and accompanying text.
116. *Id.*
117. J. NOWAK, *supra* note 60, at 544-50.
118. *Id.* at 545; *see* Casteneda v. Partida, 430 U.S. 482 (1977); Alexander v. Louisiana, 405 U.S. 625 (1972); Cassell v. Texas, 339 U.S. 282 (1950); Hill v. Texas, 316 U.S. 400 (1942).
119. Batson v. Kentucky, 476 U.S. 79 (1986).
120. This discretion is generally susceptible to abuse. *See infra* notes 129-132 and accompanying text.
121. Under Gregg v. Georgia, 428 U.S. 153 (1976), and cases thereafter, the juror's discretion is sufficiently narrowed where a juror, considering all relevant circumstances, finds at least one statutory aggravating factor before imposing the death penalty. *Id.* at 207. *See supra* notes 85-90 and accompanying text.

that discretion is "essential to the criminal justice process,"[122] the Court stated that it would "demand exceptionally clear proof" before inferring that this discretion had been abused.[123]

A. Separation of Jurors' Roles From the Prosecutor's Role

Admittedly, the value and privilege of a jury trial is fundamental to the criminal justice system and the decision to impose the death penalty was, in McCleskey's case, made by a "petit jury selected from a properly constituted venire."[124] While the results of the Baldus study challenged the sufficiency of the safeguards "designed to minimize racial bias,"[125] the Court correctly pointed out that an attempt to deduce a consistent policy from the decisions of hundreds of juries, each made up of twelve unique individuals, is extremely difficult.[126] True, as well, is the fact that jurors "cannot be called . . . to testify to the motives and influences that led to their verdict."[127]

Analysis of the *prosecutor's* role in the death penalty process does not present these problems. The prosecutor alone has a large amount of control over the number of defendants sent to death row.[128] This control occurs in three areas where he has the opportunity to intervene in the criminal process. First, it is the prosecutor who formulates the criminal charge determining whether or not the death penalty is permissible if a conviction is obtained.[129] Second, he has virtually complete discretion in deciding whether to offer a life sentence in exchange for a guilty plea in cases where a death sentence is possible and a plea bargain is appropriate.[130] Third, after conviction, the prosecutor may or may not demand that the trial proceed to the death penalty stage.[131] The jury does not enter the death sentencing process until after the prosecutor has made the appropriate decisions leading to their involvement.[132] By separating the prosecutor's role in *seeking* the death penalty from the jury's role in *imposing* the death penalty, the factors that the Court used to distinguish the Baldus study

122. 481 U.S. at 297.
123. *Id.*
124. *Id.* at 294.
125. *Id.* at 313.
126. *Id.* at 295-96 n.15.
127. *Id.* (quoting Chicago B. & R. Co. v. Babcock, 204 U.S. 585, 593 (1907)).
128. Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 466 (1981); *see also* Grifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659, 669 (1981) ("Existing controls on the prosecutor are inadequate to guard against abuses in the charging decision."); McDaniel, *Prosecutorial Discretion*, 72 GEO. L. J. 365, 365-66 (1983) ("The prosecutor has broad authority to decide what charges to bring, when to bring them, where to bring them, and whether to prosecute.").
129. Zeisel, *supra* note 128, at 466-67.
130. *Id.*
131. *Id.*
132. *Id.*

from statistics used in Title VII and jury selection cases are eliminated.[133] As discussed in more detail below, these factors include: 1) the number of factors affecting a decision; 2) the number of decision-makers; and 3) the availability of an opportunity to explain any statistical disparity. It is difficult to reconcile the Court's claimed "unceasing efforts to eradicate racial prejudice from . . . [the] criminal justice system,"[134] with the difficult, if not impossible, burden of establishing a *prima facie* case it placed on McCleskey in the instant case.

1. Number of Factors Affecting a Decision

The Court expressed the belief that there are fewer factors affecting a decision in jury selection or Title VII cases than in McCleskey's case.[135] Therefore, statistics showing a racially disparate impact in those cases may show intentional discrimination simply because of the lack of alternative factors.[136]

While a prosecutor may consider a number of relevant factors in deciding whether to seek the death penalty, including strength of available evidence and witness availability, credibility and memory,[137] these factors provide a common standard for the prosecutor to assess each defendant's case. This is directly comparable to an employer who must review numerous relevant factors in making an employment decision, or to a jury commissioner who must consider an array of factors in determining whether a citizen is "upright" or "intelligent" so as to be eligible for jury duty.[138] Since a prosecutor considers an equivalent number of factors in making his decision as does an employer or jury commissioner, it is inaccurate to distinguish McCleskey's case from jury selection or Title VII situations on this basis.

In *Bazemore v. Friday,*[139] a Title VII situation, the Court emphasized how "a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case [of purposeful discrimination]."[140] According to statistical experts submitting an *amicus* brief in support of McCleskey, "the likelihood that any omitted variable could significantly affect Baldus's . . . findings

133. *See infra* notes 147-57 and accompanying text.

134. 481 U.S. at 309 (quoting Batson v. Kentucky, 476 U.S. 79, 85 (1986)).

135. 481 U.S. at 294-96 (The Court pointed out that the factors in jury selection cases are limited by state statute). *See* Turner v. Fouche, 396 U.S. 346 (1970) (jury commissioners may exclude from grand jury service those citizens that are not "upright" and "intelligent"); *see also supra* note 37. As to factors involved in employment decisions, the Court stated that: "while employment decisions may involve a number of relevant variables, these variables are to a great extent uniform for all employees because they must all have a reasonable relationship to the employee's qualifications to perform the particular job." 481 U.S. at 279.

136. Brief Amicus Curiae by State of California, by John K. Van de Kamp, Attorney General and County of Los Angeles, by Ira Reiner, District Attorney, for Respondent at 25, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811).

137. 481 U.S. at 307 n.28.

138. *Id.* at 295 n.14.

139. 478 U.S. 385 (1986).

140. *Id.* at 400.

is negligible."[141] This is especially true because of the numerous variables that were taken into account. For an unaccounted variable to actually make a difference in the Baldus study results, "it would have to be substantially correlated with the race of the victim and yet substantially uncorrelated with the 230 variables defined by Professor Baldus . . . . It is extremely unlikely that any factor that powerful has been overlooked in [his] study."[142] In light of the detail and sophistication of the Baldus study, it is difficult to understand why the Court did not follow the reasoning in *Bazemore*, at least to the extent of accepting the Baldus study as proving a *prima facie* case of purposeful discrimination.

2. Number of Decision-makers

The Court also believed that there is a greater number of decision-makers in a capital sentencing case than in a Title VII case or a jury selection situation.[143] Since fewer decision-makers are involved in the latter cases, it is much easier to statistically show a consistent policy of the particular decision-maker.[144] Yet the Baldus study demonstrated that the race of the victim is an especially significant factor at the point at which the *prosecutor* decides whether or not to proceed to the death sentencing phase.[145] This effect was demonstrated in Fulton County, the county where McCleskey was tried and sentenced and also at the statewide level.[146] In regard to the Fulton County statistics, the Court stated that "the statistics in Fulton County alone represent the disposition of [a relatively few number of] cases . . . . [T]he weight to be given the results gleaned from this small sample is limited."[147] It is difficult to understand why statistics demonstrating discriminatory prosecutorial decisions, that correlate with statewide statistics,[148] were found insufficient to even require the State's rebuttal.[149] The decisions were made solely by prosecutors within Fulton County, a group small enough where any "unexplained statistical discrepancy"[150] could more easily be attributed to a consistent policy of the decision-makers. These statistics were based on 629 cases, and were consistent with statewide statistics based on a much larger group.[151]

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141. Brief Amicus Curiae by Dr. Franklin M. Fisher, Dr. Richard O. Lempert, Dr. Peter W. Sperlich, Dr. Marvin E. Wolfgang, Professor Hans Zeisel, and Professor Franklin E. Zimring for Petitioner at 22. McCleskey v. Kemp, 481 U.S. at 279 (1987) (No. 84-6811).
142. *Id.*
143. 481 U.S. at 295.
144. *Id.* at 295 n.14.
145. 481 U.S. at 353-59 (Blackmun, J., dissenting); *see supra* note 9 and accompanying text.
146. 481 U.S. at 353-59 (Blackmun, J., dissenting).
147. 481 U.S. at 295-96 n.15.
148. 481 U.S. at 356 n. 11 (Blackmun, J., dissenting).
149. 481 U.S. at 293-95.
150. *Id.* at 295 n.15.
151. *Id.* at 356 (Blackmun, J., dissenting).

3. Opportunity to Explain Statistical Disparity

The Court further distinguished McCleskey's case from the jury selection and Title VII cases. In the latter cases, "the decision-maker has an opportunity to explain the statistical disparity."[152] The Court noted that because of the wide discretion traditionally given prosecutors, it would be improper to require them to defend their decisions to seek death penalties.[153]

With respect to this proposition, it is important to note Justice Blackmun's dissenting opinion in which he states: "[t]he Court's refusal to require that the prosecutor provide an explanation for actions . . . is completely inconsistent with this Court's longstanding precedent."[154] Justice Blackmun cited *Imbler v. Pachtman*[155] which held that a prosecutor acting within the scope of his duties was immune from an action for damages.[156] The Court in that case, however, noted that this did not mean that a prosecutor would never have to account for his decisions.[157] The recent case of *Batson v. Kentucky*[158] demonstrates that prosecutorial action is reviewable. In *Batson*, the Court recognized that a prosecutor could be required to rebut a *prima facie* case formulated against him, evidencing a racially discriminatory exercise of his peremptory challenges.[159]

In comparison, the Court in the instant case found it improper to question prosecutorial motive when confronted with statistical proof which was based on hundreds of cases and which evidenced a racial disparity in the prosecutor's decision to seek the death penalty.[160] Admittedly, McCleskey did not offer particularized evidence in his case.[161] However, when the Baldus study is considered only in terms of the prosecutor's role, the adequacy of these statistics is directly comparable to the adequacy of statistics accepted as *prima facie* proof of discrimination in jury selection and Title VII cases.[162] Statistical evidence this comprehensive should have been sufficient to overcome the Court's deference to "policy considerations" underlying the traditional discretion allowed prosecutors.[163]

B. Suggested Standard of Review

The Court in *Batson* remanded with instructions that the evidence demon-

152. *Id.* at 296.
153. *Id.*
154. *Id.* at 363 (Blackmun, J., dissenting).
155. 424 U.S. 409 (1976).
156. *Id.* at 429.
157. *Id.* at 428-29.
158. 476 U.S. 79 (1986).
159. *Id.* at 96-98.
160. 481 U.S. at 356 (Blackmun, J., dissenting).
161. *Id.* at 292-93.
162. *See supra* notes 129-32 and accompanying text.
163. 481 U.S. at 296.

strating a prosecutor's discriminatory use of peremptory challenges at the defendant's trial should be analyzed under the *Casteneda* three part test.[164] Under this test, a showing of express discriminatory purpose is not required.[165] Instead, the claimant must show that first, he is a member of a recognizable class "singled out for different treatment";[166] second, that there has been a "substantial degree of differential treatment";[167] and third, that the procedure is "susceptible of abuse."[168] If a *prima facie* case is established, the burden shifts to the prosecutor to come forward with a neutral explanation for his actions. If the prosecutor cannot establish this explanation, the petitioner's conviction should be reversed.[169] Thus, the Court held the prosecutor to the same standard as administrators of jury selection processes.[170] *Batson* involved discrimination in choosing a jury, the central duty of which is to act as a safeguard against "the arbitrary exercise of power by prosecutor or judge."[171] The state contended that the prosecutor's "privilege of unfettered exercise of the [peremptory] challenge is vital [to the criminal justice system]."[172] In response, the Court stated that requiring courts to be wary of racially discriminatory use of peremptory challenges "enforces the mandate of equal protection and furthers the ends of justice."[173]

In contrast, the Court in the instant case demanded "exceptionally clear proof" before inferring that "discretion essential to the criminal justice process" had been abused.[174] The discrepancy is difficult to justify. Where statistics as comprehensive as the Baldus study indicate an abuse of prosecutorial discretion throughout a death penalty process, the Court should apply the same degree of scrutiny to the prosecutor's actions as provided in *Batson*. Generally, the separation of powers doctrine prevents judicial interference with a prosecutor's discretion to conduct criminal prosecutions.[175] However, this does not relieve the Court from its duty to scrutinize evidence which substantiates an allegation

164. 476 U.S. at 96-98.
165. 430 U.S. 482, 493 (1977).
166. *Id.* at 494.
167. 481 U.S. at 352 (Blackmun, J., dissenting) Blackmun is applying the "rule of exclusion" method of proof. *Id.* at 352 n. 6.
168. 430 U.S. at 494-95.
169. Batson v. Kentucky, 476 U.S. 79, 97 (1986).
170. *Id.*
171. *Id.* at 86.
172. *Id.* at 98.
173. *Id.*
174. 481 U.S. at 297.
175. *See* United States v. Moran, 759 F.2d 777, 783 (9th Cir. 1985) (court reluctant to substitute its judgment for prosecutor's in deciding when indictment should issue), *cert. denied*, 474 U.S. 1102 (1986); United States v. Greene, 697 F.2d 1229, 1235 (5th Cir.) (principle of prosecutorial discretion grounded in separation of powers), *cert. denied*, 463 U.S. 1210 (1983); United States v. Chagra, 669 F.2d 241, 247 (5th Cir.) (Constitutional authority for faithful execution of laws textually committed to executive branch), *cert. denied*, 459 U.S. 846 (1982).

of discrimination in prosecutorial decisions.[176] The assumption that the jury will act as a safety net for any "arbitrary exercise of power by the prosecutor"[177] cannot be used to excuse discriminatory behavior on the part of the prosecutor.

VIII. CONCLUSION

The Court in *McCleskey* placed an extraordinarily heavy burden of proof on the petitioner when compared to cases where statistics have been accepted as proof of discrimination. The statistics proffered as evidence of discriminatory prosecutorial conduct should have been analyzed under the less burdensome *Casteneda* three part test. Whenever a *prima facie* case is established under this analysis, as it was in *Batson*,[178] the prosecutor should be made to bear the burden of establishing a neutral basis for his actions.[179]

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176. *See* United States v. Batchelder, 442 U.S. 114, 123 (1979) (The government is free to prosecute under any statute violated by defendant, as long as prosecution is not discriminatory.); Oyler v. Boles, 368 U.S. 448, 456 (1962) (The equal protection clause prohibits selective enforcement of a statute where such selection was "based upon an unjustifiable standard such as race, religion or other arbitrary classification." *Id.*).

177. Batson v. Kentucky, 476 U.S. 79, 86 (1986).

178. In his dissent, Justice Blackmun, joined by Justices Marshall, Stevens and Brennan, stated that under this standard, "McCleskey's showing is of sufficient magnitude that, absent evidence to the contrary, one must conclude that racial factors entered into the decisionmaking process." 481 U.S. at 359 (Blackmun, J., dissenting).

179. 476 U.S. at 97; *see supra* notes 21-38 and accompanying text.