

ABSTRACT

Title of Dissertation: A RE-ANALYSIS OF THE ROLE OF RACE IN THE
FEDERAL DEATH PENALTY SYSTEM

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The death penalty, as the ultimate sanction, has always served as a source of great debate and remains one of the most controversial punishments meted out by the criminal justice system. Due to concerns of its administration and application, a moratorium on the death penalty was declared by the U.S. Supreme Court in *Furman v. Georgia* in 1972, and states were mandated by the Court to overhaul their respective death sentencing statutes in a manner that would conform to Court-approved standards under the U.S. Constitution. After the death penalty was reinstated in 1976, it was believed by many that the deficiencies cited in sentencing outcomes in capital cases four years earlier in *Furman* would either be eliminated or at least brought within constitutionally acceptable levels. Although there has been a wealth of empirical studies over the years at the state level, very few analyses have focused on how the death penalty is administered in the Federal system. In 2002, a study was funded to examine the potential influence of race in decisions by U.S. Attorney's Offices to seek or not seek the death penalty for defendants charged with death-eligible offenses under Federal law. Three independent research teams investigated whether

charging outcomes could be explained by relevant legal factors such as the heinousness of the offense. However, unlike the wealth of death penalty research which has conducted such analyses using more traditional multivariate models to isolate the effect of race on charging and sentencing outcomes, the three research teams conducted alternate analyses to compare outcomes in white victim versus non-white victim cases. The purpose of the current study will be to examine the role of race on charging decisions made in the federal death penalty system using more traditional logistic regression analyses. The final results suggest that capital cases involving white victims may have a higher risk of being charged with the death penalty than cases involving non-white victims.

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SYSTEM

by

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Dedication

This work is dedicated to Barbara A. Chapman
and Pamela C. Chapman
whose love and support has
always been unwavering and limitless.

Acknowledgement

I would like to thank my family, friends and professors who supported me and helped to make this goal a reality. First and foremost, I want to thank one of my closest friends, Dr. William F. Tate IV, for his friendship, guidance and support. Second, I would like to express my gratitude to each of the members that served on my dissertation committee for their support and guidance throughout my academic career. I am especially grateful to Dr. Ray Paternoster, my committee chairman, who was not only an advisor, but a mentor and valued role model during my academic career at the University of Maryland. Finally, I would like my former division chiefs at the National Institute of Justice who stayed on my back to make sure that I was doing the right thing. The journey was hard and long, but it was worth it.

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Chapter I

INTRODUCTION

A. Opening Remarks

In the area of criminal justice and criminology, there may be few subjects that evoke as much controversy and debate as the death penalty. Although the death penalty is thought to be an appropriate sentence for the “worst of the worst”, critics characterize this sanction as capricious, arbitrary, and discriminatory. In 1972, the United States Supreme Court struck down existing death sentencing statutes nationwide in the landmark case of *Furman v. Georgia*¹, and declared them to be in violation of the Eighth and Fourteenth Amendments of the U.S. Constitution. Although a very fractious opinion, the common sentiment that resonated among the plurality was the belief that the statutes were arbitrary, capricious and discriminatory in their application. These statutes, the Court held, were administered in such a manner that extra-legal criteria such as the race or social class of the victim and defendant could have influenced sentencing outcomes in the decision making. The Court was also concerned with the legal structure of the existing death sentencing statutes and their failure to provide sufficient safeguards against arbitrary and capricious sentencing in cases where the death penalty was permissible by law.

Accordingly, all states with capital sentencing statutes that wanted to retain the death penalty in their jurisdictions were required to revise their statutes in order to correct the deficiencies cited in *Furman*. The four year moratorium on the death penalty was lifted in 1976 when the Court found that procedural and substantive changes in a number of state

¹408 U.S. 238, 1972.

statutes were sufficient enough to pass constitutional scrutiny in *Gregg v. Georgia*² and its companion cases.³ Unlike the statutes prior to *Gregg*, which gave the jury complete and unfettered discretion in the sentencing process, the new Georgia statute guided the sentencing body's discretion by enumerating a specific list of statutorily defined aggravating circumstances which had to be considered before the pronouncement of sentence. In cases where at least one of the newly crafted aggravating circumstances was found beyond a reasonable doubt, juries were also required to consider those circumstances against factors proffered by the defense in mitigation prior to the imposition of a death sentence.⁴ Other features of the new system included a bifurcated hearing, which consisted of two proceedings where guilt and penalty were determined separately, and automatic appellate review. While it was not clear from the *Furman* decision which procedural safeguards, if any, were required, these revisions, it was believed, would produce sentencing outcomes that were equitable and consistent in comparison to the previous statutes.

As of February 2008, there were 3,263⁵ inmates on death row in the nation's prison system. Of the 1,057 inmates executed between 1977 and December 2006, 79 percent of the

²428 U.S. 153, 1976.

³The death sentencing schemes in Florida and Texas were upheld in *Proffitt v. Florida*, 428 U.S. 242 and *Jurek v. Texas*, 428 U.S. 262, respectively, on the same day as the *Gregg* decision. Mandatory death sentencing statutes in North Carolina and Louisiana were struck down in *Woodson v. North Carolina*, 428 U.S. 280 and *Roberts v. Louisiana*, 428 U.S. 325, respectively.

⁴It is important to note that the United States Supreme Court also approved two different death sentencing statute revisions in Florida and Texas on the same day that the Georgia death sentencing statute was approved.

⁵The Death Penalty Information Center. (2008, February). *Facts about the Death Penalty*. Retrieved February 1, 2008, from <http://www.deathpenaltyinfo.org/FactSheet.pdf>

victims involved in those cases were white while only 14 percent were black and 7 percent were victims of Asian, Native American or Hispanic origin.⁶ Similar differences were also found to exist when the combination of the race of the defendant and victim are taken into account. Cases involving white defendants and white victims accounted for 53% of those executed while cases involving white defendants and black victims resulted in 1.4% of those executed since 1977. Also, cases involving black defendants and white victims resulted in 21% of total number of executions and cases where the defendant and victim were both black resulted in 11% of all executions since 1977 with the remaining 25% racial combinations consisting of whites, blacks, Asians, Hispanics and Native Americans.⁷

While these apparent differences in sentencing outcomes do not establish proof of racial discrimination towards one particular group, they do, however, raise concerns of whether justice is being meted out fairly in the present system of capital punishment, and questions whether the deficiencies cited in *Furman* were properly corrected after the Court's ruling in the *Gregg* decision. Despite the Court's belief, in the absence of empirical evidence at the time, that procedural reforms in state law had created a fairer way of imposing the death penalty, post-*Gregg* studies have suggested that the pattern of racial disparity in the imposition of the death penalty condemned in *Furman* was still present in the new statutes.

Early studies in the pre-*Furman* era suggested that race figured prominently in charging and sentencing outcomes. Studies on sentencing rates in the early 20th century

⁶NAACP Legal Defense & Educational Fund, Inc. *Death Row USA*. (Winter, 2007).

⁷Id.

found that defendants who killed whites were more likely to receive a sentence of death and less likely to have those sentences commuted than defendants who killed blacks.⁸

Consistent with pre-*Furman* research in the area of racial disparities in sentencing, several more recent studies have concluded that defendants whose victims were white had the greatest likelihood of receiving a death sentence (Bowers and Pierce, 1980; Jacoby and Paternoster, 1982; Baldus, Pulaski and Woodworth, 1983, 1985; Bowers, 1983; Gross and Mauro, 1984; Smith, 1987; Paternoster and Kazyaka, 1988; Vito and Keill, 1988; Paternoster and Brame, 2003; Pierce and Radelet, 2005). These findings are somewhat problematic in view of the fact that the procedural revisions in the death sentencing statutes were believed to be consistent with principles of a fair and equitable system of justice. However, these empirical studies have painted a different picture of the new death sentencing statutes in operation. This discrepancy sets up the inevitable clash between the claim that the procedurally revised statutes had adequately corrected for the possibility of race-based decision-making and the empirical studies which show the existence of unexplained racial differences in charging and sentencing outcomes.

This issue would ultimately be decided by the U.S. Supreme Court. In considering the claim that statistical studies were sufficient to prove that the death penalty was imposed in a manner that was inconsistent with the Eighth and Fourteenth Amendments, the Court focused on the intent of such legislation. Specifically, a state's death sentencing statute could be invalidated if it was determined that such legislation was enacted and/or

⁸Garfinkel, H. (1949). Research Note on Inter- and Intra-Racial Homicides. Social Forces, 27:369-380.

maintained because of an anticipated discriminatory effect on a particular group of people.⁹ In such a case where it was alleged that equal protection rights were violated, the defendant had the burden of proof of showing what the Court referred to as "purposeful discrimination."¹⁰ Since the Court believed that statistical evidence could only show a correlation between race and death sentencing, it reasoned that no equal protection violations were present under the death penalty system in question. Similarly, the Court concluded that no Eighth Amendment violations existed since the decision making process in capital cases was based on rational criteria in determining whether or not the circumstances of a defendant's case warranted the imposition of a sentence of death.

Although a number of empirical studies have found little or no significance between the race of the defendant and charging and sentencing outcomes, the race of the victim has been cited in numerous studies as having a significant effect on the decision to seek a death sentence and the imposition of a death sentence in capital cases cases. The influence of race is important since the Court's ruling in *Furman* was due in part to the possibility that racial considerations could taint the charging and sentencing process. After the Court's ruling in *Gregg*, which was followed by several procedural revisions of state death sentencing statutes, a finding of a "suspect" factor such as race would seem to call into question the fairness of the revised statutes in eliminating discriminatory decision-making. Although the Court, in *McCleskey v. Kemp*, would ultimately rule that general statistical studies which noted certain racial disparities in sentencing were insufficient to establish purposeful

⁹See *McCleskey v. Kemp*, 107 S.Ct., at 1766.

¹⁰Id.

discrimination, a body of research has questioned whether revisions to death sentencing statutes in several state jurisdictions have reduced the constitutionally significant risk of racial bias cited in *Furman* given the number of safeguards afforded to defendants in the death sentencing process.¹¹

B. Study Objective

The potential role of racial disparity in charging and sentencing outcomes has been a constant source of controversy in cases involving the imposition of the death penalty. Since the landmark decisions of *Furman v. Georgia* and *Gregg v. Georgia*, a body of research examining the influence of race in capital cases has questioned whether the overhaul of death sentencing schemes nationwide accomplished their goals of creating a system of justice that was free from the potential of arbitrary, capricious, and discriminatory application of the capital punishment.¹² A significant body of research which has examined the role of race in capital cases has suggested that the concerns raised by the *Furman* Court are still an issue in the aftermath of substantive and procedural changes in death sentencing statutes. A number of these studies have suggested the role of the victim may influence whether a sentence of death is sought by the state and rendered by the sentencing authority

¹¹The Court's ruling in *McCleskey* also stated that the state legislatures should decide for themselves if the safeguards afforded to defendants in the sentencing process were sufficient enough to reduce the risk of racial bias in sentencing of defendants in capital cases. Such a ruling would seem to make any state data to the contrary relevant to the issue of whether or not the state's death sentencing statute was operating in an equitable manner.

¹²The issue of race in capital cases would initially be addressed by the U.S. Supreme Court in the landmark case of *Powell v. Alabama* (1932). The Court declared that all defendants in federal or state criminal trials had the fundamental right to adequate counsel under the Due Process Clause of the Fourteenth Amendment. The Court's decision in *Powell* would lead to subsequent Court rulings which would prevent the systematic exclusion of potential jurors from jury service based on race or ethnicity.

in death penalty cases. An examination of several studies at the state level has revealed a significant level of consistency across a number of different jurisdictions in their findings of the potential influence of the race of the victim on charging and sentencing outcomes. However, only a few of the death penalty studies have focused on the Federal death sentencing system. In the most recent study of the Federal death penalty system, three research teams conducted separate analyses which examined the role of race on decisions by the U.S. Attorney's Office whether or not to seek the death penalty in death-eligible cases. Each of the three teams received a copy of the study's database and was allowed to construct its own separate variables and files. Additionally, each team designed and conducted its own analyses and drew individual conclusions regarding the impact of race on charging outcomes in the Federal death penalty system. In a number of preliminary analyses, one of the three research teams found the race of the victim to be statistically significant on charging decisions by the U.S. Attorneys in capital cases. However, all three research teams concluded that race was not significant in charging decisions after conducting a series of statistical alternative approaches to more traditional logistic regression models.

C. Statement of the Issues

Since the U.S. Supreme Court's rulings in *Furman* and *Gregg*, a wealth of empirical studies have examined the role of race in charging and sentencing outcomes using a number of multivariate regression models. As these methodological approaches became more sophisticated, they gained acceptance by the U.S. Supreme Court in terms of their ability to demonstrate levels of disparity in sentencing outcomes in capital cases. Researchers in the federal death penalty study conducted a number of multivariate regression analyses which

suggested a relationship between the race and charging decisions by federal prosecutors.

However, a number of the preliminary regression analyses used were either limited in the number of variables included in their models or produced unexpected estimates. In response to the methodological approaches conducted by the aforementioned research teams on the Federal death penalty study, the current study will focus on a number of issues:

1. Does the race of the defendant or victim have a significant impact on the decision of the U.S. Attorney's Office to recommend a death sentence?
2. Does the race of the defendant or victim have a significant impact on the decision of the U.S. Attorney's Office to recommend the death penalty when controlling for legally relevant aggravating and mitigating circumstances?
3. Does the race of the defendant or victim have a significant impact on the decision of the Attorney General to recommend the death penalty when controlling for legally relevant aggravating and mitigating circumstances?

The purpose of this study will be to examine the role of race and its relationship to charging outcomes by re-analyzing a data set of a population of cases in the Federal death penalty system that was funded by the U.S. Department of Justice. Following this introduction, Chapter I will provide a legal summary of key decisions of the United States Supreme Court which led to the dismantling of the pre-*Gregg* death sentencing statutes at that time and subsequent Court decisions which resulted in the creation of structured death penalty statutes. Empirical research will also be presented which has examined racial disparities at the charging and sentencing phases and attempted to explain such bias by controlling for certain legal factors. These studies will provide an introduction for the data and methods of analysis presented in Chapter III. The results of the analyses on the federal

death penalty data set will be outlined in Chapter IV. The final chapter will offer a summary and implications of the findings and a discussion of what role race may play at different levels in the Federal death penalty to influence charging outcomes in capital cases.

Chapter II

Race and the Death Penalty

Throughout history, critics of capital punishment have expressed concerns over the uneven application of the death penalty. Whether those concerns were conveyed during the earliest period in colonial America¹³ or post-Reconstruction era¹⁴ patterns emerged over time that questioned whether capital punishment was fairly applied. Many of the questions of fairness were ultimately answered by the U.S. Supreme Court in several key decisions that resulted in a moratorium of the death penalty and a re-emergence thereof with newly crafted death sentencing statutes which structured or guided the decision making process of juries or judges in capital punishment cases. Of particular relevance to the issues that the Court would eventually grapple with in their decisions regarding the existing death penalty statutes at that time, centered on issues raised in *Maxwell v. Bishop*¹⁵. Although the Court eventually vacated and remanded the case back to the U.S. District Court for consideration, the issues raised before the Court would serve as the foundation for future Court decisions that resulted in existing death sentencing schemes at the time being deemed to be inconsistent with the 8th and 14th Amendments under the U.S. Constitution.¹⁶

¹³The administration and application of the death penalty varied across the 13 colonies with mandatory sentences being imposed for crimes against the state, people, and/or property.

¹⁴Blacks were disproportionately executed relative to their representation in the population after the turn of the 19th century.

¹⁵398 U.S. 262.

¹⁶The petitioner in *Maxwell v. Bishop* challenged his sentence of death upon being convicted of rape on the grounds that (1) issues of guilt and the related sentence were

A. Unstructured Jury Discretion

1. *McGautha V. California*

Prior to 1971, opponents of capital punishment mounted attack after attack on state death sentencing statutes in existence at that time. One point of attack centered on the issue of unguided discretion being afforded to judges and juries which resulted in challenges to the death penalty in *McGautha v. California* in 1971.¹⁷ The main source of controversy in *McGautha* involved the question of whether unguided discretion given to judges and juries amounted to a violation of the Due Process Clause of the Fourteenth Amendment. Specifically, arguments focused on the whether the absence of statutorily defined guidelines created a system of sentencing that resulted in discriminatory, capricious and arbitrary determinations over who lived or who died. The Court granted certiorari to the petitioner in the case in order to determine whether such standardless death sentencing statutes were constitutionally permissible.¹⁸

The death sentencing statutes in California were drawn up in such a way that they allowed for a determination of penalty, based on the evidence of the circumstances surrounding the crime, the defendant's background and any facts in mitigation or aggravation as received by the court, after a finding of guilt in the trial proceeding. As was

determined in a single proceeding, and (2) the jury was not given any standards for guidance during the sentencing part of the proceeding.

¹⁷420 U.S. 183 (1971).

¹⁸The Court also granted certiorari in the case of *Crampton v. Ohio* to decide the same question as that in *McGautha* as well as a question involving the permissibility of deciding guilt and penalty in a single trial proceeding.

the case in *McGautha*, the state's death sentencing statute called for the jury to "consider all of the evidence surrounding the crime, of each defendant's background and history, and the facts in aggravation and mitigation of the crime."¹⁹ The jury was also advised that weighing the aggravating and mitigating circumstances was not essential to the determination of the appropriate sentence and that they were "entirely free to act according to their own judgment, conscience and absolute discretion."²⁰ The absence of statutorily defined standards, it was argued, amounted to nothing more than lawless decision making on the part of the sentencing body and a direct violation of the 14th Amendment of the Constitution.²¹

The Court, however, rejected this claim and ruled that such a codification of strict legal rules of decision making where the sentencing guidelines were structured would be difficult, if not impossible, to create. Justice Harlan, in writing the majority opinion of the Court, reasoned that

"Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by history...To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language

¹⁹402 U.S. 189.

²⁰*Id.*, at 189-190.

²¹The petitioner also contended that a single, unitary trial proceeding, where guilt and penalty were determined together, constituted an infringement on his rights under the Due Process Clause of the Fourteenth Amendment. The single trial was argued to limit his right to be heard or right of allocution, since any attempt on his part to exercise this right during the guilt phase on why the judgment of death should not be pronounced against him would entail a surrender of his right against self incrimination.

which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond human ability."²²

In reaching the decision, the Court cited certain historical attempts to structure such decision making and their ultimate failure to achieve the desired results. The Court initially focused their attention on mandatory death sentencing statutes which imposed death for all defendants convicted of murder in the first degree under common law in 1794.²³ This legislative attempt to structure death sentencing statutes proved to be unsuccessful, in their view because of instances where juries failed to convict a defendant after a finding guilty in cases where a sentence of death was mandatory.²⁴ Therefore, the Court believed that it was impossible for a legislative body to clearly identify beforehand a class of homicides suitable for the sentence of death without increasing the likelihood of reckless jury decision making. The better option, in their view, would be to grant juries wide discretion to decide the issue of life versus death than to attempt to guide their decision making at the sentencing stage.²⁵

The Court also cited other instances that supported their contention that juries

²²402 U.S., at 204.

²³Murder in the first degree at common law was defined as being "willful, deliberate and premeditated."

²⁴The problem of jury nullification existed in cases where juries found defendants guilty of murder but failed to impose a death sentence because they felt that such a sentence was inappropriate in that particular case.

²⁵Critics of the Court's failure to limit the discretion of juries in this decision, point to the recommendations of the American Law Institute's Model Penal Code which drafted written standards to guide the decisions of juries in capital cases. The Model Penal Code also crafted a number of additional procedural safeguards to prevent the imposition of death sentences in close cases where there is juror doubt regarding the defendant's guilty despite the fact that the verdict is sustained by the evidence.

needed to be free from structured or guided sentencing statutes that might hinder, rather than provide assistance in their final deliberations in capital cases. In *Winston v. U.S.*²⁶, the Court, for the first time, reviewed jury instructions regarding a recommendation of mercy upon a finding of mitigating circumstances during the sentencing phase of the proceeding. In reversing the conviction, the Court found that the jury instructions “interfered with the scheme of the Act to commit the whole question of capital punishment to the judgment and the conscience of the jury.”²⁷ Additionally, the Court ruled that:

“how far considerations of age, sex, ignorance, illness or intoxication of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death...is committed by the act of Congress to the sound discretion of the jury, and the jury alone”.²⁸

The Court’s position regarding the need for standardless jury discretion was revisited in *Andres v. U.S.*²⁹ when it confirmed the jury’s power to recommend mercy and the result of the jury exercise of their judgment without any defining rules to guide those decisions. The Court would address the issue of standardless jury sentencing in capital cases one final time in *Witherspoon v. Illinois*, 391 U.S. 510 (1968).³⁰ Although the key issue in this case centered on the exclusion of potential jurors who expressed opinions

²⁶172 U.S. 303 (1899)

²⁷172 U.S. 313 (1899)

²⁸*Ibid*

²⁹333 U.S. 740 (1948)

³⁰Although this issue was raised in other cases heard before the Court, this was the last case where a significant discussion of standardless jury discretion was heard prior to the Furman decision.

against the death penalty, the case was very relevant to the Court's past rulings that the jury decision making process not be controlled by a number of sentencing standards. Instead, the Court focused on the importance that juries "express the conscience of the community" when deciding between a sentence of death or life imprisonment.

All three cases were instrumental in establishing the constitutionally permissible process in capital cases that gave wide latitude to juries to consider a variety of factors prior to the pronouncement of sentence in death-eligible cases. In taking this position, the Court ultimately held that history and experience showed that standardless death sentencing statutes could in fact pass constitutional scrutiny and juries, faced with the responsibility of deciding between life or death, would consider the many factors involved and render a fair and equitable sentence.³¹ While the Court expressed apprehensiveness to the idea that death sentencing statutes could be codified to structure and guide the jury's discretion, they did not view unguided discretion as a potential catalyst for arbitrary, capricious and discriminatory sentencing patterns. Quite the contrary, Justice Harlan, writing for the majority, reasoned that the juries did use legal and moral criteria when deciding upon the appropriate penalty.³² But the question that remained unanswered in the case was: What legal and moral criteria were being used by these juries?³³ Although Justice Harlan never provided an answer to this question, he remained very skeptical at any attempts that would formally structure

³¹402 U.S., at 208.

³²Id.

³³The dissenting opinion expressed concern that there was no way to determine what facts were applied by sentencing authorities in capital cases without some form of sentencing guidelines.

sentencing in capital cases and allow for a more systematic approach in its application.³⁴

Additionally, the Court considered in *McGautha* whether it was constitutionally permissible to decide a defendant's guilt and penalty in a single proceeding. A single hearing in death penalty cases, it was argued, would be inconsistent with the Due Process Clause under the Fourteenth Amendment by forcing the defendant to choose between his right to remain silent under the Fifth Amendment and his right to be heard on the issue of punishment during the penalty phase of the trial proceeding. One potential remedy that the Court would consider was whether a bifurcated hearing was required in capital cases. Unlike a single hearing, a bifurcated hearing would consist of two separate hearings where issues of guilt and penalty would be considered separately. Such a hearing would eliminate the potential conflict of the defendant's rights that was argued to exist in single hearings where guilt and penalty were considered together.

However, in pointing to the absence of a formal constitutional right to a bifurcated hearing, the Court held, instead, that all that was required under the Constitution was that the defendant was afforded due process as required by the Fourteenth Amendment. The *McGautha* Court concluded that no conflict of rights was created in a singular hearing where the defendant was forced to choose between remaining silent during the guilt phase at the risk of being impeached at the penalty phase. Additionally, the Court ruled that it was "not inconsistent with an enlightened administration of criminal justice to require a defendant to weight such pros and cons in deciding whether to testify".³⁵ Thus, the Court

³⁴Id.

³⁵183 U.S. 215 (1971)

established, at least for a brief period, that the Constitution did not require structured guidelines to assist juries during the decision making process to decide punishment nor did it require a bifurcated hearing to decide guilt and punishment separately. Although the Court would reject a number of procedural safeguards that were believed to be critical in the death penalty cases, the *McGautha* opinion did provide the foundation for later rulings that would result in a major overhaul of the death sentencing schemes across the United States.

2. *Furman v. Georgia* – The Death Penalty as Cruel and Unusual” Punishment

Unlike the *McGautha* decision, which failed to touch upon the issues of unguided discretion and its potential relationship to race-based discriminatory decision making, *Furman v. Georgia* laid the groundwork for what would result in the demise of the death sentencing statutes in the United States at that time. Rather than challenge these statutes on solely due process considerations under the Fourteenth Amendment, the petitioners attacked the existing death penalty statutes under the Eighth Amendment's prohibition against Cruel and Unusual punishment.

The opinions critical to the Court's decision in *Furman* concerning unguided discretion and its relationship to possible sentencing disparities involved those written by Justices Douglas, Stewart and White. The opinions of Justices Marshall and Brennan, although no less important than the others in the majority, held that the death penalty was, per se, unconstitutional in every instance.³⁶

³⁶The fact that Justices Marshall and Brennan believed the death penalty to be unconstitutional in all cases, it is not likely that revisions to death sentencing statutes would

The key objection to the death penalty held by Justice Brennan was his feeling that the very nature of the imposition of death ran contrary to the notion of human dignity and the amount of respect that should be afforded to every human being. Implicit in this notion of human dignity was Justice Brennan's belief that the death penalty was so severe, arbitrary and excessive that it was unnecessary in a contemporary society. Although he recognized a fundamental right of each state to punish violators of its laws, he reasoned that the imposition of death was an awesome punishment, "in its pain, in its finality, and in its enormity,"³⁷ and that the infliction of a punishment of that magnitude was, "by its very nature, a denial of the executed person's humanity."³⁸

Justice Marshall also viewed the death penalty as excessive, severe, unusual and deficient of a legitimate legislative purpose. After considering a number of possible goals served by capital punishment,³⁹ Justice Marshall found each to be an insufficient justification for the infliction of society's ultimate sanction. Because of this lack of a legitimate legislative purpose, as well as his belief that such purposes could be equally achieved by lesser penalties, Marshall concluded that the death penalty was excessive in its needless infliction of pain and suffering and that the average citizen would "find it shocking

have changed their views on the death penalty.

³⁷Id., at 287, (J. Brennan concurring).

³⁸Id., at 290.

³⁹Justice Marshall's review of potential goals of capital punishment included retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics and economy.

to his conscience and sense of justice."⁴⁰

Unlike Justices Brennan and Marshall the aforementioned three justices in the plurality did not believe that the imposition of the death penalty was, by its very nature, a violation of the Cruel and Unusual Clause of the Eighth Amendment. Instead, they contended the existing death penalty statutes were structured in such a way that they created a system of punishment that was cruel and unusual under the Eighth Amendment because of the manner in which the sentences were imposed.

Justice Douglas based his opinion on a number of points which raised the possibility that death sentencing schemes in operation at the time were inconsistent with 8th Amendment protections under the U.S. Constitution. First, Justice Douglas noted that the litmus test for the death penalty to be deemed cruel and unusual did not hinge solely on the punishments that were “inhumane or barbarous” when the 8th Amendment was established.⁴¹ Instead, he cited *Trop v. Dulles* which stated the definition of cruel and unusual punishments such as the death penalty had to “draw its meaning from the evolving standards of decency that mark the progress of a maturing society”.⁴² In other words, Justice Douglas expressed concern that the law as it was written in theory could differ from the manner in which it was applied. From a historical perspective, Justice Douglas also analyzed the purpose of the formation of the Bill of Rights and the Eighth Amendment and concluded that its main objective was to prevent the "selective or irregular" imposition of

⁴⁰Id., at 369, (J. Marshall concurring).

⁴¹408 U.S. 238, 241.

⁴²356 U.S. 86, 101.

harsh penalties and ensure that such penalties were not rendered in an arbitrary or discriminatory manner. In his view, the death penalty could be considered “cruel and unusual” if it was found to discriminate against a person based on the individual’s race, religion, class, or social position, or if it was imposed under such a procedure that allowed for the sentencing body to allow prejudices to enter into the decision making process. Thus, his argument contained the element of fundamental fairness and a notion of equal protection under the law which would make the Eighth Amendment applicable to each of the States under the Due Process Clause of the Fourteenth Amendment.

Justice Douglas believed that the system of capital punishment imposed was based more on discrimination, rather than equity and fairness. As support for this position, he cited a study of capital cases in Texas from 1924 to 1968 which suggested an uneven application of the death penalty that was imposed mostly on defendants who were poor, young and uneducated.⁴³ However, his opinion did not suggest that the death penalty was discriminatory in its application. Instead, it was his opinion that unstructured discretion created a system of penalties that were applied selectively against minorities and other groups lacking power. Further, he found these statutes to be "pregnant with discrimination," which was contrary to the idea of equal protection under the law.⁴⁴ Equal protection under the law and penalties that were not cruel and usual required a system of administration that prevented the discretion of judges and juries to allow prejudices to influence sentencing

⁴³ Although the cited study did not represent proof of discrimination toward minorities in capital cases and failed to consider any number of other factors that would have explained the disparities, the study did raise the possibility of uneven treatment in the application of the death penalty.

⁴⁴ *Id.*, at 255, (J. Douglas concurring).

outcomes in the decision making process.

Justice Stewart, citing the number of defendants convicted of rape and murder in 1967 and 1968 and the relatively few death sentences imposed, concluded that such discretion in the death sentencing statutes demonstrated a system of punishment that was randomly applied to a select few defendants. While agreeing with Justice Douglas and Justice White that the death penalty was not, per se, unconstitutional, he expressed concern over the rarity in which the death penalty was imposed. He believed that such a system was "wanton and freakish" in its application and compared the imposition of the death penalty as similar to being struck by lightning.⁴⁵ The fact that the death penalty was imposed in so few cases, led Justice White to question the utility of such a punishment that was believed to have a deterrent value for the criminal justice system. In his view, the death penalty, as it was administered at the time, had reached a point where questions were raised as to whether it was accomplishing social goals. Additionally, he concluded that any punishment with such marginal returns to society would be excessive and cruel and unusual under the 8th Amendment. In raising the issue of discretion granted to judges and juries in capital cases, Justice White questioned whether such discretion could be instrumental in muting the legislative intent behind the death penalty. However, it was one of his final points that illustrated the potential problem that could result from unstructured discretion in capital cases. By allowing juries and judges wide latitude in the consideration of the death penalty, there was no meaningful way, in his view to distinguish the few cases that received death

⁴⁵Id., at 309-310, (J. Stewart concurring).

sentences from the vast number of cases that received sentences of life imprisonment.⁴⁶

While accepting the morality and utility of inflicting punishment on defendants for the purpose of deterring others from violating the law, Justice White also recognized the need for such punishments to be imposed with sufficient frequency in order to further the legitimate goal of deterrence. Thus, he saw the constitutionality of capital punishment in its ability to further a socially defined goal. Although he stopped short of viewing these statutes as being discriminatory per se, he expressed apprehensiveness about a system of punishment that was rarely enforced. Accordingly, his opposition to the death penalty at that time rested on his belief that the lack of frequency with which it was inflicted created a system of punishment that involved the "pointless and needless extinction of life with only marginal contributions to any discernable public purposes".⁴⁷

B. Post-*Furman* Revisions

The Court's ruling in *Furman* effectively struck down all of the existing death sentencing statutes and concluded these statutes would have to be restructured in such a way that they would reduce the likelihood that death sentences would be imposed in an arbitrary, capricious or discriminatory manner.⁴⁸ As a result of the Court's decision in *Furman*, state legislatures either eliminated discretion in the sentencing decision making process and replaced them with mandatory sentencing statutes or restructured them with some form of

⁴⁶408 U.S. 238, 313.

⁴⁷*Id.*, at 313, (J. White concurring).

⁴⁸After the Court's ruling in *Furman*, all death sentences of inmates statewide were invalidated and commuted to sentences of life imprisonment without parole.

guided discretion statutes. Although the Court struck down the mandatory nature of the new changes in the death sentencing statutes in *Woodson v. North Carolina* (1976) and *Roberts v. Louisiana* (1977),⁴⁹ statutory changes, which structured discretion, were upheld. In 1976, the Court approved three newly created "guided discretion" statutes in *Gregg v. Georgia*, *Proffitt v. Florida* and *Jurek v. Texas*.

1. Structured Discretion Statutes

a. *Gregg v. Georgia*

Unlike the *McGautha* decision which upheld the manner in which the death penalty was administered on procedural grounds, the *Furman* and *Gregg* decisions focused on the requirement that a number of safeguards be included in death penalty schemes to avoid punishments that could be viewed as "cruel and unusual". Citing concerns addressed in *Furman*, the *Gregg* decision placed certain requirements on death penalty statutes seeking to pass constitutional muster. The Court based their opinion on the definition of what amounted to "cruel and unusual" punishments under the Eighth Amendment of the U.S. Constitution. In earlier rulings, the Court determined that punishments that were barbaric or inflicted pain ran contrary to the types of punishment that were permissible. For example, the Court's ruling in *Wilkinson v. Utah* suggested the constitutionality of a particular method of death could be defined by whether those methods were found to involve torture or were barbaric in their administration.⁵⁰ The *In re Kemmler* Court defined punishments as "cruel"

⁴⁹Substantive changes in the death sentencing statutes of North Carolina called for a mandatory death sentence in all murder cases while statutes in Louisiana made a death sentence mandatory for all cases involving the killing a police officer.

⁵⁰99 U.S. 130 (1879)

if they involved torture or a lingering death.⁵¹ Additionally, the Court's decision in *Francis v. Resweber* found that a second attempt to execute the defendant via the electric chair was not cruel because there had been no intent to inflict unnecessary pain during the execution.⁵²

However, the *Gregg* Court took a different path in their explanation of what constituted cruel and unusual punishment. Instead of focusing on the level of pain involved in executions or whether they amounted to torture, the Court turned its attention to the emerging societal acceptance of capital punishment. Citing the Court's earlier ruling in *Weems v. U.S.*, the definition of cruel and unusual punishment was not rooted in the level of pain or barbaric treatment involved in executions, but in society's emerging opinion of what constituted a system of humane justice.⁵³ In taking this view, the *Gregg* Court shifted their focus from the types of modes of execution to the manner in which the system administered justice. Thus, the Court sought to require a number of procedural safeguards in death sentencing schemes that would prevent the death penalty from being imposed in an arbitrary, capricious, or discriminatory manner.

First, the Court held that juries or judges in capital cases were required to consider guilt and punishment in a bifurcated proceeding. The Court reasoned that such a proceeding would allow for a rational decision at each phase of the trial and reduce the concerns expressed by the *Furman* Court. In such a hearing, defendants would not be forced to choose between their right to be heard on the issue of punishment and their right against

⁵¹136 U.S. 436 (1890)

⁵²329 U.S. 459 (1947)

⁵³217 U.S. 349 (1910)

self-incrimination. The Court also suggested that since juries were usually not skilled in matters of sentencing, there was a need to guide the decision making process in order to ensure that the proper factors would be considered at the penalty phase prior to the imposition of punishment. This discretion would be guided by certain statutorily defined aggravating circumstances which would be considered with a number of mitigating circumstances after a finding of guilt at the previous guilt phase hearing.

Although the Court noted that such standards were general in their nature, it was believed that such a system would reduce the likelihood of decisions being rendered in a manner similar to those condemned in *Furman v. Georgia*. Therefore, the Court reasoned, the Constitution required that death sentencing statutes adopt some formal set of guidelines to guide the jury's decision making so that relevant aggravating and mitigating circumstances are weighed against each other prior to the imposition of punishment. This requirement would represent an improvement over the *McGautha* decision that left the issue of punishment up to the unfettered discretion of the jury. Such standards would also, in theory, eliminate the likelihood that sentences would be rendered in an arbitrary or capricious manner. Finally, the Court held that all death sentences should be subject to appellate review to safeguard against capricious or freakish decisions.⁵⁴

The *Gregg* decision would ultimately evaluate the newly created death sentencing schemes in Georgia, Florida, Texas, North Carolina, and Louisiana. Each jurisdiction created death penalty statutes that were believed to be sufficient to address the concerns cited in *Furman* and the statutory requirements that were articulated in *Gregg*. In its

⁵⁴428 U.S. 153, 195.

summation, the Court held that concerns of discriminatory, arbitrary, or capricious decision making in death penalty cases could be addressed by sentencing schemes that provided the sentencing authority with all relevant information to guide their decision to impose death or life imprisonment. This feature, along with a bifurcated hearing and an automatic appellate review, the Court reasoned, would create a better system of justice in such cases.

In the case of the statute that was upheld in *Gregg v. Georgia*, 10 aggravating circumstances were specified in the Georgia statute, of which at least one had to be found beyond a reasonable doubt prior to the imposition of a death sentence.⁵⁵ As an additional

⁵⁵Aggravating circumstances created under the Georgia death penalty sentencing scheme included:

- (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions.
- (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
- (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
- (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or anything of monetary value.
- (5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
- (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
- (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
- (8) The offense of murder was committed against any peace officer, corrections employee or fireman in the performance of his official duties.
- (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
- (10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

safeguard, the Georgia statute provided automatic appellate review of each death sentence in order to determine whether the sentence was imposed under the influence of passion or prejudice, whether the evidence supported the jury's finding of a statutory aggravating circumstance and whether the sentence was disproportionate compared to other sentences imposed in similar cases.⁵⁶

b. *Proffitt v. Florida*

Newly adopted death sentencing statutes in Florida and Texas were also accepted by the U.S. Supreme Court on the same day as the Georgia statute in *Proffitt v. Florida* and *Jurek v. Texas*, respectively.⁵⁷ Similar to the newly crafted sentencing scheme in Georgia, the death penalty statute in Florida identified eight aggravating circumstances that could be considered in capital cases.⁵⁸ Additionally, the Florida death penalty system, unlike the

⁵⁶The Court was quick to note that its ruling did not suggest that Georgia statute revisions were the only way to statutorily address the concerns cited in the *Furman* decision. Instead, the Court noted the need to consider each death sentencing scheme on an individual basis.

⁵⁷The Florida death sentencing statute is slightly different from the Georgia statute in that the jury must weigh all relevant factors from a list of eight aggravating circumstances and seven mitigating circumstances prior to the imposition of a sentence of death or life imprisonment. The jury's decision to impose death, unlike the jury's decision in Georgia, is not binding and may be overridden by the judge. The Texas death sentencing statute also differs from the other two by requiring the jury to answer the following three questions in the affirmative prior to the imposition of a sentence of death: (1) whether the conduct of the defendant causing the death was committed deliberately and with the reasonable expectation that death would occur; (2) whether it is probable that the defendant would commit criminal acts of violence constituting a continuing threat to society, and; (3) if raised by the evidence, whether the defendant's conduct was an unreasonable response to the provocation, if any by the deceased. An answer in the negative to any of the three questions results in the imposition of a sentence of life imprisonment.

⁵⁸Aggravating circumstances included:

(1) The capital felony was committed by a person under

Georgia statute, included a number of statutorily defined mitigating circumstances that should be considered by the judge or jury prior to the imposition of sentence.⁵⁹ The Florida statute also mandated that the jury's majority vote on the sentence would only be an advisory recommendation to the judge in the case who would make the final determination of the sentence of death or life imprisonment. The Florida revision also allowed for automatic appellate review in all sentences of death and it was assumed that the new law added an extra protection against the concerns expressed by the *Furman* Court by giving the

sentence of imprisonment.

- (2) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to a person.
- (3) The defendant knowingly created a great risk of death to many persons.
- (4) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- (5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (6) The capital felony was committed for pecuniary gain.
- (7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (8) The capital felony was especially heinous, atrocious, or cruel.

⁵⁹ Mitigating circumstances included:

- (1) The defendant has no significant history of prior criminal activity.
- (2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (3) The victim was a participant in the defendant's conduct or consented to the act.
- (4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
- (5) The defendant acted under extreme duress or under substantial domination of another person.
- (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
- (7) The age of the defendant at the time of the crime.

final sentencing authority to the trial judge.

c. *Jurek v. Texas*

The Texas death sentencing scheme also crafted a new death penalty law which structured the discretion of the jury in capital cases. Unlike the Georgia and Florida schemes which created a number of aggravating and/or mitigating circumstances that were subject to consideration by the jury and/or judge prior to the imposition of sentence, the Texas statute crafted their death sentencing scheme differently in response to the earlier *Furman* decision. First, the new scheme limited the number of homicides that could potentially subject a defendant to a sentence of death.⁶⁰ By limiting the types of death-eligible homicides, the new system sought to identify offenses that were the most deserving of a death sentence and alleviate many of the concerns that were expressed by the *Furman* Court. The new statute also required the jury to unanimously answer three questions in the affirmative prior to the imposition of a death sentence.⁶¹

A sentence of death, in this case, could only be imposed after the jury found that

⁶⁰The new revisions under the Texas Penal Code identified five categories of homicides that, if knowingly and intentionally committed, could subject a defendant to a death sentence: murder of a peace officer or fireman; murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is an employee.

⁶¹The Texas Code of Criminal Procedure Article 37.071 required the jury to affirmatively answer the following questions:

- (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
- (2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;
- (3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

each of the three statutory questions was proven by the State beyond a reasonable doubt. By requiring the three questions to be answered prior to the imposition of sentence, the Court found the new statute to be constitutionally permissible despite the fact that it failed to create any statutorily defined mitigating circumstances that could be considered during the penalty phase of the trial proceeding.⁶² In addition to the procedural safeguards provided for defendants in death penalty trials, the Texas system, like the Georgia and Florida systems, afforded automatic appellate review to all defendants receiving a sentence of death.

1. Mandatory Sentencing Schemes

Although the new statutes in Georgia, Florida and Texas were found to be constitutional, the Court struck down statutory changes to death penalty statutes in Louisiana and North Carolina⁶³. Unlike the Georgia, Florida, and Texas statutes which structured the discretion of the jury and imposed a set of guidelines in order to make sentencing more rational, the legislatures of Louisiana and North Carolina responded to the Court's decision in *Furman v. Georgia* by making the death penalty mandatory for all persons convicted of specifically defined categories of first degree murder.⁶⁴ These mandatory death sentencing schemes were put in place under the assumption that mandatory

⁶²The Court reasoned that the second of the three questions allowed the defendant to introduce evidence to mitigate the question of whether he would commit criminal acts of violence that would constitute a continuing threat to society”.

⁶³428 U.S. 325, 1976, and 428 U.S. 280, 1976, respectively.

⁶⁴Both statutes were similar to those in Georgia, Florida and Texas in requiring the finding of any one of several aggravating circumstances that had to accompany the commission of the first degree murder prior to the imposition of a death sentence.

sentences in certain cases would remove the potential for arbitrary, capricious, and discriminatory decision making by the jury through the elimination of their discretion in capital cases. In such a system, the jury would only be required to find beyond a reasonable doubt that the defendant was guilty of committing the death-eligible offense.

a. *Roberts v. Louisiana*

In the case of the Louisiana statute, the law was revised from a discretionary statute to one which mandated a mandatory sentence of death upon a finding of guilt among a select number of first degree murder charges.⁶⁵ Additionally, the jury could only impose a sentence of death in cases where both conditions were found to have existed in the commission of one of the statutory definitions of first degree murder: specific intent to kill or inflict great bodily harm and the commission or attempted commission of one of the statutorily defined offenses.⁶⁶

⁶⁵The Louisiana Code of Criminal Procedure defined First Degree Murder as the killing of a human being:

- (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape, or armed robbery; or
- (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
- (3) When the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving life sentence; or
- (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]
- (5) When the offender has specific intent to commit murder and has been offered or received anything of value for committing the murder.

⁶⁶Cases where only one of the two conditions were found resulted in a offense of second degree murder and a mandatory sentence of life imprisonment. The Louisiana statute also provided instructions to the jury on four different verdicts at the guilt phase of the trial proceeding: guilty of first degree murder, guilty of second degree murder, guilty of manslaughter, and not guilty.

b. Woodson v. North Carolina

The new death sentencing statute in North Carolina also adopted a mandatory sentencing scheme which mandated a sentence of death for defendants found guilty of first degree murder. Unlike the Louisiana law which narrowly defined the number of first degree murder offenses that were subject to a death sentence, the North Carolina law was broader in its application of death sentences in first degree murder cases.⁶⁷

The Court ruled that such mandatory systems of sentencing as those drafted by the legislatures of North Carolina and Louisiana ran contrary to the Eighth and Fourteenth Amendments.⁶⁸ It was such a rejection of these mandatory statutes that led states with death penalty laws to provide the juries with sentencing discretion which was ultimately structured and upheld in the *Gregg* decision. The Court, while recognizing that mandatory laws could lead to more defendants receiving death sentences instead of a relative few, expressed concerns that such a system was constitutionally repugnant due to a number of shortcomings.

First, the Court, in reviewing the history of mandatory death sentencing statutes held that such types of sentencing schemes could potentially result in additional problems. Specifically, the Court cited instances where mandatory death sentencing schemes could

⁶⁷The North Carolina General Assembly mandated a sentence of death in cases of murder which were “perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony”.

⁶⁸The Court cited the history of mandatory death sentencing statutes at common law and the instances of jury nullification where juries often failed to convict offenders of first degree murder in cases where the penalty of death was believed to be inappropriate.

result in cases of jury nullification.⁶⁹ Although it was argued that the Louisiana and North Carolina statutes corrected deficiencies in death sentencing schemes that were cited in the *Furman* decision, the Court held that mandatory sentences only “papered over the problem of unguided and unchecked jury discretion”.⁷⁰ By taking this approach, the mandatory sentencing statutes were viewed as problematic by the Court for their failure to create standards to determine who would receive a sentence of death or life imprisonment. The Court also found that neither of the mandatory sentencing schemes provided any consideration of the character or record of the offender or other mitigating circumstances prior to the imposition of a death sentence. Such a failure on the part of the new statutes to take into account these types of factors only served to “treat those convicted of first degree murder as members of a faceless, undifferentiated mass of people to be subjected to the blind infliction of death” which would be inconsistent with the Eighth and Fourteenth Amendments”.⁷¹ Finally, the mandatory sentencing schemes were struck down for failing to provide for proper appellate review which was one of the staples in the Georgia, Florida, and Texas statutes.

Despite the Court's ruling in *Gregg*, the new death sentencing procedures were challenged as being merely cosmetic⁷² and the system under *Furman*, the petitioner argued,

⁶⁹The Court noted that mandatory death sentences could lead juror to depart from their oaths by finding the defendant guilty of a lesser offense in cases where the felt a death sentence was inappropriate.

⁷⁰428 U.S. 280, 302.

⁷¹*Id.* 304.

⁷²428 U.S., at 198.

was still in operation. However, in its opinion, the Court rejected this argument believing that, in the absence of supportive scientific evidence, the new death sentencing statutes, by focusing on the nature of the crime and the characteristics of the individual, promised to adequately channel the jury's discretion in such a way to provide safeguards against the arbitrary, capricious and discriminatory sentencing patterns cited in *Furman*.⁷³

C. The Federal Death Penalty System

1. Brief Overview

Similar to death penalty systems, at the state level, the federal death penalty has a history that extends back to the formation of the United States. After the creation of the U.S. Constitution, Congress enacted a mandatory death penalty for a number of newly created federal offenses and proscribed hanging as the new method of execution for those found guilty of death-eligible offenses.⁷⁴ In addition to proscribing the death penalty for a select number of offenses, the early federal death penalty statute specified a number of related procedures for handling all federal capital cases. Special procedures included the appointment of one or two counsels that were experienced in the rule of law, free access to counsel, complete access to potential witnesses, and the right to an advanced copy of the

⁷³*Id.*, at 206-207.

⁷⁴The First Congress specified a number of federal offenses at this time that were punishable by death including: murder, treason, piracy, forgery, offenses committed on the high seas, if committed within that body of a county; violent acts committed on a ship's commander to hinder defense of the ship or its goods; making revolt in the ship, any act of hostility against the United States, or any citizen thereof, upon the high sea under colour of authority from any foreign prince or state; aiding and abetting piracy; assisting forgery or uttering forged public securities; and, rescuing or freeing of anyone convicted of a federal capital offense.

jury list at least two days prior to the start of the trial proceeding.

As the death penalty moved from its early roots into the 19th century, the administration of capital punishment at the federal level resulted in unintended consequences. Because of perceptions that mandatory death sentences were overly harsh, a significant number of death sentences imposed during this period ended with convicted offenders receiving pardons.⁷⁵ A number of capital trials also ended in acquittals in cases where the jury believed the sentence of death was unjustified.⁷⁶ At the same time, the American Society for the Abolition of Capital Punishment was founded in 1845 and by 1890 a number of state legislatures either moved to abolish their respective death penalty statutes or eliminated mandatory death sentences and replaced them with discretionary statutes (Bedau, 1982). Rather than follow the movement toward the total abolition of its death sentencing statutes, the federal government enacted legislation which limited the death penalty to five statutory situations, made all death sentences completely discretionary, and substituted life imprisonment for a number of offenses that were previously capital offense.⁷⁷ By 1899, the U.S. Supreme Court would approve the federal death sentencing statute which granted absolute discretion to juries in capital cases in *Winston v. United*

⁷⁵By 1829, 138 federal capital trials had resulted in 118 convictions and 42 executions. However, an additional 64 of 118 convictions resulted in pardons because of perceptions that mandatory death sentences were too harsh in their administration.

⁷⁶A number of acquittals involved cases of jury nullification where sympathetic juries freed guilty offenders because of the harshness of mandatory death sentences.

⁷⁷The Federal government limited the administration capital punishment by enacting, “An Act To Reduce The Cases In Which The Death Penalty May Be Inflicted” Act in 1897. Juries were granted discretion in recommending a death sentence or life imprisonment for offenses involving murder or rape.

States and required the jury to use its sound discretion to be lenient in cases that it deemed appropriate.⁷⁸

As the Federal death penalty system progressed in to the 20th century, unguided, absolute discretion remained the staple of juries in the federal system. After revisions to the statute in 1909 and 1948, the penalty for rape was amended to permit juries to impose a sentence of death, life imprisonment or any term of years in prison upon conviction. Additionally, the U.S. Supreme Court would require juries to reach a unanimous decision prior to the imposition of a death sentence. As a consequence of increases in the commission of a variety of crimes nationwide, Congress also expanded the list of death-eligible offenses that would be subject for consideration by the jury in capital cases.⁷⁹

The Court's decision in *Furman v. Georgia* strike down the federal death penalty for being in violation of the 8th and 14th Amendments in the same fashion as the death sentencing statutes at the state level. By giving judges and juries absolute and complete discretion in capital cases, the statutes at both levels fell significantly short of providing the guidance to sentencing authorities that the Court deemed necessary to produce fair sentencing decisions.⁸⁰ The Court ruled that it was the lack of structured discretion or guidance to the sentencing authorities in capital cases that the Court believe could increase the likelihood of arbitrary, capricious, or discriminatory sentencing outcomes which were

⁷⁸172 U.S. 303 (1899).

⁷⁹Congress expanded to the list of death-eligible offenses included violent kidnapping, train-wrecking resulting in the death of its passengers, providing narcotics to a minor, espionage under the Atomic Energy Act, bombing, hijacking, killing by use of explosives, and non-lethal rapes.

⁸⁰408 U.S. 238, (1972)

inconsistent with protections under the U.S. Constitution. In a review of the history of the federal death penalty, Little (1999) noted a predictable response to the *Furman* decision by the Federal government and a number of state legislatures.⁸¹ In response to the Court's rejection of death sentencing statutes which gave judges and juries unguided discretion, many jurisdictions replaced unguided discretion sentencing schemes with mandatory death penalty statutes. Now, juries and judges were required to impose a death sentence in capital cases after finding relevant facts in the case beyond a reasonable doubt. In such cases, mandatory sentences would presumably reduce the likelihood of arbitrary, capricious, and discriminatory sentencing practices by focusing solely on whether the death-eligible offense was committed. Two years after the *Furman* decision, the Federal government created a federal death sentencing statute that it believed would address many of the Court's concerns. Following recommendations contained in the Model Penal Code that was previously proposed by the American Law Institute, the Antihijacking Act was created in 1974 to make the death penalty an option in cases where air piracy resulted in the death of the victim.⁸²

The new procedural process under the new law provided a bifurcated sentencing hearing and created a list of statutory aggravating and mitigating factors for consideration at the charging and sentencing phases. Also, the new law authorized a mandatory sentence of death in cases where at least one aggravating circumstance was found without any mitigating present. However, the Court would eventually strike down early attempts by

⁸¹Little, R. (1999). The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role. *Fordham Urban Law Journal*, 26, 347-508.

⁸²The Model Penal Code was developed in 1962 to assist legislatures in creating standards to structure the discretion of the judges and juries on capital cases.

North Carolina and Louisiana to adopt mandatory death sentencing statutes in their respective jurisdictions.⁸³ This ruling would ultimately render the federal death penalty law unconstitutional.

2. Revisions to the Federal Death Penalty Statutes

a. The 1988 Continuing Criminal Enterprise “CCE” statute.

In his analysis of the Federal death penalty system, Little also noted a series of substantive and procedural changes in the law that were designed to address the Court’s earlier rulings on death sentencing statutes that either guided discretion or required mandatory death sentences in capital cases. In 1970, in response to an increasing problem of drug use and distribution in the United States, Congress enacted the Comprehensive and Drug Abuse Prevention and Control Act, which created the crime of engaging in a continuing criminal enterprise.⁸⁴ By creating the new offense, Congress sought to target drug kingpins and deter potential traffickers with penalties that included mandatory sentences of life imprisonment without parole. By 1988, penalties for committing a continuing criminal enterprise offense would be expanded to include the possibility of the

⁸³*Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976).

⁸⁴The continuing criminal enterprise offense consists of five elements:

- (1) A felony violation of the narcotics laws;
- (2) As “part of a continuing series of violations” of the narcotics laws;
- (3) Undertaken in concert with five or more other persons;
- (4) “With respect to whom” the defendant is an organizer or supervisor; and,
- (5) The defendant obtains substantial income from the activities. In order to secure a conviction, federal prosecutors are required to establish conspiratorial conduct among the third and fourth elements.

death penalty. Since the *Furman* decision, several legislative measures were taken by the U.S. Congress between 1972 and 1988 to revise the federal death penalty and how it would be administered. After going through a period of failed legislative efforts and a lack of consensus over the parameters to be included in the new law, Congress successfully created new procedures to be implemented in cases under the 1988 Continuing Criminal Enterprise or “CCE” offense.⁸⁵ Similar to the state death penalty laws, the federal statute provided a bifurcated hearing which separated guilt and penalties phases in capital cases, required aggravating circumstances to be unanimously found by the jury, permitted non-unanimous findings of mitigating circumstances, and removed any requirement that the jury impose a death sentence in certain circumstances.⁸⁶ The new law also provided a number of additional protections to offenders in capital cases including reasonable advanced notice by the government of its intent to seek the death penalty, appointment of defense lawyers competent in capital cases for defendants, investigative, expert or other reasonable personnel for the defendants, and a list to defense counsel regarding the specific aggravating circumstances that federal prosecutors would seek to prove. Finally, the law required trial judges, as an additional safeguard prior to jury deliberations, to specifically instruct the jury in capital cases that it:

“Shall not consider the race, color,
religious beliefs, national origin,
or sex of the defendant or victim,

⁸⁵The new federal death penalty law would be limited to individuals who intentionally killed or caused the intentional killing of another individual.

⁸⁶The new law also significantly narrowed the class of death-eligible cases by specifying four different levels of intent as aggravating circumstances that were required to be found by the jury beyond a reasonable doubt prior to the imposition of a death sentence.

and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what such characteristics of the defendant may be.”⁸⁷

After the guilt phase of the trial, the jury was also required to unanimously conclude, beyond a reasonable doubt, that one or more aggravating circumstances were present, permit non-unanimous consideration of mitigating circumstances, and was not required to impose a sentence of death in cases where aggravating circumstances were found to “outweigh” mitigating circumstances.⁸⁸ Finally, the federal death penalty statute was created with the expressed prohibition of being carried out on mentally retarded individuals, the insane, or persons who were under the age of eighteen at the time of the commission of the offense.

b. The 1994 Federal Death Penalty Act (“FDPA”).

Although the CCE procedures would survive a number of constitutional challenges, Congress eventually expanded the federal death penalty to include additional death-eligible offenses. Congress also added a number of procedural safeguards similar to those found in several death penalty statutes at the state level to address concerns cited in the *Furman* opinion which were assumed to reduce the likelihood of arbitrary, capricious, or discriminatory sentencing outcomes. The enactment of the FDPA was also followed by the implementation of a number of protocols which required United States Attorney to follow

⁸⁷Little (1991) noted in his analysis that the jury instruction was not required by past rulings on federal or state death sentencing schemes but was added as an extra protection to defendants in capital cases.

⁸⁸The jury would not be constitutionally precluded from granting the defendant mercy in cases where aggravating circumstances were found to outweigh mitigating circumstances.

specific guidelines in cases where the death penalty was sought in federal cases.⁸⁹

Additionally, the revisions to the FDPA included many of the procedural protections approved by the *Gregg* decision. Death penalty cases in the federal system would be subject to a separate, bifurcated hearing to determine the penalty after a finding of guilt and prosecutors are required to provide written notice to defendants of their intent to seek the death penalty within a reasonable time before the trial proceeding.⁹⁰ Federal prosecutors were also required to specify which statutory and non-statutory aggravating circumstances they intended to prove at trial and are limited to those identified circumstances unless amended and approved by the court.⁹¹ The statute also provides defendants with two lawyers in all capital cases.⁹² Finally, in capital cases that result in a death sentence, a review of the case is conducted by the court of appeals upon appeal by the defendant to determine, among other things, “whether the sentence of death was imposed under the

⁸⁹Although United States Attorneys were required under the FDPA to follow strict protocols in gaining approval from the U.S. Attorney General to seek the death penalty, they continued to have wide latitude overall in choosing which cases would be subjected to the approval process.

⁹⁰The enactment of the FDPA resulted in forty federal offenses that could be subject to the death penalty. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) added four additional death-eligible offenses to the federal death penalty system.

⁹¹Non-statutory aggravating circumstances may include: the defendant’s history of violence, likelihood of future dangerousness, prior guilty pleas to violent offenses, or, prison records indicating bad conduct. Also, 18 U.S.C 3592 defines twenty-seven aggravating circumstances separately for offenses involving homicide (16); espionage and treason (3); and, drug offenses (8).

⁹²This statutory protection exceeded many previous constitutional requirements of court-appointed counsel and required at least one of the assigned attorneys to have experience in capital cases.

influence of passion, prejudice, or any other arbitrary factor.”⁹³ Also, cases that received death sentences were entitled to appellate review upon appeal by the defendant.⁹⁴

The passage of the FDPA also resulted in the creation of a number of procedural requirements in capital cases that were assumed to address many of the concerns expressed in the *Furman* opinion. Juries in capital cases are required, upon a finding of guilt, to consider three separate criteria prior to the imposition of the death penalty: (1) whether the defendant acted with a requisite mens rea making him eligible for a sentence of death; 2) whether other aggravating and mitigating circumstances were present; and, (3) whether a sentence of death was justified.

The first criteria under the FDPA requires capital juries to determine beyond a reasonable doubt if the defendant is eligible for a death sentence by establishing whether the defendant’s conduct was consistent with any one of four specific statutorily defined mental states or “mens rea” which is considered a necessary element of the death-eligible offense.⁹⁵

⁹³18 U.S.C. Sec §3595.

⁹⁴Cases at the state level that result in death sentences are subject to automatic appellate review. However, appellate review of federal cases resulting in death sentences are not automatic and are conducted only upon request by the defendant.

⁹⁵Under 18 U.S.C. §3591(a)(2), a defendant found guilty of a death-eligible offense can be sentenced to death by the jury if it finds that the defendant:

- (1) Intentionally killed the victim;
- (2) Intentionally inflicted serious bodily injury that resulted in the death of the victim;
- (3) Intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim dies as a result of the act; or,
- (4) Intentionally and specifically engaged in an act of violence, knowing that the act created grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a result of the act.

The statute established a range of “mens rea” categories from “clear intent” to “reckless disregard” to prohibit defendants who were negligent in their actions from being sentenced to death in cases where their victims died.

After the mental state of the defendant in the commission of the offense was established, the jury is required to determine whether a statutorily defined aggravating circumstance advanced by federal prosecutors at trial was present.⁹⁶ The FDPA also provides an added protection in federal capital cases, by giving defendants wide latitude to present any relevant mitigating circumstances to the jury during the penalty phase without requiring them to provide any advanced notice of this information to federal prosecutors.⁹⁷ However, federal prosecutors are required to notify defendants of their decision to seek the

⁹⁶Aggravating circumstances were required to be proven beyond a reasonable doubt by federal prosecutors and unanimously agreed upon by the jury. Defendants are required to prove mitigating circumstances by a preponderance of the evidence.

⁹⁷Statutory mitigating circumstances under 18 U.S.C. Sec. §3592 include:

- (1) Impaired capacity – The defendant’s capacity to appreciate the wrongfulness of the defendant’s conduct or to conform to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.
- (2) Duress – The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.
- (3) Minor participation – The defendant is punishable as a principal in the offense, which was committed by another, but the defendant’s participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.
- (4) Equally culpable defendants – Another defendant or defendants, equally culpable in the crime, will not be punished by death.
- (5) No prior criminal record – The defendant did not have a significant prior history of other criminal conduct.
- (6) Disturbance – The defendant committed the offense under severe mental or emotional disturbance.
- (7) Victim’s consent – The victim consented to the criminal conduct that resulted in the victim’s death.
- (8) Other factors – Other factors in the defendant’s background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.

death penalty and must provide advanced notice to defense counsel regarding which specific aggravating circumstances will be presented and proven at trial.⁹⁸

The final stage of the federal capital sentencing phase process involves a “weighing” process of all relevant aggravating circumstances that are proven beyond a reasonable doubt and any mitigating circumstances submitted by defendants for consideration by the jury. Under federal law, the weighing process is more qualitative than quantitative, and is not based on whether aggravating circumstances are found to outweigh mitigating circumstances.⁹⁹ Rather, the final sentence of death or life imprisonment is based on the jury’s final determination of whether the sentence is justified. In reaching this

⁹⁸Aggravating circumstances for homicide under 18 U.S.C. Sec. §3592 include:

- (1) Death during the commission of another crime.
 - (2) Previous conviction of a violent felony involving a firearm.
 - (3) Previous conviction of an offense for which a sentence of death or life imprisonment was authorized.
 - (4) Previous conviction of other serious offenses.
 - (5) Grave risk of death to additional persons.
 - (6) Heinous, cruel, or depraved manner of committing offense.
 - (7) Procurement of offense by payment.
 - (8) Pecuniary Gain – The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.
 - (9) Substantial planning and premeditation.
 - (10) Conviction of two felony drug offenses.
 - (11) Vulnerability of the victim – The victim was particularly vulnerable due to old age, youth, or infirmity.
 - (12) Conviction for serious federal drug offenses.
 - (13) Continuing criminal enterprise involving drug sales to minors.
 - (14) Crime committed against high public officials.
 - (15) Prior conviction of sexual assault or child molestation.
 - (16) Multiple killings or attempted killings.
- (for complete statute information, see Table 1).

⁹⁹At this point in the decision process, the DFPA does not provide any guidance to the jury regarding how aggravating and mitigating circumstances should be weighed against each other.

determination, jury's are required to enter the final sentence of "death" or "no death" on a special verdict form. Additionally, juries are required to record all aggravating circumstances that are found unanimously and beyond a reasonable doubt, and whether more aggravating or mitigating circumstances were determined to exist after the final deliberations.¹⁰⁰ The jury is then required to determine, after the weighing process, whether a death sentence is justified. As an added precaution, the FDPA clearly provides for instructions to the jury which state that death sentences are not mandatory in cases where aggravating circumstances are found without any mitigating circumstances. Rather, juries are required to determine whether the presence of aggravating circumstances in the absence of mitigating circumstances is sufficient to justify a sentence of death. Finally, the jury is instructed not to consider race, gender, religious beliefs or other inappropriate factors into the jury deliberations and required to sign a certificate to this fact after the final decisions has been determined.

3. Prosecutorial Discretion and the Federal Capital Case Review protocols.

At the time that the FDPA was enacted, procedures and protocols were also put in place at the charging phase of the death penalty process to ensure consistency in the administration of the death penalty at the federal level.¹⁰¹ All cases involving the death penalty routinely begin with the decision by federal prosecutors to seek the death penalty in

¹⁰⁰ Although non-statutory aggravating circumstances may be considered by the jury, at least one statutory aggravating circumstance must be found by the jury beyond a reasonable doubt prior to the imposition of a death sentence.

¹⁰¹ The U.S. Department of Justice's Capital Case Protocols, commonly referred to within the department as the "Death Penalty Protocol, was issued by the U.S. Attorney General on January 27, 1995.

cases deemed to be eligible. In *Furman v. Georgia*, the U.S. Supreme Court expressed concern that unguided discretion in the sentencing process could result in arbitrary, capricious, or discriminatory outcomes by juries in capital cases.¹⁰² To address those concerns, the *Gregg v. Georgia* approved death sentencing statutes which provided guidelines to the juries in capital cases to prevent the influence of extra-legal or other inappropriate factors on sentencing outcomes.¹⁰³ However, no such concerns were raised by the Court with respect to the significant latitude available to prosecutors in their decisions to seek the death penalty among eligible cases.

Prosecutorial discretion is a constant fixture in the criminal justice system. As a result of this longstanding tradition, prosecutors are entrusted with considerable power over exercising their judgment and conscience in decisions involving the filing or dismissal of charges, the number and types of charges filed, as well as potential plea bargains with defendants. In an overview of prosecutorial discretion, Cox (1975) noted the structure of statutes and criminal codes in many American jurisdictions may explain the wide degree of latitude that is often given to prosecutors.¹⁰⁴ First, the broad range of criminalized behaviors such as offenses that are “victimless crimes” often result in a degree of discretion on the part of prosecutors to decide which offenses will be prosecuted and how those prosecutions will be pursued. Second, many criminal statutes often overlap and duplicate one another, which provides opportunities to prosecutor to charge defendant’s with criminal offenses that may

¹⁰²408 U.S. 238, (1972).

¹⁰³428 U.S. 153, (1976).

¹⁰⁴Cox, S. (1975). Prosecutorial Discretion: An Overview. American Criminal Law Review. 13, 383-434.

produce the desired conviction and penalties. Third, a number of criminal statutes often reflect the moral sentiments of the citizens in a given jurisdiction. For example, violent offenses against children may invite selective enforcement of the law since these types of violations are more likely to evoke the moral outrage of the public and influence charging decisions by the prosecutor. Fourth, a number of statutes often attempt to apply criminal sanctions as mechanisms of social control to behaviors that may be more appropriate for disposition through other means.¹⁰⁵ Finally, prosecutorial discretion often results from antiquated or outdated laws that remain on the books so long that prosecutors often have the power to choose which laws will be enforced.

In addition identifying the nature of criminal statutes and codes as sources of prosecutorial discretion, Cox noted a number of extra-legal factors that may result in disparities from such discretion. First, a prosecutor's caseload and existing resources could have an impact on charging decisions. Prosecutors, as a way of reducing existing caseloads, could shift the responsibility of prosecuting cases to other state or federal agencies. Second, the adversarial nature of the criminal justice system may breed the prosecutor's desire to maintain or increase his or her conviction rate. Prosecutorial discretion, in such instances, may influence the manner in which certain cases are screened, pursued or settled via plea bargain prior to or during trial. Third, discretion may result in charging disparities in cases where the prosecutor may bargain with certain defendants as a way to gain valuable

¹⁰⁵Cox noted that social problems such as child nonsupport, intra-family conflicts, and other victimless crimes may be disposed of more effectively by agencies outside of the criminal court system.

information or testimony concerning other suspected criminals or criminal offenses.¹⁰⁶

Finally, the pressure of public opinion may influence charging decision on the part of the prosecutor. Additionally, political pressures, the need to maintain the public's respect for the criminal justice system, and negative press coverage may also influence how prosecutors exercise their discretion in charging outcomes.

Despite the fact that the *Furman* court raised concerns over the potential impact of unguided discretion of capital juries on sentencing outcomes, no such concerns were raised regarding the unfettered discretionary power of prosecutors. Rather, the Court recognized the importance of prosecutorial discretion in cases involving the death penalty. The *Gregg* court, in their approval of the revised Georgia death sentencing statute, rejected the claims that the “unfettered authority” of the prosecutor was constitutionally impermissible.¹⁰⁷

Thus, in the view of the Court, prosecutor discretion did not render the state's death penalty statute unconstitutional.

The Court's ruling in *McCleskey v. Kemp*, would also influence how the federal death penalty procedures and protocols were adopted in the federal system. In that case, the petitioner raised concerns that the race of the victim influenced whether the death penalty was imposed and, in turn, suggested that the death penalty in the State of Georgia was unconstitutional under the Equal Protection Clause of the 14th Amendment.¹⁰⁸ Specifically,

¹⁰⁶Cox pointed to a number of negative consequences that can result in instances where the prosecutor uses discretion to obtain information or testimony: decisions not to charge, decisions to dismiss charges already brought, or a reduction in existing charges.

¹⁰⁷428 U.S. 153, at 199 (1976).

¹⁰⁸The petitioner also raised the issue that the death penalty in Georgia was

the petitioner in *McCleskey* focused on statistical data submitted to the Court which found that killers of white victims were 4.3 times more likely to have the death penalty imposed in their cases than killers whose victims were black.¹⁰⁹ Additionally, the race effects found in the Georgia sentencing system remained significant after considering 230 non-racial variables that could have influenced sentencing outcomes in capital cases. Based on these findings, the petitioner concluded that the State of Georgia placed a higher value on the lives its white citizens than its black citizens. Although the Court would ultimately reject the petitioner's claims of racial bias in the Georgia sentencing system, the Court's ruling would lead to the eventual creation and adoption of several procedural safeguards in the federal death penalty system which attempted to address the impact of racial bias in capital cases.¹¹⁰ As a result of the *Gregg* and *McCleskey* rulings, as well as subsequent revisions to the federal death penalty statutes, measures would eventually be adopted by 1994 with the intent of addressing threats of racial bias in the federal death penalty system.

After the enactment of the FDPA, the U.S. Department of Justice (hereafter referred to as "DOJ") adopted procedures and protocols for death penalty cases to remove the potential influence of extra-legal factors, such as race, from the decisions of U.S. Attorneys

unconstitutional under the 8th Amendment's Cruel and Unusual Punishment clause.

¹⁰⁹Although race-of-the victim effects were found in several analyses, the race-of-the-defendant effects were not found to be statistically significant.

¹¹⁰The Court would reject the petitioner's claim that racial discrimination influenced the outcome in his case due to his failure to demonstrate "purposeful discrimination" in the Georgia death penalty system. That is, the petitioner failed to demonstrate that the Georgia legislature passed the death statutes with prior knowledge that the administration of the death penalty would result in it be unfairly applied to certain racial groups over others.

seeking to charge defendants with death-eligible offenses. Little's review of the federal death penalty protocols describes a fairly complex decision making process at several levels in the federal death penalty system that differs substantially from charging procedures typically found at the state level.¹¹¹ At each of these levels, which begin with the charging decisions of the U.S. Attorneys with additional oversight by the Capital Review Committee, the Deputy Attorney General and the U.S. Attorney General, a number of procedural protections have been adopted to address the potential influence racial bias in charging outcomes in federal capital cases.

Although the DOJ protocols and procedures do not create any substantive or procedural rights for defendants charged with capital crimes, a number of governing standards were adopted with the federal charging protocols and procedures to address previous concerns of racial bias in capital cases and assist decision makers at each level in the charging process.¹¹² First, the charging process required all authorities with decision making power to consider each case on its own merits. This requirement would promote fairness in the charging process by preventing extra-legal characteristics such as race or ethnicity from influencing the charging recommendations by U.S. Attorneys and/or charging decisions by the U.S. Attorney General. Second, decision makers were required to treat cases with similar characteristics in a similar fashion. Although each federal district was

¹¹¹ Little, R. (1999). The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role. *Fordham Urban Law Journal*, 26, 347-508.

¹¹²In *United States v. McVeigh*, 944 F. Supp. 1478 (1996), two district courts ruled that the decision to seek the death penalty is solely a function of prosecutorial discretion and defendants are not entitled to due process protections that are typically afforded in adjudicative or quasi-adjudicative government proceedings.

viewed as being distinctive in terms of its respective State and local practices, federal prosecutors were required to adopt charging practices that would result in more consistency across the nation. By requiring oversight at multiple levels, this requirement would reduce charging disparities across federal districts. Third, the charging process required the decision makers at each level in the review process to determine whether the applicable statutory aggravating factors and any relevant non-statutory aggravating factors sufficiently outweighed the applicable mitigating factors or whether aggravating factors existed in the absence of mitigating factors to justify a sentence of death. Finally, the U.S. Attorneys, the Capital Review Committee, the Deputy Attorney General, and the U.S. Attorney General were are required to consider whether any legitimate law enforcement or prosecutorial reasons existed prior to the decision to seek or not to seek the death penalty.

a. The United States Attorneys

At the federal level, the charging process begins with an internal assessment by prosecutors of eligibility of the offense for the death penalty.¹¹³ All death-eligible cases are generally required to meet three criteria: (1) the defendant is charged with an offense that is statutorily authorized to receive a death sentence; (2) the defendant intended or had a high degree of culpability with respect to the death of the victim; and, (3) one or more statutory aggravating circumstances must be present in the case.¹¹⁴ Additionally, the decision to seek

¹¹³ Generally, federal cases for which a death sentence may result require the killing of the victim as a necessary element of the crime. However, a number of non-homicide offenses such as treason, espionage and drug distribution offenses under certain circumstances are statutorily eligible to receive the death penalty.

¹¹⁴ Prosecutors seeking the death penalty are also required to provide a notice of intent to seek the death penalty to defense counsel and must specify which aggravating

the death penalty in federal capital cases is also influenced by whether it is in the interest of the Federal government to pursue the case over the interest of the state in which the offense initially occurred. The “substantial federal interest” provision requires U.S. Attorneys to consider whether the Federal interest to pursue prosecution outweighs the interests of other State or local jurisdictions. In such cases involving “dual jurisdiction”, it is generally recognized that the federal death-eligible offense may also be prosecuted under state law.¹¹⁵ According to the United States Attorney’s Manual, “substantial federal interest” to prosecute a criminal case over the interests of the specific state can be demonstrated if: (1) the Federal government’s case is found to be stronger than that of the state’s case; (2) the criminal activity involved in the case was found to extend beyond the borders of the respective state; and, (3) there is a higher likelihood of effective prosecution in the federal court versus the state court.¹¹⁶

Additional safeguards were also added to the adopted protocols to promote fairness and consistency in charging decisions by federal prosecutors. Cases involving the decision

circumstances the government will propose to prove as a justification for seeking the death penalty.

¹¹⁵According to the “substantial federal interest” provision, U.S. Attorneys can assume jurisdiction over the case and request the death penalty in state jurisdiction that do not have the death penalty as a charging and sentencing option. However, federal prosecutors cannot claim “substantial federal interest” in a non-death penalty state solely as a means to obtain the death penalty.

¹¹⁶According to DOJ policy, federal authorities will often defer to state officials in homicide prosecutions to avoid duplicate prosecutions of cases where the federal and state governments hold dual jurisdiction. In such cases, federal authorities will not prosecute offenses if the state chooses to do so.

by U.S. Attorneys to seek the death penalty advance through a number of levels prior to the final authorization by the U.S. Attorney General to seek the death penalty in capital cases. After eligibility requirements have been met and charging decisions have been finalized, all U.S. Attorneys are required to submit any pending cases for which the death penalty is authorized regardless of whether or not the death penalty is being recommended.¹¹⁷ Although the U.S. Attorneys are not required to consult with the authorities in DOJ with final decision making power over cases that receive authorization to continue in the process as death-eligible cases, they are required to prepare a “Death Penalty Evaluation” form for all potential capital cases. Similar to cases filings at the state level, prosecutor are provided considerable discretion in their decisions regarding the death penalty. Although senior staff at DOJ will often defer to the decisions by U.S. Attorneys to not seek the death penalty in many cases, all indictments which may result in a death sentence are regarded as “trigger cases” and are heavily scrutinized during the charging process.¹¹⁸

The current charging system also gives wide latitude to U.S. Attorneys in plea bargains with defendants in capital cases. Although DOJ protocols and procedures prevent federal prosecutors from seeking the death penalty in order to gain a more favorable plea bargaining position, they are free to use their discretion to approve any plea bargains in a capital cases as a means of disposing with the case prior to the trial proceeding.¹¹⁹ After the

¹¹⁷All U.S. Attorneys must obtain written approval from the U.S. Attorney General in order to formally seek the death penalty.

¹¹⁸Any federal case that is potentially eligible for the death penalty is considered a “trigger” case and is sent to DOJ for review regardless of whether or not the death penalty is being sought.

plea bargain is approved, federal prosecutors are required to report any plea agreement to senior-level officials at DOJ with an explanation for the agreement.¹²⁰

Under 21 U.S.C. § 848(h)(1) and 18 U.S.C. § 3593(a), U.S. Attorneys are required to provide notice to defense counsel that they intend to seek the death penalty and all statutory and non-statutory aggravating circumstances that will be proven at trial must be clearly specified. The capital case protocols and procedures also require that proper notice of intent to seek the death penalty be given to defense counsel at the time of the indictment of a death-eligible offense or prior to the time that the U.S. Attorney decides to obtain approval from the Attorney General to seek the death penalty.¹²¹ Additionally, U.S. Attorneys are also encouraged to consult with defense counsel before the case is submitted

¹¹⁹Under section 9-10.000 of the *United States Attorneys Manual*, the U.S. Attorneys may not seek, or threaten to seek the death penalty for the purpose of gaining a more favorable negotiating position with defendants in capital cases. Additionally, the U.S. Attorneys, unless approved by the Attorney General, are prevented from entering into any binding plea agreements which may preclude the Attorney General from seeking the death penalty. Accordingly, the U.S. Attorneys are required to inform all parties that any plea agreements reached are not binding and are conditioned on the authorization of the Attorney General.

¹²⁰U.S. Attorneys are not required to seek approval from the U.S. Attorney General prior to the decision to enter into a plea agreement with defendants in capital cases. However, the withdrawal of the death penalty in a case that was not part of a plea bargain and was previously approved by the U.S. Attorney General requires a review by the capital case review committee and final approval by the U.S. Attorney General.

¹²¹The requirement of notice of intent to seek the death penalty is intended to provide defense counsel with the opportunity to present mitigating facts to the U.S. Attorneys that may influence the decision or not to seek the death penalty in death-eligible cases.

to the Attorney General in cases where the death penalty is being recommended.¹²² After notice has been given or approval has been sought, the U.S. Attorneys are required to prepare the evaluation form with the required information for submission to the Capital Case Review Committee, which has nationwide jurisdiction. Upon submission, the capital case review committee, which consists of the Deputy Attorney General, the Assistant Attorney General of the Criminal Division, and other senior Justice Department lawyers who are designated by the U.S. Attorney General, reviews the information prior to making a final recommendation to the U.S. Attorney General. Per DOJ protocol, all death-eligible cases, regardless of whether the death penalty is being sought, are submitted by the U.S. Attorneys to the capital case review committee. After the case has been submitted for review, counsel for the defense is afforded the opportunity to submit a presentation to the committee prior to the final decision made by the U.S. Attorney General to seek the death penalty. In response to concerns raised in *McCleskey* of potential racial bias in the Georgia death penalty scheme, defense counsel's presentation may also include any evidence of racial bias against the defendant, as well as any additional evidence of a systematic pattern of racial discrimination by DOJ in the administration of the death penalty in the Federal system. Concerns of racial bias in the Federal death penalty scheme were presumably addressed by the creation of a "race-blind" charging system that attempts to remove race or ethnicity from the consideration in the final charging process. Thus, U.S. Attorneys are prevented from including any information regarding the race or ethnicity of the defendant or victim in the

¹²²Meetings with defense counsel often provide an opportunity for the U.S. Attorneys to explain the position of the defense and provide any relevant rebuttal information to DOJ authorities who have decision making power in the charging process.

case file that goes to the U.S. Attorney General.¹²³

Prior to the submission of the charging recommendations to the U.S. Attorney General, federal prosecutors are required to articulate a moral rationale which provides a justification for the decision to seek the death penalty under the applicable federal statute. Additionally, federal prosecutors are required to use similar standards as those typically used by juries in capital cases to justify their decisions to seek the death penalty. Thus, the justification to seek the death penalty is based, in part, on the requirement that federal prosecutors determine which aggravating and mitigating circumstances exist AND whether the aggravating circumstances are found to “outweigh” the mitigating circumstances.¹²⁴

b. The Capital Case Unit (“CCU”)

After the preliminary decision making process has been completed with respect to the request by the U.S. Attorneys to seek the death penalty, all capital case submissions are submitted with all required documentation to the Capital Case Unit for review.¹²⁵ The

¹²³By removing all information of race or ethnicity from the case file that goes before the U.S. Attorney General, it is assumed that this requirement provides a safeguard against racially biased charging decisions being made at a conscious or unconscious level.

¹²⁴The charging process is considered by some to be favorable to defendants in capital cases in view of the fact that the aggravating factors submitted by federal prosecutors must be supported by evidence beyond a reasonable doubt. However, the mitigating circumstances submitted for consideration are held to a lower standard and generally consist of any such circumstances that may be reasonably raised from the existing evidence.

¹²⁵All capital case submissions must include a death penalty evaluation form for each defendant charged with a capital offense, a detailed prosecution memorandum, copies of the indictments, written documentations from defense counsel which express opposition to the death penalty, and any additional relevant documentation and/or evidence. As an added precaution, prosecutors seeking the death penalty do not submit any information to the review committee regarding the defendant(s) racial or ethnic background. However, defense counsels have shared their client’s race and/or ethnicity in past cases.

Capital Case Unit (hereafter referred to as the CCU) was created to add an additional layer of review oversight to the capital case decision making process. Although there is no formal requirement, U.S. Attorneys are strongly encouraged to consult with the CCU prior to seeking a capital indictment. In 1998, the CCU was established within the Criminal Division of the U.S. Department of Justice in response to an increase in capital cases in the federal system with the intent of serving as an advisory component for federal prosecutors. One of the primary functions of the CCU, which is staffed with prosecutors with extensive experience in prosecuting capital cases at the state level, is to ensure that all information related the race of the defendants and victims has been removed from the case files before that are submitted to the U.S. Attorney General.¹²⁶ Thus, the removal of all direct racial

¹²⁶According to § 9-10.080 of the United States Attorneys' Manual, charging documents submitted for review must include:

- (A) A prosecution memorandum detailed information regarding the basis for the recommendation by the U.S. Attorney including:
1. Any unusual circumstances in the case such as:
 - a. The case is being submitted for expedited review.
 - b. The case involves the extradition of the defendant from a country where a waiver of the authority of the United States to seek the death penalty is necessary for extradition.
 - c. The case presents a significant law enforcement reason for not seeking the death penalty (such as the defendant's willingness to cooperate in a difficult prosecution.
 - d. The case has been submitted for pre-indictment review.
 2. Any deadline established by the Court for the filing of a notice of intent to seek the death penalty, trial dates, or other time considerations that could affect the timing of the review process.
 3. A narrative statement of the facts and supporting evidence.
 4. A discussion of relevant prosecutorial considerations.
 5. A death penalty analysis which identifies intent,

information addresses concerns of racial bias in capital cases which was raised in *McCleskey* and creates a “race blind” charging process.¹²⁷

and applicable aggravating and mitigating circumstances. Additionally, the U.S. Attorney should note whether the aggravating circumstances outweigh the mitigating circumstances to justify a sentence of death or whether aggravating circumstances exist in the absence of mitigating circumstances to justify a sentence of death.

6. All background and criminal records of the defendant (with the exception of information on race or ethnicity of the defendant).
 7. All background and criminal records of the victim (with the exception of information on race or ethnicity of the victim).
 8. Victim impact statements from the victim’s family on seeking the death penalty as well as other victim impact evidence.
 9. Discussion of the federal interest in prosecuting the case.
 10. Any discussion on whether the defendant(s) are citizens of foreign countries, and if so, whether the requirements of the Vienna Convention on Consular Relations have been satisfied.
 11. A recommendation of the United States Attorney on whether the death penalty should be sought.
- (B) A death penalty evaluation form for each defendant charged with a death-eligible offense.
- (C) A non-decisional information form.
- (D) Copies of all existing and proposed superseding indictments.
- (E) A draft notice of intention to seek the death penalty.
- (F) Any materials submitted by defense counsel.
- (G) The name of the assigned U.S. Attorney who is responsible for communicating with the Capital Case Unit.
- (H) Any relevant court decisions which highlight court orders and deadlines.

¹²⁷ Although direct racial information of the defendant and victim is removed prior to charging authorizations made by the U.S. Attorney General, U.S. Attorneys are aware of those racial characteristics when their charging decisions are determined. However, all racial information is retained by DOJ for research purposes.

The CCU also provides a level of oversight to the charging decisions made by the U.S. Attorneys by evaluating whether all cases submitted are eligible under the capital statutes in the United States Code. Under DOJ's *Capital Resource Manual*, all capital eligible cases are assigned to crime-specific sections within DOJ.¹²⁸ Upon receipt of the required documentation from the U.S. Attorneys, the CCU assesses the death eligibility of all cases submitted by cross-referencing those cases to the list of capital eligible statutes contained in the DOJ's *Criminal Resource Manual*.

c. The U.S. Attorney General's Review Committee ("AGRC")

The U.S. Attorney General's Review Committee (hereafter referred to as the Review Committee) represents a critical oversight authority in the federal charging process. The Review committee is appointed at the discretion of the U.S. Attorney General and is comprised of the U.S. Deputy Attorney General, the Assistant Attorney General for the Criminal Division, and a number of other high-ranking attorneys in the Department of Justice.¹²⁹ Cases submitted to the Review Committee include those with all of the required documentation and cases requiring an immediate decision by the Attorney General because of a deadline set by the court. In cases requiring an immediate decision, the Review Committee is required to respond court-ordered deadlines at the risk of losing the decision

¹²⁸Capital cases are currently assigned one of the following sections in DOJ: Terrorism and Violent Crimes, Narcotics and Dangerous Drugs, Organized Crime and Racketeering, Office of Special Investigations, Child Exploitation and Obscenity, or the Criminal Section, Civil Rights Division.

¹²⁹Due to the lack of a formal review process for capital cases in the federal system, then-Attorney General Janet Reno created the Review Committee in 1995 to provide an advisory body to the Attorney General in cases involving the decision to seek or not to seek the death penalty in capital-eligible cases.

making authority of the Attorney General to seek the death penalty in those cases. All cases submitted to the Review Committee are required to include a Death Evaluation form, other supporting documents forwarded by the U.S. Attorneys and a memo which summarizes any other issues that have been flagged for consideration prior to the decision by the Attorney to seek the death penalty. Additionally, U.S. Attorneys are required to provide a recommendation to the Attorney General whether the death penalty should or shouldn't be sought as well as an explanation for that decision.¹³⁰

Similar to the charging decision making process which is initiated by the U.S. Attorneys, the Review Committee evaluates all capital-eligible cases by determining which aggravating and mitigating circumstances are present in each case and whether the aggravating circumstances outweigh the mitigating circumstances. The Review Committee, in determining whether the death penalty should be authorized, is also required to determine whether the aggravating circumstances are supported by admissible evidence that can be sustained on appeal.¹³¹ In an effort to achieve national uniformity in charging decisions, cases where the death penalty is recommended receive an extra level of scrutiny by the Review Committee. In such cases, the Review Committee is required to address two issues in their charging recommendation process to the Attorney General. First, the Review

¹³⁰U.S. Attorneys are given significant deference by the Attorney General in “no death penalty” recommendations under the presumption that they are most familiar with the dynamics of their local federal districts such as the judges, juror pools and attitudes for and against the death penalty, and the strengths and weaknesses of their cases.

¹³¹The federal charging process is viewed as being in the defendant's favor by requiring that only those aggravating circumstances supported by evidence beyond a reasonable doubt may be submitted to the Attorney General for authorization to seek the death penalty.

Committee examines each case to determine whether the existing facts and circumstances justify the request for the death penalty. Second, a comparative analysis is conducted to examine how the case under considerations compares to other cases in which the death penalty was previously recommended by the U.S. Attorney, but not authorized by the Attorney General. After careful consideration of whether the death penalty is justified and how the case compares to other comparable cases, the Review Committee begins preliminary discussion in preparation to make its final recommendation to the Attorney General.

During the preliminary decision making phase of the charging recommendation process, the defense counsel is afforded the opportunity to present arguments to the Review Committee prior to the official recommendation to the Attorney General of whether or not the death penalty should be sought.¹³² Although no formal record of the presentations is maintained, defense counsel is given wide latitude regarding the nature of the presentation and often responds to a series of legal, factual, or philosophical questions from the Review Committee.¹³³ The defense is also allowed to present any evidence of racial bias against the defendant in his or her case as well as any evidence of a pattern or practice of racial

¹³²These meetings between the Review Committee and the defense counsel are often strategic in nature as the each side attempts to gauge the other's possible course of action once the case moves to the trial phase. However, defense counsel presentations tend to be more serious in nature in cases where a death-eligible case is filed, but a death recommendation is either unlikely or can be realistically avoided.

¹³³Questions from the Review Committee often include issues of culpability among co-defendants, the level of heinousness present in a homicide, or the likelihood that the death penalty will be recommended in a given case.

discrimination on the part of the Department of Justice.¹³⁴ The defense may present previously unknown facts in the case such as psychological evaluations records of the defendant which may indicate some form of mental illness and result in an additional investigation on the part of the Review Committee.

After the conclusion of the presentation by defense counsel, all relevant case documentation is reviewed and the Review Committee initiates charging recommendation deliberations. Although the Review Committee must clearly articulate its rationale for the charging recommendation, neither the rationale nor the final decision is required to be unanimous. Thus, it is possible that members of the Review Committee may recommend that the death penalty be sought for different reasons.¹³⁵ Once the memorandum is deemed satisfactory by the Review Committee, a meeting is scheduled with the Attorney General for the final charging discussions. Unless further information is need, the Attorney General, at the conclusion of the discussion, makes the final decision whether or not to authorize the U.S. Attorney in the case to seek the death penalty.

D. Empirical Research

1. The Pre-Furman Studies

¹³⁴Similar to the function performed by the Capital Case Unit, the Review Committee also reviews the case documents to verify that all references to the race of the defendant(s) and victim(s) have been removed from the case file before it is forwarded to the Attorney General.

¹³⁵For example, one member may reach the conclusion that one aggravating circumstances wasn't proven and another member may conclude that the aggravating circumstances present do not significantly outweigh the mitigating circumstances present in the case.

In addition to the concerns addressed by the Court regarding the application of the death penalty, researchers over time have grappled with the best way to evaluate the potential effect of racial characteristics on sentencing outcomes in capital cases. One of the key criticisms by opponents of capital punishment involves the notion that the death penalty is administered in a discriminatory manner. This argument resulted in a body of research prior to the Court's ruling in *Furman v. Georgia* which appeared to establish a relationship between the racial characteristics of the offender and/or victim and whether a sentence of death or life imprisonment was imposed by the sentencing authority. The key challenges to researchers seeking to establish such a relationship centers on the how to measure these relationships and how to interpret the research findings. Since the turn of the 20th century, numerous studies have attempted to capture this relationship using different research approaches.

One of the earliest studies (Mangum, 1940) analyzed the administration of the death penalty in nine Southern states during a period from 1909 to 1938 and found black offenders had a higher likelihood being executed than white offenders. Additional studies (Johnson, 1941; Garfinkel, 1949) which focused on the interracial relationships between the offender and victim also found what was believed to be influences of the race of the offender and victim on whether a death sentence was imposed. By comparing the race of both the offender and the victim, these studies found a higher likelihood of the death sentence resulting in cases where the offender was black and the victim was white. A series of studies that followed which examined the same racial relationship between the offender and victim confirmed earlier findings that cases where the offender was black and the victim was white were sentenced to death at a higher rate than in cases with the other three

offender/victim categories (Florida Civil Liberties Union, 1964; Howard, 1967; Southern Regional Council, 1969; Wolfgang and Reidel, 1973; Zimring et al., 1976).¹³⁶

Despite these findings, many of the pre-*Furman* studies were characterized by poor or limited methodological approaches which made it difficult to draw conclusions of the effect of race on charging or sentencing outcomes. Kleck's (1981) review of a number of capital punishment sentencing studies pointed to a number of statistical weaknesses of this body of work which questioned the validity of the findings.¹³⁷ For example, many of the studies failed to control for key legal variables such as the prior criminal record of the offender or included very crude measures of the defendant's prior record. Additionally, many of the studies that examined the role of offender/victim interracial relationships on sentencing outcomes failed to consider the prior record of the offender or produced findings that were called into question by a series of later studies. Kleck (1981) also pointed to a number of studies that found felony killings were punished more severely than other homicides when considering race and that black offender/black victims homicides were more likely to involve some level of precipitation by the victim than in homicides where the offender was black and the victim was white (Wolfgang, 1958; Wolfgang et al., 1962; Bedau, 1964; Wolf, 1964;).¹³⁸ Finally, many of the studies did not focus on sentencing

¹³⁶These studies suggested the possibility of a discriminatory effect involving the imposition of sentences of death in rape cases where the offender was black and the victim was white.

¹³⁷Kleck, G. (1981). Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty. American Sociological Review, 46, December: 783-805.

¹³⁸A review of many of the pre-*Furman* studies also revealed a weaker effect of race

outcomes at the trial stage. Instead, many of the studies were found to focus on comparisons of sentences that were executed or commuted, or death sentences receiving appeals at higher levels in the legal process. Because of these limitations, Kleck (1981:799) found no evidence among the studies reviewed of a significant effect of race on death penalty sentencing outcomes.

2. The Post-*Furman* Studies

After the Court's rulings in *Furman v. Georgia* and *Gregg v. Georgia*, the revisions in the Georgia statute were thought to have adequately addressed and corrected the potential for lawless decision. Although empirical evidence was either lacking or found to be flawed during this period of time, the Court believed that the new death sentencing statutes would administer death sentences in a manner that was rational, structured and more likely to produce sentencing outcomes that would be free from potentially arbitrary, capricious, and discriminatory practices of the pre-*Furman* era. However, a number of empirical studies have cited the existence of race as a possible influence in determining the recommendation and imposition of the death penalty at the sentencing phase of trial even after the procedural guidelines in *Gregg* were put into operation.

Unlike the earlier studies which examined the role of race on sentencing outcomes in capital cases in the pre-*Furman* era, studies that were conducted after the *Gregg* decision were more sophisticated in their methodological approaches. In 1990, the United States General Accounting Office examined 28 studies on patterns of racial disparities in death

on sentencing outcomes when the prior record of the offender was considered.

penalty sentencing that were conducted after the *Furman* decision.¹³⁹ The report evaluated the research quality of each study and found them to be superior to earlier studies that were conducted prior to *Furman v. Georgia*.¹⁴⁰ A review of the 28 studies under evaluation indicated a pattern of racial disparities at several stages in the death penalty process after the *Furman* decision.¹⁴¹ The GAO report noted that 82 percent of the death penalty studies reviewed revealed that the race of the victim was found to have a significant impact on whether the offender was charged with a death-eligible offense or received a sentence of death.¹⁴² Specifically, cases involving white victims were found to have a higher likelihood of being charged or sentenced in death penalty cases. Although these findings supported earlier pre-*Furman* studies on race and the death penalty, the results from analyses after the *Gregg* ruling were strengthened by their consideration of variables such as the prior record of the offender and the number of aggravating circumstances present during the commission

¹³⁹ United States General Accounting Office. (1990). *Death Penalty Sentencing: Research Indicates Patterns of Racial Disparities*. Washington, DC: United States Congress.

¹⁴⁰ Each study was rated by five criteria: (1) study design, (2) sampling, (3) measurement, (4) data collection, and (5) analysis. Studies were judged to be of high quality if they: (a) had a sound design that analyzed homicide cases throughout the sentencing process; (b) controlled for legally relevant variables such as aggravating and mitigating circumstances; and, (c) incorporated analytical techniques to control variables that were correlated with race or sentencing. Other studies were characterized as of medium quality if they did not meet one of the previous three quality rating measures and weak studies were defined as having flawed designs and were too basic in their final data interpretations.

¹⁴¹ Racial disparities were found at the charging, sentencing, and the imposition of sentence stages.

¹⁴² Although the majority of the studies reviewed found race-of-the-victim effects on charging and sentencing outcomes, the race of the offender has been found in a small number of studies to have an impact on such outcomes as well.

of the offense. A review of studies deemed to be of high or medium quality by the GAO report found that the inclusion of legal variables into several of the analyses did not completely explain the racial disparities cited. That is, after legal factors such as the number of aggravating circumstances, prior record of the offender, level of culpability, and heinousness of the crime were considered, cases involving white victims still were found to have a higher likelihood of receiving a death sentence. A number of these studies at the charging and sentencing phases using multivariate analyses will be discussed below.

3. Studies at the State Level

Bowers and Pierce¹⁴³ analyzed the effect of race on the outcomes of sentencing in several states with death sentencing statutes. Since it was determined that approximately 70% of all death sentences handed down at that time were imposed in Florida, Georgia, Texas and Ohio, Bowers and Pierce sought to examine, among other factors, whether or not possible sentencing disparities existed in these states according to the race of the defendant and victim. By using the Supplemental Homicide Reports from 1973 to 1976, demographic variables such as the race, sex and age of the defendant and victim as well as other legal factors such as the number of aggravating and mitigating circumstances, the analysis was constructed to examine the effect of race on sentencing among four defendant/victim categories. After considering each of these categories--black defendant-white victim, white defendant-white victim, black defendant-black-victim and white defendant-black victim--Bowers and Pierce were able to determine that black defendants whose victims were white

¹⁴³Bowers, W.J. & Pierce, G.L., (1980). Arbitrariness and Discrimination under Post-Furman Capital Statutes. Crime and Delinquency, 26, October: 563-575.

had the greatest likelihood of receiving a death sentence. In Florida, defendants whose victims were white were forty times more likely to receive a death sentence than defendants whose victims were black. When the race of the defendant was considered along with the race of the victim, black defendants who killed whites were five times more likely to receive a death sentence than white defendants whose victims were also white. Similar patterns, though slightly lower in magnitude in Georgia and Texas and higher overall in Ohio, were noted as well.

Bowers and Pierce also examined the influence of other legal factors as a possible explanation for racial disparities in sentencing by dividing the homicides into felony and non-felony murders.¹⁴⁴ Felony type murders were defined as those murders which were committed in the commission of another felony such as a case where a homicide was committed in the course of a robbery. Non-felony murder, on the other hand, were homicides which were often typical in cases involving black victims--domestic fights, fights among acquaintances or friends, etc. If such legal factors accounted for sentencing disparities, disparities found in the previous analysis according to the race of the defendant and victim should disappear. However, a pattern of sentencing disparity similar to the initial analysis was noted in the felony and non-felony murder categories of the analysis. Although the disparities were less pronounced in the non-felony category,¹⁴⁵ the addition of legal

¹⁴⁴Id., at 597-600. Felony homicides consisted of those cases that were eligible to receive a death sentence whereas non-felony homicides may or may not have been eligible.

¹⁴⁵A death sentence was more than five to ten times more likely in a felony murder case than a non-felony murder case among each of the four defendant-victim categories in Florida, Georgia and Texas. Ohio was not considered in this part of the analysis due to the fact that its death statutes were struck down by the Supreme Court in *Lockett v. Ohio*, 438

factors into the analysis still did not adequately account for racial disparities in sentencing noted in each of the four categories. The probability of receiving a death sentence for felony and non-felony convictions was still highest in cases where the victim was white.

Zeisel conducted a study in 1981 using Florida's Supplemental Homicide Reports to examine the influence of race among cases involving 114 inmates on Florida's death row.¹⁴⁶ The purpose of the study was to conduct a comparative analysis of the race defendants and victims among the men on Florida's death row to race distributions of 189 Florida arrestees from January, 1976 to September, 1977. Of the 114 death row inmates, 75% of the inmates committed murders during the commission of a felony such as rape, robbery, or burglary. Zeisel noted in his results that 94% of the death row inmates were convicted of killing involving white victims. Only 2% of the death sentences resulted in multiple victim cases involving white and black victims, and 4% of the inmates were sentenced to death in cases where the victim was black. Final results that showed a ratio of death row to arrestees for murder during a felony was 31% for offenders whose victims were white compared to 1% for offenders whose victims were black. Zeisel's study also examined offender/victim racial combinations and found that cases involving black offenders and white victims represented 47% of arrestees on death row compared to 24% of arrestees where the offender and victim

U.S. 586 (1978) because of its quasi-mandatory nature.

¹⁴⁶Zeisel, H. (1981). Race Bias in the Administration of the Death Penalty: The Florida Experience. Harvard Law Review, 95, 456-468.

were white.¹⁴⁷

Radelet conducted a study in Florida which examined 637 homicide indictments in twenty Florida counties in 1976 and 1977.¹⁴⁸ In his analysis, he focused his examination on defendant/victim distributions among homicide indictments among 326 “non primary homicides”.¹⁴⁹ Among the non-primary homicides, Radelet found defendants who killed white victims had a higher probability of being indicted for first degree murder and receiving a death sentence than defendants whose victims were black.

A series of studies in South Carolina examined death-eligible homicides and the charging practices of state prosecutors. In the first study, Jacoby and Paternoster reviewed death-eligible cases taken from the Supplemental Homicide Reports and identified 205 murder cases that met the statutory requirements necessary to receive a death sentence.¹⁵⁰ Findings from their analysis suggested that prosecutors were 3.2 times more likely to seek the death penalty in cases involving white victims, regardless of the race of the defendant. A second analysis estimated interaction effects between the race of defendant and victim and found that prosecutors 4 times more likely to seek the death penalty when blacks were

¹⁴⁷Cases involving black offenders/black victims and white offenders/black victims together represented less than 2% of arrestees on Florida’s death row.

¹⁴⁸Radelet, M. (1981). Racial Characteristics and the Imposition of the Death Penalty. American Sociological Review, 46, 918-927.

¹⁴⁹Primary homicides, which represented 1% of cases resulting in a death sentence, consisted of offenses involving family members, friends, or acquaintances, and usually involve acts of passion. Non-primary homicides are typically instrumental, occur in the commission of another felony and are more likely to result in a capital indictment and a death sentence.

¹⁵⁰Jacoby, J. & Paternoster, R. (1982). Sentencing Disparity and jury packing: Further Challenges to the Death Penalty. Journal of Criminal Law, 73, 379-387.

accused of killing whites compared to cases where blacks were accused of killing other blacks.

Paternoster examined charging decisions by prosecutors in South Carolina in a more extensive analysis of 1,805 non-negligent homicides recorded from June 8, 1977 to December 31, 1981.¹⁵¹ Data was compiled from the Supplemental Homicide Reports, police and investigation reports, and records from the State Office of the Attorney General, and a list of known characteristics of the victim and suspect were included in a series of analyses. After reviewing cases from the three data sources, a number of analyses were conducted on a sample of 1,686 homicides with known offenders and a sample of 321 cases that met the statutory qualifications to receive a death. Additionally, two homicide seriousness scales were created to record the level of aggravating circumstances among the homicide cases in the analyses. Included in the first scale were aggravating circumstances such as whether the victim and offender know each other, whether there were multiple victims or multiple offenders, or whether the victim was a female. The second scale included a fifth aggravating factor which included aggravating circumstances such as the past violent criminal history of the offender, the level of brutality involved in the present offense, whether the victim was shot multiple times, or if the offender tried to hide the body. The purpose of the study was to determine if race emerged as a significant factor in charging decisions made by prosecutors in capital cases.

A preliminary analysis which examined the probability of the prosecutor seeking the

¹⁵¹Paternoster, R. (1983). Race of the Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina. Journal of Criminal Law and Criminology, 74(3), 754-785.

death penalty for all homicides with known offenders showed no significant disparities when the race of the offender is considered. However, when the race of the offender and victim were considered together, a different pattern emerged. Paternoster found that black offenders whose victims were white were 40 times more likely to be charged with a death-eligible offense than cases involving black killers and black victims. For white offenders, an opposite effect of race on charging decisions was found. White offenders who killed black victims were only 1.6 times more likely to have the death penalty sought by prosecutors than cases involving white offenders and white victims. A similar pattern was found when the smaller number of death-eligible offenses was examined. Although there were no significant differences in the decision of the prosecutor to seek the death penalty when the race of the offender was considered, black offenders who killed white victims were 4.5 times more likely to have the death penalty requested than cases where the defendant's victim was black. Also, whites who killed blacks were only 1.1 times more likely to have the death penalty sought compared to cases involving white offenders and white victims.¹⁵²

Paternoster also conducted a number of analyses on two aggravation scales to examine the impact of non-statutory aggravating factors on the prosecutor's decision to seek the death penalty. By using the aggravation scales, a comparative analysis was conducted to examine the charging decisions by prosecutors for cases with similar levels of aggravation by the race of the victim. Paternoster found that white victim cases at each level of aggravation were more likely to have a death penalty requested by prosecutors than cases

¹⁵²Paternoster noted that the disparities found could have been the result of a significant relationship between non-statutory aggravating factors and prosecutor charging decisions.

with black victims.

A final analysis was conducted via a logit model to examine the simultaneous effect of the race of the victim, victim-offenders relationship, and the number of victims on the decision by the prosecutor to seek the death penalty. The logit analysis showed that of the three significant variables included in the model, the race of the victim had a stronger impact on the prosecutor's decision to request a death sentence than the number of victims or the offender-victim relationship. Consistent with the finding in the previous analyses, cases involving white victims were found to have a significant effect on the changing decisions of the prosecutor.

Baldus et al.¹⁵³ conducted one of the most comprehensive examinations (hereafter referred to as the Baldus study) of the influence of race in the capital sentencing system in the state of Georgia. The Baldus study analyzed a universe of cases which included 2,484 offenders who were arrested and charged with homicide and later convicted of murder or involuntary manslaughter between 1973 and 1979. Of these cases, 127 of the defendants were sentenced to death. Information collected on each case contained over 230 aggravating and mitigating circumstances, as well as other non-legal factors such as the defendant's race, age and socioeconomic status. After controlling for several non-racial factors through the use of an ordinary least squares regression analysis, a number of separate linear and logistic regression models were developed to examine the role of race on a number of outcomes including indictment decisions, plea-bargaining decisions, guilt-trial

¹⁵³Baldus, D.C., Pulaski, C.A. & Woodworth, G.G. (1983). Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience. Journal of Criminal Law and Criminology, 74(3), 661-751.

decisions, prosecutorial decisions to seek the death penalty, and jury penalty-trial decisions.

When the models were constructed to control for all of the statutory aggravating circumstances, mitigating circumstances and the race of the defendant, the effect of the victim's race was found to be statistically significant. From this finding, the Baldus study concluded that a dual system operated in the Georgia death sentencing system where the killers of whites were 4.3 times more likely to receiving a death sentence than the killers of blacks. Also, the findings suggested that Georgia juries tended to impose a sentence of death at a higher level of aggravation in cases involving black victims than white victims.

Bowers¹⁵⁴ sought to examine possible operating factors which influenced the decision at the sentencing phase to impose a sentence of death upon conviction. Using a multiple regression analysis, Bowers sampled twenty Florida counties and analyzed 191 cases from a combined sample of 1973-1977 first degree murder convictions considering a number of legal¹⁵⁵ and extralegal¹⁵⁶ factors. If extralegal factors were in fact operating in the decision-making process, Bowers argued that these factors would be evident at the sentencing stage of capital cases. Among the legally relevant factors, only murders accompanied by a felony circumstance were found to be statistically significant at the .01

¹⁵⁴Bowers, W.J., (1983). The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes. The Journal of Criminal Law and Criminology, 74(Fall): 1067-1100.

¹⁵⁵Legal factors in the analysis included: murders accompanied by a felony circumstance, number of offenders, number of victims, sex of victim, age of victim, gun as a murder weapon, age of defendant, accessories involved with the defendant and whether a quarrel precipitated the killing.

¹⁵⁶Extralegal factors included: race of the defendant and victim, region of the state and type of attorney representing the offender.

level.¹⁵⁷ Also, after including three different race variables in the analysis--black offender/white victim, white offender/white victim and white offender/black victim¹⁵⁸-- Bowers noted a race-of-the-victim effect at the sentencing stage. Cases involving white victims and offenders who were black were more likely to result in death sentence than those cases where the offender and victim were black. It was also noted that cases involving a white offender and black victim were less likely to result in a sentence of death than in cases where the offender and victim were both black.¹⁵⁹

Paternoster conducted a similar analysis on the South Carolina data to examine the impact of a number of statutory felonies, non-statutory felonies, and non-felony aggravating factors on the prosecutor's decision to seek the death penalty.¹⁶⁰ In a preliminary analysis of a sample of 1,800 non-negligent homicides committed from June 8, 1977 to December 31, 1981, 300 offenses were identified as potential capital cases and were committed with an additional felony offense. Capital murders were analyzed in three groups: (1) all homicides committed with an additional felony offense, (2) a subgroup of homicides committed with a single felony, and, (3) a subgroup of homicides committed with multiple felonies. The analyses investigated the effect of the race of the victim on prosecutorial discretion to seek

¹⁵⁷Id., at 1084.

¹⁵⁸The black offender/black victim variable was omitted from the analysis in order to be compared to the other three offender/victim categories in assessing the effect of race on sentencing outcome.

¹⁵⁹The white offender/white victim and black offender/white victim variables yielded .13 coefficients test and the white offender/black victim yielded a -.17 coefficient.

¹⁶⁰Paternoster, R. (1984). Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination. Law and Society Review, 18 (3), 437-478.

the death penalty in: (1) all murders involving statutory aggravating felonies, (2) murders involving armed robbery-larceny as the sole aggravating circumstance, (3) murders involving one non-robbery felony as the sole aggravating circumstance, and, (4) murders involving multiple statutory felonies.¹⁶¹

The analysis of all 300 homicides produced findings which showed racial disparities in charging decisions of the prosecutor by the race of the victim. Cases involving white victims were two and a half times more likely to have a death penalty sought by the prosecutor than cases involving black victims.¹⁶² A second analysis of homicides with robbery as the only aggravating circumstance produced similar effects of the race of the victim on charging decisions of the prosecutor. Cases involving white victims were three times more likely to have the death penalty requested than cases involving black victims. A similar pattern of racial disparities in charging decisions was found among homicides committed with a non-robbery felony. White victim cases were found to be three times more likely to have a death sentence requested by the prosecutor than cases involving black victims. The fourth analysis which examined charging decisions by the prosecutor in cases involving homicides committed with other multiple felonies showed weaker effects of the race of the victim on charging decisions. Finally, a series of multivariate analyses were conducted simultaneous effects of a number of variables on charging decisions by the prosecutor.¹⁶³ Results from the probit analysis confirmed earlier findings with respect to the

¹⁶¹Id., at 450.

¹⁶²The race of the offender was not found to have a significant on charging decisions by the prosecutor.

¹⁶³Variables used in the probit analysis included: number of statutory felonies,

race of the victim and charging decisions of the prosecutor. Although the number of statutory felonies emerged as the strongest predictor of charging decision in capital cases, offenses involving white victims also were found to have a significant effect on those decisions as well. Interaction effects calculated between the race of the offender and the race of the victim among all homicides involving felonies also found that black offenders who killed white victims were significantly more likely to result in the prosecutor requesting the death penalty than cases where the offender and victim were white. A second probit analysis of the subgroup of homicides committed with a single felony found that black killers whose victims were black had a significantly lower probability of having a death penalty sought by prosecutors than cases where the offender and victim were white.¹⁶⁴

Gross and Mauro¹⁶⁵ analyzed post-*Furman* death penalty laws in several states including Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma and Virginia in order to examine racial patterns in sentencing between January 1, 1976 and December 31, 1980. Data were collected from the Supplemental Homicide Reports which were filed by local police agencies with the Uniform Crime Reporting section of the FBI.

number of non-statutory felonies, number of non-statutory aggravating factors, number of victims, number of offenders, sex of victim, weapon used, victim-offender relationship, and the race of the victim.

¹⁶⁴The third probit analysis which examined race effect among the second subgroup of cases involving the commission of homicides with multiple felonies found insignificant effects of the race of the victim on the prosecutor's decision to seek the death penalty.

¹⁶⁵Gross, S.R., & Mauro, R. (1984). Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization. Stanford Law Review, 37,(November): 27-153.

Variables included in the reports consisted of the sex, age and race of the offender and victim, the date and place of the homicide, the weapon used, felony circumstances accompanying the homicide and the relationship between the victim(s) and the offender(s). By examining each of these factors, Gross and Mauro were able to determine the existence of certain racial patterns within each state. In an analysis of Georgia, Florida and Illinois, a large proportion of homicide victims were found to be black and the risk of receiving a death sentence was far lower for those who killed blacks as opposed to those who killed whites.¹⁶⁶ Also, despite the fact that white homicide offenders were found to have a slightly higher risk of receiving a death sentence, the disparity cited was largely due to the fact that black offenders were more likely to kill black victims while white offenders were more likely to kill white victims. However, when the race of the offender was controlled, black offenders with white victims were found to have a greater likelihood of receiving a death sentence than white offenders with white victims.¹⁶⁷ Offenders whose victims were white were ten times more likely to receive a death sentence in Georgia, eight times more likely in Florida and six times more likely in Illinois than offenders whose victims were black.

After concluding that three additional non-racial factors were found to have a strong effect on the likelihood of receiving a death sentence, an analysis was conducted in order to determine whether racial disparities could be explained by those factors. Felony circumstances were found to exist in the majority of cases receiving death sentences. However, when the felony circumstances were controlled for, white victim cases were more

¹⁶⁶Id., at 55.

¹⁶⁷Id., at 55.

likely to result in death sentences for both felony and non-felony homicides in each state. The relationship of the victim to the suspect was also an influential factor in determining the likelihood of a sentence of death in each of the three states. Strangers were ten times more likely to be sentenced to death in Georgia, four times more likely in Florida and six times more likely in Illinois.¹⁶⁸ However, when the relationship of the suspect to the victim was controlled for, those whose victims were white were still more likely to receive a death sentence than those whose victims were black.¹⁶⁹ When that category was broken down further by stranger versus non-stranger homicides and the race of the offender, the pattern of disparity in sentencing remained the same. Finally, the number of victims involved was found to increase the likelihood of a death sentence. Defendants with multiple victims were six times more likely to receive a death sentence in Georgia and Florida, while defendants in Illinois with multiple victims were eighteen times more likely to receive a death sentence.¹⁷⁰ Additionally, when the level of aggravation was controlled for by the use of a multivariate regression analysis, disparities in death sentencing cited in the previous analysis remained strong and consistent. Similar effects of the race of the victim on the likelihood of receiving a death sentence were found to be statistically significant using a logistic regression model in Oklahoma, North Carolina and Mississippi, but statistically insignificant in Virginia and

¹⁶⁸Id., at 58.

¹⁶⁹Id., at 59.

¹⁷⁰Although multiple homicides were relative low Illinois from 1976 through 1980, 44% of the case in this category received a death sentence.

Arkansas.¹⁷¹

In a reexamination of the death sentencing system in Georgia, Baldus et al.¹⁷² analyzed 606 murder cases according to the culpability level of each case in order to identify determining factors that led to a death sentence. An arbitrary system would operate in such a manner that cases that would normally call for a period of incarceration would result in a death sentence. Similarly, a system that demonstrated a higher probability of a death sentence based on a factor such as race would be discriminatory in its application of the death sentencing laws. By employing a multiple regression analysis, this study sought to identify which factors best explained death sentencing decisions. After collecting over 200 variables which were thought to have some influence in sentencing decisions, each case was given a culpability level or weight according to the facts of that case. Cases were then separated into subgroups to measure racial effects. Although no race-of-the-defendant effect was found, the race of the victim was found to have some effect on the likelihood of receiving a death sentence.¹⁷³ Overall, cases involving white victims were found to be four times more likely to result in a death sentence than cases involving black victims. However,

¹⁷¹The authors viewed the findings in these five states with some skepticism due to the fact that the small number of cases receiving death sentences made sentencing patterns difficult. Additionally, the use of FBI's data on homicide left researchers a small number of data points to analyze in their comparative analyses. Nonetheless, the researchers were confident in the finding of racial disparities in a number of the jurisdictions since those results were consistent with finding produced by other researchers in a number of different jurisdictions.

¹⁷²Baldus, D.C., Woodworth, G.G. & Pulaski, C.A. (1985). *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*. University of California-Davis, 18(4), 1375-1408.

¹⁷³Id., at 1401.

the most pronounced effects of the race of the victim were found in the moderate culpability levels.¹⁷⁴

The importance of this finding is twofold. On one hand, it indicates that there is apparent sentencing consistency among cases of low culpability where life imprisonment was frequently imposed and in the cases of high culpability where death was imposed in the majority of those cases. However, the findings in the moderate level of cases are even more significant since they show an inconsistency in sentencing among cases of similar culpability and raise the possibility that a race-of-the-victim effect exists in the disposition of those cases.

Smith¹⁷⁵ examined 504 homicides reported to the FBI through the Supplemental Homicide Reports for a period covering October 1, 1976 to December 31, 1982 in order to determine distinguishable factors among cases which resulted in death sentences. By analyzing certain demographic and legal information, homicide cases taken from the reports were selected where death was an option in sentencing under Louisiana law.¹⁷⁶ After arranging the homicides cases according to the race of the defendant and victim, Smith

¹⁷⁴Culpability levels were assigned a numerical number of 1 to 6 with a level of 1 being the least culpable and a level of 6 being most culpable. Levels in the moderate range were determined to occur between levels 2 through 4.

¹⁷⁵Smith, M.D., (1987). Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana. Journal of Criminal Justice,15, 279-286.

¹⁷⁶Death penalty statutes allowed for a capital murder charges under one or more of the following conditions: (1) a homicide committed in the course of another felony; (2) an offender kills or endangers the life of others while murdering another person; (3) the victim is an on-duty law enforcement officer or elected official; or (4) the homicide was committed for financial compensation.

noted that 53 cases eventually received death sentences. Of the total number of cases receiving death sentences 84.9% involved white victims.¹⁷⁷ However, unlike previous studies which noted discrimination against black offenders, Smith's findings cited evidence of bias towards white offenders. Although white offenders were charged with 34.9% of all homicides, they made up 50.9% of the total number of offenders on death row at that time whose victims were white. However, despite the fact that sentencing bias was found to exist against white offenders rather than black offenders, cases involving white victims resulted in a higher number of death sentences than cases involving black victims. Also, none of the 13 cases involving white offenders and black victims resulted in a death sentence. Of the 26 black offenders on death row, 18 of their victims were white and 8 were black. Smith used a logistic model which analyzed the race of the offender and victim, sex of victim, type of weapon, victim-offender relationship, number of victims and location of the homicide. From the analysis, he found that the only statistically significant effects were the race and sex of the victim. A homicide involving a white victim was two times more likely to result in a death sentence than a black victim case. Also, a case involving a female was one and one half more likely to receive a death sentence than a male victim case.

Paternoster and Kazyaka¹⁷⁸ examined sentencing outcomes over a three year period in the state of South Carolina after its death penalty statute went into effect in 1977. Unlike prior studies that found the race of the victim to be significant in whether a defendant was

¹⁷⁷Id., at 282.

¹⁷⁸Paternoster, R. & A.M. Kazyaka (1988). Racial Considerations in Capital Punishment: The Failure of Evenhanded Justice. In K.C. Haas and J.A. Inciardi (Eds.). Challenging Capital Punishment, 24. California: Sage Publications.

sentenced to death, their study found a different effect on sentencing outcomes. After controlling for legally relevant factors such as the total number of aggravating circumstances, the number of felony offenses committed in addition to the murder, the prior violent record, and the number of mitigating circumstances, race of the offender emerged in the analysis as a significant predictor in the sentencing outcome. This finding represented somewhat of a departure from a significant number of studies in different jurisdictions that found the race of the victim to be significant in sentencing outcomes. Additionally, the findings suggested an opposite race effect in the cases where the offender was sentenced to death. In this study, white offenders found to be four times more likely to receive a sentence of death than black offenders after legal circumstances and the race of the victim were considered.¹⁷⁹ The findings also differed from other death penalty studies by finding no significant effect of the race of the victim on whether the defendant was sentenced to death.¹⁸⁰

Keil and Vito examined the role of the victim's race on the probability of the defendant being charged with a capital crime and being sentenced to death in the state of Kentucky.¹⁸¹ Although their analysis did not include a large number of variables that normally could have been extracted from court case files, the researchers reviewed

¹⁷⁹The authors took this finding with a measure of caution and suggested no definite conclusions could be drawn because of the small overall number of death sentences (26) and the small number of black defendants who received sentences of death (7).

¹⁸⁰Defendants who killed whites were found to be half as likely to be sentenced to death as defendants who killed blacks.

¹⁸¹Keil, T.J., & Vito, G.F., (1990). Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post-*Gregg* Outcomes. *Justice Quarterly*, 7, (1), 189-207.

institutional files from Kentucky Corrections Cabinet and examined the impact of a number of aggravating circumstances on the decision of juries to impose a sentence of death or life imprisonment in 401 cases.¹⁸² Their multivariate analyses found that cases involving black offenders and white victims were more likely to be charged with a capital crime and sentenced to death when controlling for the seriousness of the crime, prior criminal record, and the personal relationship between the offender and the victim.

In a comparative analysis of neighboring jurisdictions, Paternoster examined charging and sentencing practices in North Carolina and South Carolina.¹⁸³ Data for the South Carolina study was collected from a series of prior analyses conducted by Paternoster and consisted of 302 homicides identified as “death eligible” by the researcher.¹⁸⁴ Data for the North Carolina study was previously collected for analysis of sentencing practices in North Carolina and consisted of a sample of 438 homicides (Nakell, 1987). In the South Carolina study, a maximum likelihood logit analysis was conducted on two separate models. The first model consisted of a number of variables that could influence the decision of the prosecutor to seek the death penalty.¹⁸⁵ The second model excluded a number of variables

¹⁸²The findings produced from the study were limited by their inability to include any consideration of mitigating circumstances in their analyses.

¹⁸³ Paternoster, R. (1991). Prosecutorial Discretion and Capital Sentencing in North Carolina and South Carolina. In R.M. Bohn (ed.) The Death Penalty in America: Current Research, pp.39-52. Cincinnati, OH: Anderson Publishing Co.

¹⁸⁴Data for the South Carolina study was collected from the Supplemental Homicide reports, police reports and related investigation reports, trial and court information, and records from the state department of corrections.

¹⁸⁵Variables in the full model included the number of victims, number of offenders, type of weapon, victim/offender relationship, the race of victim, the race of offender, total

that were found to be statistically insignificant in the first model. Consistent with previous studies, the race of the victim emerged as a significant predictor of whether the prosecutor sought the death penalty. Cases involving the killing of white victims were more likely to have a death penalty sought than cases involving the killing of black victims. The second model, which analyzed the race of the offender and victim together, also found a similar pattern of racial disparities in the charging patterns of state prosecutors. After legal factors were considered, prosecutors were more likely to seek the death penalty in cases where the offender was black and the victim was white compared to the other racial combinations. Additionally, compared to the other racial combinations, black offenders who killed black victims were significantly less likely to have the prosecutor seek a death penalty in their cases. Although legally relevant factors explained the charging decisions of prosecutors in capital cases, the race of the victim also emerged to explain those decisions as well. Finally, Paternoster's geographical analysis suggested the possibility that charging decisions by prosecutors in South Carolina may have varied by region. Prosecutors were more likely to seek the death penalty against white offenders while rural prosecutors were more likely to seek the death penalty against black offenders.¹⁸⁶ In the North Carolina study, neither the race of the offender nor the race of the victim was found to significantly influence the charging decisions of the state prosecutors.

number of aggravating circumstances, number of statutory felony offenses, general factors in aggravation, factors in mitigation, sex of victim, age of victim, use of torture, and use of personal weapon.

¹⁸⁶The charging disparity found toward black offenders by rural prosecutors was small.

In one of the few death penalty studies in a non-southern state, researchers examined the role of race on the decision to impose death sentences in the Commonwealth of Pennsylvania.¹⁸⁷ The study identified a universe of 425 death-eligible cases from the city of Philadelphia and conducted a number of logistic regression analyses to examine the impact of legitimate, illegitimate and case characteristics deemed suspect on capital sentencing decisions.¹⁸⁸ Data points were obtained from court records, files from the Administrative Office of Pennsylvania Courts (AOPC), appellate records, opinions of the Pennsylvania Supreme Court, briefs from the Commonwealth and direct interviews of the defendant. In a series of logistic multiple regression analyses, the researchers in that study included all aggravating circumstances, mitigating circumstances, and other relevant variables that would be expected to have an impact of sentencing outcomes in 425 death-eligible cases.¹⁸⁹ Similar to findings produced in prior death penalty studies, the race of the victim was found to be statistically significant in cases where at least one aggravating circumstance was found by the jury without any mitigating circumstances present.¹⁹⁰ Additionally, the race of the

¹⁸⁷Baldus, D.C., Woodworth, G., Zuckerman, D., Weiner, N.A., & Broffitt, B. (1997). Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia. Cornell Law Review, 83, 1638-1770.

¹⁸⁸The Pennsylvania study also analyzed the impact of a number of variables on capital charging outcomes as well.

¹⁸⁹After examining the role of aggravating and mitigating circumstances on case outcomes in earlier models, additional variables such as the race and SES of the offenders and victims were considered in later models.

¹⁹⁰The race of the victim was found to be marginally significant when cases that resulted in a hung jury were included in the logistic regression model. The inclusion of these cases in the analysis, which were mostly black-victim cases, resulted in higher

defendant was found to have a statistically significant effect on the jury's decision to impose a death sentence at the penalty phase of the trial. Black defendants were found to be three times more likely to receive a death sentence than non-black defendants.¹⁹¹

In a 2001 study, researchers in North Carolina examined the role of race at several stages in the death penalty process. The study examined death-eligible homicides over a five-year period from January 1, 1993 to December 31, 1997.¹⁹² Using data collected from several sources, the researchers collected over one hundred and thirteen cases characteristics to examine whether race had an impact at decision points in the death penalty process. The analyses were conducted in a core of 502 cases and a model was constructed to include thirty six variables considered to be relevant to factors believed to have an impact on decision outcomes. By using a logistic regression approach, several findings were produced that were consistent with prior death penalty studies in a number of jurisdictions. Among all homicide cases in the analysis, the odds of cases involving white victims receiving a death sentence were 3.4 times higher than cases involving black victims. Similar findings were produced in analyses which examined the role of race in sentencing outcome among death-eligible homicides. Homicides involving white victims were 3.5 times more likely to result in the defendant receiving a death sentence than in cases where the victim was black. Also,

likelihood that more cases involving non-white victims would receive a death sentence.

¹⁹¹The death sentencing model reflected the decisions of the prosecution and the jury in the logistic estimates. The race-of-the-offender effects also held up when cases involving hung juries were included in the model.

¹⁹²Unah, I., & Boger, J.C., (2001). Race and the Death Penalty in North Carolina: An Empirical Analysis – 1993-1997.

cases where the prosecutor sought the death penalty were 3.0 times more likely to result in a death sentence in cases where the victim was white than in cases where the victim was black. Finally, cases that came to trial and reached the penalty phase were 2.8 times more likely to result in a death sentence in cases involving white victims than in cases where the victim was black.¹⁹³

Researchers in the state of Maryland also examined the influence of race at four stages in the death penalty charging and sentencing process: (1) the formal notification of intent to seek the death penalty; (2) the decision by the prosecutor to not withdraw a death penalty request upon notification; (3) the decision by the prosecutor to advance a death-eligible offense to the penalty phase upon conviction; and, (4) the decision by the jury or judge to impose a death sentence.¹⁹⁴ In their review of a pool of 1,311 death eligible cases over an 11-year period from July 1, 1978 to December 31, 1999, 180 cases were found to have advanced to the penalty phase of the trial proceedings and 76 cases received death sentences. Consistent with the findings from many of the previous analyses on death penalty studies in other states, researchers in the Maryland study found no evidence to suggest that the defendant's race played a significant role at any point in the death penalty decision making process. No significant differences were found in the handling of black or non-black offenders as their cases progressed through each stage of the capital case process.

¹⁹³Similar to a number of prior studies, the race of the defendant was found to have an insignificant impact on whether the defendant received a death sentence. Additionally, the race of the victim was statistically significant at each decision point in the death penalty process and rose above the .05 level of significance at the decision point of homicide cases that came to trial and reached the penalty phase (.07).

¹⁹⁴Paternoster, R. & Brame, R., (2002). *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction.*

However, an analysis of the unadjusted estimates of the effect of race of the victim on each of the decision points produced different findings.¹⁹⁵ The race of the victim was found to have a statistically significant effect on three of the four decision points in the death penalty process. First, the decision by the prosecutor to file a notice of intent to seek the death penalty was more likely in cases where at least one victim was white than in cases with no white victims (.43 v. .19). Additionally, the prosecutor was more likely to retain the death penalty notification after it was filed in cases involving white victims compared to cases with black victims (.70 v. .46). Finally, cases involving white victims were more likely to advance to the penalty trial compared to cases involving black victims (.88 v. .75).¹⁹⁶ A second analysis which examined the race of the offender and victim in combination also found several disparities at each of the decision points in the death penalty process. Cases involving black offenders and white victims were more likely to progress through each successive stage of the decision points than other cases involving the other offender/victim race combinations.

The adjusted analysis, which controlled for a number of legally relevant case factors, appeared to confirm earlier findings produced in the unadjusted analyses. Similar to the earlier estimates, the race of the offender was not found to have an effect on any of the decision points in the death penalty process. However, the race of the victim was found to

¹⁹⁵The unadjusted analysis consisted of basic descriptive estimates which looked at racial disparities at each of the four decision points in the death penalty process.

¹⁹⁶The effect of the race of the victim on the decision to impose a sentence of death was found to be statistically insignificant. However, the overall finding that death-eligible cases involving white victims was .093 times more likely to result in a death sentence than cases involving black victims was statistically significant.

have an influence at two of the four decision points after controlling for legally relevant case characteristics. Prosecutors were 1.6 times more likely to file a notification to seek the death penalty and 1.5 times more likely to retain that notification as the case moved forward in cases with white victims compared with cases with black victims.¹⁹⁷ Also, the researchers controlled for legally relevant case characteristics and the jurisdiction in which the offense occurred by conducting a multiple regression analysis on all death-eligible cases and found that offenders who killed white victims were more likely to be sentenced to death compared to offenders who killed non-white victims.¹⁹⁸ An additional analysis using a stepwise logistic regression model, the earlier findings of a race-of-the-victim effect on the sentencing outcomes were confirmed.¹⁹⁹ Finally, the predicted probabilities of the race of the offender and victim in combination on the four decision points in the death penalty process were examined. Prosecutors were most likely to file a notification of intent to seek the death penalty in cases where a black offender killed a white victim compared to the other racial combinations. Also, prosecutors were most likely to retain the death notification after it was filed in cases where the offender and victim were white compared to the other racial

¹⁹⁷The decisions to advance a capital case to the penalty trial and to impose a death sentence after the penalty trial were not found to have been influenced by the race of the victim.

¹⁹⁸In addition to the four decision points examined in the study, researchers in the Maryland study also focused on geographical variation and its potential influence on outcomes at the four data points. Those geographical areas included the City of Baltimore, Baltimore County, Harford County, Prince George's County, Anne Arundel County, Montgomery County, and a number of other reference counties.

¹⁹⁹The researchers noted the use of the stepwise logistic regression model resulted in a weaker, but significant race-of-the-victim effect on whether the case received a death sentence (.07 level). Cases involving whites in this analysis were two times more likely to receive death sentences than cases involving non-white.

combinations. Among all death-eligible cases, blacks who killed white victims were two and one-half times more likely to be sentenced to death than white offenders who killed white victims, three and one-half times more likely to be sentenced to death than black offenders who killed black victims, and approximately eleven times more likely to be sentenced to death than all of the other racial offender/victim combinations.

4. Studies at the Federal Level

Although a wealth of death penalty research has been conducted at the state level since the Court's ruling in *Furman*, very few studies have examined the role of race in charging or sentencing decisions at the federal level. Shortly after the Court's landmark decision in 1972, a number of state jurisdictions began to address the Court's concerns of unstructured death penalty laws by creating new statutory requirements which structured the death penalty process by providing guidance to juries in capital cases. As a result, a number of newly created guided discretion statutes passed constitutional scrutiny in the *Gregg* decision at the same time that mandatory sentencing statutes were struck down as unconstitutional. However, the creation of federal death sentencing statutes which would conform to the Court's decision in *Gregg* would take a longer period of time to develop.

By 1974, the federal government passed the Antihijacking Act which provided a number of procedural protections similar to several state death sentencing statutes that passed constitutional scrutiny by the Court in 1976. However, given the Court's rulings in the *Woodson* and *Roberts* decisions, the mandatory sentencing component of the new federal death sentencing statute rendered it unconstitutional. Eventually, the federal death penalty would become operational with the passage of the Continuing Criminal Enterprise

statute in 1988 and the Federal Death Penalty Act of 1994.²⁰⁰ On September 20, 2000, the U.S. Department of Justice released a statistical survey of the federal death system which examined several variables related to death-eligible cases including the race of the defendants and victims.²⁰¹ Although the report did not include more sophisticated multivariate regression analyses, it did report a number of unadjusted statistical findings on the issue of race, ethnicity, and charging decisions by the United States Attorneys and the Attorney General.

A population of 682 defendants from 1995 to 2000 whose cases were submitted by the United States Attorneys to the U.S. Department of Justice for review under the department's death penalty procedures found that 134 were White (20%), 324 were Black (48%), and 195 were Hispanic (29%). Additionally, U.S. Attorneys were more likely to seek the death penalty and the Attorney General was more likely to approve recommendations by U.S. Attorneys in cases involving White defendants (38%) than in cases which involved Black (25%) or Hispanic defendants (20%).²⁰² Although the findings did not result in the conclusion that racial or ethnic bias influenced charging decisions in the federal death penalty system, an additional analysis was conducted to examine charging

²⁰⁰The passage of the two laws would result in over 60 federal offenses becoming eligible for the death penalty. The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) would add four additional offenses to the list of capital crimes.

²⁰¹The Federal Death Penalty System: A Statistical Survey. (U.S. Department of Justice, September 12, 2000).

²⁰²The report also noted that in cases considered by the Attorney General, similar lower rates for seeking the death penalty for Black and Hispanic defendants than White defendants was found in cases involving defendants and victims from the same race or ethnicity as well as in cases involving defendants and victims from different races or ethnicities.

decisions by U.S. Attorneys and the Attorney General.²⁰³ A supplemental statistical survey, which included an additional 231 cases to the original pool of 682 cases, was conducted to examine any evidence of disparity in charging decision on the part of the U.S. Attorneys.²⁰⁴ The survey from the larger pool of 973 cases found that 134 out of 166 cases submitted for review to the capital case review committee involved White defendants (81%), 324 out of 408 cases submitted involved Black defendants (79%), and 195 out of 350 cases submitted involved Hispanic defendants. Overall, the Attorney General approved the death penalty for 27% of White defendants (44 out of 166 cases submitted), 17% of Black defendants (71 out of 408 cases submitted), and 9% of Hispanic defendants (32 out of 350 cases submitted).

In response to the findings of the federal surveys and continuing concerns over the possibility of disparities in charging decisions in the federal death penalty system, an independent study using more sophisticated methodological approaches was commissioned by the U.S. Department of Justice.²⁰⁵ The study consisted of a population of 312 cases from January 1, 1995 to December 31, 2000 and involved 652 defendants in which decisions of whether or not to request the death penalty were made by the U.S. Attorneys. The cases

²⁰³Calls for a moratorium on the federal death penalty would be rejected for a number of reasons: (1) competent counsel provided for defendants in capital cases; (2) a lack of evidence of innocent defendants being sentenced to death in federal cases; (3) the procedural safeguards included in the federal death penalty process; and, (4) a lack of proof of bias demonstrated in the study's findings.

²⁰⁴The additional 231 cases were submitted to the pool of 682 cases if: (1) any of the cases should have been, but were not, submitted to the department for capital case review; (2) the cases were exempted from submission for capital case review because the defendant pled guilty to a non-capital offense; or (3) cases could have been submitted as death-eligible, but were not.

²⁰⁵Klein, S.P., Berk, R.A., & Hickman, L.J., (2006). Race and the Decision to Seek the Death Penalty in Federal Cases.

also involved 600 defendants where decisions were made by the Attorney General to seek or not to seek the death penalty over that same period of time.²⁰⁶ The research strategy consisted of three independent teams of researchers conducting separate analyses which examined whether racial differences in capital cases could be explained by differences in the “heinousness” of the crimes. Each research team was provided with a copy of the federal death penalty data set and was allowed to construct and design their own analyses and drew separate conclusions as to effects of race on charging decisions of the U.S. Attorneys and Attorney General.²⁰⁷

In the first analysis, researchers attempted to build a model from over 100 possible explanatory factors which might have an influence on charging outcomes.²⁰⁸ After reporting difficulty with fitting an appropriate explanatory model with so many aggravating and mitigating factors, the researchers created an “aggr” score, which represented the total sum of aggravating factors for each defendant, and a “mitg” score, which represented the total sum of mitigating factors for each defendant.²⁰⁹ From this coding procedure, the

²⁰⁶Of the total number 652 defendants charged with capital cases, the 94 U.S. Attorneys sought the death penalty for 23% of the 652 defendants and the Attorney General made the decision to seek the death penalty for 25% of a total number of 600 defendants (a number of defendants pled guilty prior to the final decision by the Attorney General).

²⁰⁷The final set of preliminary analyses that were conducted by the third research team which compared propensity scores of White victim cases to those of Non-White cases did not find any evidence that race influences charging decision in federal capital cases.

²⁰⁸Klein, S.P., Freedman, D.A., & Bolus, R.E. (2006). A Statistical Analysis of charging Decisions in Death-Eligible Federal Cases: 1995-2000. In *Race and the Decision to Seek the Death Penalty in Federal Cases*.

²⁰⁹The approach of creating the “aggr” and “mitg” variables as the total of aggravating and mitigating factors, respectively, departed from methodological approaches

analysis examined whether the mean heinousness score, rather than race, might explain the outcomes of charging decisions by the Attorney General in cases involving combinations of white and non-white defendants and victims. In the unadjusted calculations of the mean differences of aggravating and mitigating scores for defendants in charging decisions by the Attorney General, cases involving white defendants and white victims had the highest mean average score (5.3), while cases involving non-white defendants and non-white victims had the lowest mean score (3.2). Additionally, cases involving non-white defendants and white victims had mean scores of 5.0, while cases involving white defendants and non-white victims reported mean scores of 3.3. After conducting several logistic regression analyses which explained charging decisions by the U.S. Attorneys and the Attorney General, the race of the victim was found to be statistically significant in one model. In the U.S. Attorneys charging model, U.S Attorneys were .51 times more likely to seek the death penalty than in cases involving black victims.²¹⁰

In the second analysis, the next team of researchers in the study conducted two preliminary logistic regression models which examined the role of race in charging decision of the U.S. Attorneys in capital cases.²¹¹ Using the same data set discussed in the previous

found in studies at the state-level which typically analyze the effects of individual aggravating and mitigating variables on outcome decisions in multivariate models.

²¹⁰This finding was reported in a three-variable model which only included the race of the victim and the two other variables which represented the sum total of aggravating factors and sum total of mitigating factors for defendants in capital cases.

²¹¹Berk, R.A. & He, Y. (2006). Race and the Federal Death Penalty. In *Race and the Decision to Seek the Death Penalty in Federal Cases*.

analysis and building on the study that was conducted in the state of Maryland, the second analysis explored the role of race and ethnicity in federal capital cases in a number of preliminary analyses. First, the research team examined charging decisions of the U.S. Attorneys by comparing cases involving defendants from several racial or ethnic groups. The unadjusted estimates suggested that the death penalty was recommended by U.S. Attorneys in 32 percent of the cases involving White defendants compared to 23 percent for Black defendants, 17 percent for Hispanic defendants and 36 percent of defendants of other racial or ethnic groups.²¹² In cases involving at least one White victim, U.S. Attorneys sought the death penalty in 34 percent of those cases compared to 18% of cases involving victims of other racial or ethnic groups. In cases involving at least one Black victim, U.S. Attorneys sought the death penalty in 19 percent of those cases compared to 26 percent of cases involving victims of other racial or ethnic groups. Finally, in cases involving at least one Hispanic victim, U.S. Attorney sought the death penalty in 17 percent of those cases compared to 25 percent of cases involving victims from other racial or ethnic groups.²¹³ Despite the findings produced in the unadjusted analyses, the role of race in charging decisions was still unclear at that point since none of the earlier cross-tabulations accounted for other factors that might explain charging decision by the U.S. Attorneys. In order to examine the role of race on charging decisions, the researchers analyzed a number of case

²¹²Members in the final comparison group consisted of individuals of Asian, Pacific Islander, Native American, Aleut, Indian, or unknown descent and represented nine cases (36 percent) in which the U.S. Attorneys sought the death penalty.

²¹³The unadjusted estimates led the second research team to conclude that the race of the defendant and the race of the victim were associated with charging decisions in federal capital cases. However, the precise nature of the relationship could not be determined in the unadjusted estimates.

characteristics including the number of aggravating and mitigating circumstances present in addition to the race of the defendant and victim. The two preliminary logistic regression models, controlling for a number of legal factors, found the race of the victim to be statistically significant in the charging decisions of the U.S. Attorneys. Cases involving White victims were found to be .87 times more likely to have the death penalty requested compared to cases involving non-White victims. However, the race of the defendant was not found to be statistically significant in charging decisions.²¹⁴

In assessing previous the empirical studies and findings at the state and federal level, it is important to note what inferences can and cannot be drawn from this body of research. The findings from the death penalty studies do not provide definitive proof that racial discrimination operates at different stages in a number of jurisdictions to influence whether death-eligible indictments and charges are sought by prosecutors or death sentences are imposed by judges and juries. Nor do the results conclude that prosecutors, judges, and juries “favor” the race of the victim if he or she is a member of a specific racial group. However, the consistency across several studies, particularly in cases where the race of the offender or victim emerges as a significant factor in sentencing outcomes, does raise questions as to whether the concerns expressed by the *Furman* court were adequately addressed by revisions to death sentencing statutes that were constitutionally approved by the *Gregg* court four years later. The Court believed that a bifurcated trial, statutory

²¹⁴The first logistic regression model included the race of the defendant and the race of the victim as separate variables. The second logistic regression model excluded the race of the defendant. In both models, the regression coefficients for the race of the victim were .87 and .86 at the .05 level, respectively. However, when an alternative model, random forests, was applied to the data, race was not found to be statistically significant in charging decisions of the U.S. Attorneys in capital cases.

guidelines to assist the jury in decision-making, and automatic appellate review could, in the absence of evidence to the contrary, effectively eliminate or at least reduce the likelihood of racially discriminatory practices in the application of the death penalty. However, as the states revised their death sentencing statutes, empirical studies examining their effectiveness in achieving the Court's concerns in *Furman* began to accumulate as well. Although the race of the defendant has been found to have little or no effect in influencing the sentencing disposition in capital cases, a race-of-the-victim effect has consistently emerged in the majority of studies cited in the literature. Specifically, a number of studies have suggested that offenders whose victims were white had the greatest likelihood of receiving death sentences. A similar effect has also been cited in studies examining different levels of culpability in death eligible cases. In such cases, sentencing was found to be somewhat consistent among low levels of culpability where the majority of cases ended in life imprisonment sentences and high levels of culpability where death was frequently imposed. However, the race of the victim has been cited in moderate levels of culpability cases where the sentencing outcomes have been found to be inconsistent. This consistency across a number of the more methodologically sophisticated analyses would eventually in these questions be addressed by the Court in *McCleskey v. Kemp*.

E. The Role of Race and the *McCleskey* decision

Although the new revisions in death penalty legislation were believed to be the appropriate solution to the problems of capital sentencing in terms of reducing disparities, *McCleskey v. Kemp* offered a different perspective on this assumption. It may be recalled in the *Gregg* decision that the Court, lacking evidence to the contrary, assumed that the new

revisions in death sentencing statutes were such that the likelihood of arbitrary, capricious and discriminatory sentencing decisions condemned in *Furman* and similarly crafted sentencing statutes with procedural safeguards would now be sufficient enough to pass constitutional scrutiny.²¹⁵

Rather than focus on the facts of his particular case, the petitioner in *McCleskey* attacked the racial disparities in sentencing in the entire Georgia system, which he contended, was a violation of his rights under the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.²¹⁶ In order to substantiate his claim, the petitioner offered a statistical study as evidence of the existence of racial disparities in death sentences in the state of Georgia. To date, the Baldus study continues to be one of the most comprehensive analyses which examined the role of race in sentencing outcomes.²¹⁷ After initial analyses suggested a correlation between the race of the victim and sentencing outcomes, subsequent analyses found significant and consistent race effects after considering over 200 non-racial variables which were also likely to influence sentencing outcomes.²¹⁸ The race of the victim findings were also found in a

²¹⁵107 S.Ct. 1756 (1987).

²¹⁶The petitioner, a black man, was convicted in the 1978 killing of a white police officer during the robbery of a store. Consistent with Georgia law, the jury imposed a death sentence after it found the following aggravating circumstances beyond a reasonable doubt: the murder was committed during the course of an armed robbery and was committed upon a peace officer in the performance of his duties.

²¹⁷ Baldus, D.C., Pulaski, C.A. & Woodworth, G.G. (1983). Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience. Journal of Criminal Law and Criminology, 74(3), 661-751.

²¹⁸The study consisted of over 2,000 murder cases in Georgia in the 1970's and

smaller model which analyzed 39 variables thought to influence sentencing outcomes. Specifically, the study concluded that black defendants whose victims were white were substantially more likely to receive a death sentence than cases involving black victims, even after racially neutral factors were controlled.²¹⁹ The analyses also found that the racial disparities in sentencing outcomes were most likely to be found in capital cases in the middle range of aggravation.²²⁰ However, while accepting the validity of the study, the Court held that such evidence was not sufficient to prove the existence of a systematic defect in the way that death sentences were being rendered by the courts in the state of Georgia.

1. General Statistics and Racial Discrimination

Despite the rejection of the Baldus study findings as proof of racial discrimination in the State of Georgia death penalty scheme, the Court cited a limited number of previous cases in which statistical data was accepted to establish patterns of racial discrimination. In each instance, statistical data was offered in court proceedings to demonstrate racial disparities involving the selection of juror and alleged Civil Rights violations under Title VII

involved a 230-variable model which included data such as race of the defendant and the victim as well as other aspects of the offense.

²¹⁹Cases involving white victims were 4.3 times more likely to receive a death sentence than cases involving black victims.

²²⁰Cases in the low level of aggravation consist of cases involving few relevant aggravating factors which may make the death penalty less likely to be imposed. Cases in the high level of aggravation consist of cases involving greater numbers of aggravating factors which may make a death sentence more likely. However, cases in the middle range of aggravation involve those cases where the outcome is less clear and the decision of impose a sentence of death could go either way.

cases, which the Court ruled were violations under the Equal Protection Clause of the Fourteenth Amendment. In a case of employment discrimination, petitioners in *Bazemore v. Friday*, introduced a series of multiple regression analyses which compared salaries for black and white employees across a series of time periods.²²¹ While controlling for race, education, tenure, and job title, the analyses found that black employees on average were paid less than white employees in two out of three time periods that were analyzed. After a review of the evidence, the Court accepted the data as proof of a pattern of discrimination towards black employees in violation of Title VII of the Civil Rights Act of 1964. The Court also accepted statistical data submitted in several cases involving racial disparities in jury selection practices which the Court determined to be in violation of the Equal Protection Clause of the Fourteenth Amendment.²²²

Additionally, the Court has previously accepted general statistics as proof of racial discrimination in cases involving the racial compositions of grand and petit juries in their criminal proceedings. In *Whitus v. Georgia*, the petitioners challenged their convictions on the basis of racial discrimination because of the composition of juror selections conducted in Mitchell County in the State of Georgia.²²³ Specifically, the petitioners challenged their convictions based on the exclusion of Black juries from grand and petit juries despite the fact that potential jurors of the race made up approximately 45% of the population in

²²¹478 U.S. 385 (1986)

²²²The Court also ruled that multivariate regression analyses submitted to establish racial discrimination were not required to include “all measurable variables” in their statistical models.

²²³385 U.S. 545 (1967).

Mitchell County. Under Georgia law, commissioners appointed to the Superior Court were required to select “upright and intelligent” citizens from the county’s tax receiver to serve as potential jurors in criminal court proceedings. The petitioners submitted general census data which indicated in 1960, 27.1% of the taxpayers in the county were Black, that the county had a population of 10,206 people over the age of 21, of which 4,706 were male, and 2,004 (42.6%) were Black. However, juror selection data showed that only 3 of the 33 prospective grand jurors were Black and only one was eventually picked to serve on the grand jury. In the case of juror selection for petit case, only 7 of the 90 persons selected for consideration were Black, but none were accepted to serve on the jury.

The Court also ruled on a similar challenge to the jury and school board selection practices in a number of other counties in the State of Georgia. In *Turner v. Fouche*, the Court reviewed statistical data submitted by the petitioners in the case which suggested that the selection practices in Taliaferro County, as well as a number of other surrounding counties, systematically excluded Blacks as potential candidates to serve on grand juries and county school boards because of their race.²²⁴ To support their contention of racial discrimination, the statistical data submitted showed that grand jury members were predominately White despite a 60% representation of Blacks in Taliaferro County. In the case of grand jury selection procedures, the state superior court judge selected “discreet” candidates for appointment to the jury commission as commissioners, who were given discretion, in the absence of statutory or other guidelines, to exclude any potential candidates from grand jury service that were not found to be “upright” and “intelligent”.

²²⁴396 U.S 346 (1970).

The data submitted also indicated that of the 608 eligible names selected for consideration for grand jury service, 96% of the potential jurors who were eliminated as “unintelligent” or not “upright” were Black. Additionally, a reconstituted list of potential candidates by race found that Blacks only accounted for 37% of the Taliaferro County citizens on the list of 304 members despite a 60% representation in the county population.

The Court also considered statistical data submitted to support charges of racial discrimination towards Mexican-Americans in *Cantanedo V. Partida*.²²⁵ In that case, the petitioners challenged the grand jury selection procedures in the State of Texas based on statistics taken from census figures and grand jury records taken from Hidalgo County. Although census data collected for 1970 showed that 79.1% of the population in Hidalgo County was Mexican-American, grand jury records compiled from 1962 to 1972 indicated that the average percentage of participation on grand juries by Hispanic-surnamed individuals was estimated at 39%. Additionally, the average participation rate of Hispanic-surnamed individuals during the time period when the defendant was indicted was 45%.

In each of the aforementioned Title VII and grand jury selection cases, the Court allowed the submission of statistical data as proof of prima facie evidence of racial discrimination.²²⁶ These cases also represent a general acceptance of statistical data by the U.S. Supreme Court in prior cases aimed at proving racially discriminatory practices that violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

²²⁵430 U.S. 482 (1977).

²²⁶The Court would accept the statistical data submitted by the parties in each case as prima facie or evidence “at first view” that the employment practices or grand juror selection procedures were racially discriminatory against minorities.

By allowing such data, the Court's guiding rationale consisted of the requirement that the employment or juror selection procedures resulted in substantial underrepresentation of members of an identifiable racial group.

2. *McCleskey* and “Purposeful Discrimination”

Although the Court had previously accepted general statistical studies as proof of discrimination in Title VII and grand juror selection cases, it held that the nature of the capital sentencing system was fundamentally different when considering statistical data which attempted to establish racially discriminatory practices. One major difference rested on the Court's belief that capital cases required judges and juries to consider a multitude of various factors involving the character of the defendant and the facts of the offense prior to the imposition of sentence. Such a task also involved the requirement that actors in the criminal justice process be allowed a certain amount of discretion at different stages in the criminal justice decision making process. Because of this uniqueness of capital cases and the Court's prior decisions in *Gregg* and its companion cases regarding the structuring of such discretion, the Court ruled that exceptionally clear proof had to be established by the statistical data before a conclusion could be made that such discretion had been abused. Thus, given the number of safeguards contained in the Georgia death sentencing statute to reduce the taint of racial bias in sentencing, a defendant alleging equal protection violations had to show that “purposeful discrimination” existed in his or her case and that the death sentencing statutes were enacted by the state legislature in anticipation of a discriminatory effect on certain racial groups of defendants.²²⁷

²²⁷*Id.*, at 1766.

The Baldus study, the Court held, offered no proof that race played any part in the Georgia jury's decision to impose the sentence of death in McCleskey's particular case. That is, the data was required to demonstrate that the judge or jurors acted with a discriminatory intent or purpose in his case. In reviewing the data, the Court noted that the Baldus analysis was extensive in its approach in analyzing factors which were likely to have an impact on sentencing outcomes in capital cases. After conducting several analyses, the Baldus data introduced evidence to the Court which found that defendants who killed white victims were 4.3 times more likely to receive a sentence of death than defendants whose victims were black.

The Court would rule that there were fundamental differences between cases involving employment or juror selection practices and capital cases. In the case of the former, the Court noted its prior acceptance of statistics submitted in limited cases in a few classes of cases. In such cases, the data, to pass the scrutiny of the Court, was required to present a "stark" pattern to be accepted as the sole proof of racial discrimination in a particular case. However, capital cases were distinguishable from Title VII or juror selection cases because of a number of unique characteristics. The Court ruled that capital cases were characterized by separate and unique qualities such as the composition of each jury, the characteristics of each defendant and the individual facts of each case. The Court also reasoned that factors related to juror selections are typically limited and set by state statutes and the factors related to employment practices were objectively verifiable and had a reasonable relationship to job qualifications. Alternatively, capital juries are allowed to consider a wide array of factors relevant to the defendant's background, character, and the offense. By drawing this distinction, the Court ruled that there were no commonly set

standards to evaluate all defendants who did or did not receive the death penalty.

The Court also noted that cases involving Title VII violations or discriminatory jury selection practices afforded defendants in those cases with the opportunity to explain possible reasons for the racial disparities established by the statistical data. In each case where such violations were alleged to have occurred, state officials were given the opportunity to rebut charges of discriminatory practices by providing alternative explanations for the racial disparities cited in the statistical evidence. Violations of equal protection laws were only found by the courts after those alternative explanations were found in the court proceedings to be invalid. However, capital cases, the Court held, offered no such opportunities to the state to rebut claims of racial discrimination found in statistical data submitted to the court. Thus, jurors could not be called to rebut charges that discriminatory motives or influences guided their decisions which resulted in the final verdict. Similarly, prosecutors involved in decisions to charge defendants with death-eligible offenses were not able to explain whether those decisions were influenced by racial factors.

Finally, the Court would rule that the Baldus study failed to prove that the Georgia capital sentencing statute was implemented with a “discriminatory purpose”. In the view of the Court, such a purpose could be demonstrated if the evidence established that the state legislature selected and enacted a particular statute with the knowledge that it would have an adverse effect on an “identifiable group”.²²⁸ Thus, for a claim of racial discrimination to prevail, McCleskey had to demonstrate that the death penalty statute was administered with

²²⁸107 S.Ct. 1756, 1769.

prior knowledge by the State of Georgia that it would have a racially discriminatory effect.

Although the Court recognized the likelihood of disparities in Georgia sentencing statute as being an inevitable part of the criminal justice system, it believed that the disparities demonstrated by the Baldus study were insufficient to indicate a "constitutionally unacceptable risk of racial prejudice in the capital sentencing decisions".²²⁹ Additionally, the Court ruled that the sophisticated analysis submitted by the Baldus study merely demonstrated a "risk" that race could have entered into some of the capital sentencing outcomes in the state of Georgia. Thus, in light of the fact that the Court noted that certain discrepancies cited in the statistical evidence that appeared to correlate with race could not be fully explained, they declined to "assume that what was unexplained was invidious".²³⁰

3. Interpreting "Race" Effects in Death Penalty Studies

In view of the Court's ruling in *McCleskey* regarding the findings in statistical analyses which indicated an influence of race on charging or sentencing outcomes in capital cases, what interpretations can be made regarding the nature of those race effects? That is, if race effects are found in death penalty studies, how should they be interpreted? Prior findings in death penalty studies examining the role of race in charging or sentencing outcomes have led to speculation as to how those findings could be interpreted. For example, are the race effects on death penalty case outcomes the result of racial animus of one group towards another in criminal proceedings? Are the charging or sentencing outcomes the result of earlier selective practices by law enforcement practices of the police?

²²⁹*Id.*, at 1775.

²³⁰*Id.*, at 1778.

Are prosecutors more likely to be indifferent towards intra-racial crimes committed in cases where the offender and victim are black? Or, do race effects simply estimate the impact of race variables on the potential risk or likelihood of being charged with a death-eligible offense or being sentenced to death? These questions will be examined below.

a. Racial Animus and Discrimination

In reviewing the body of death penalty research, the role of race has been consistently noted across a number of those studies. First, cases involving White victims, either by themselves or in combination with the race of the defendant, are more likely to result in the defendant being charged with a death-eligible offense or sentenced to death. One possible interpretation for this race effect is that it may be the result of a legacy or pattern of racial animus and/or indifference towards Blacks and members of other minority groups. Paternoster (1991) reviewed a history of discriminatory treatment towards Blacks that may explain the relationship between race and outcomes in death penalty cases.²³¹ From the Slave Codes of the 1660s in the American colonies to the Black Codes enacted in the South in the 1800s, patterns of differential treatment would emerge and influence how the criminal laws were codified and selectively applied to different members of society. One consistent pattern that would emerge from these laws was the unequal application of the death penalty for blacks charged with criminal offenses. The penalties for blacks, whether they were free or slaves, were significantly higher in terms of severity compared to the penalties for similar offenses committed by whites. The crime of rape, particularly when committed by black offenders, provides a good illustration of the discriminatory practices

²³¹Paternoster, R. (1991). Capital Punishment in America. New York: Lexington Books.

found during this period. Typically, the criminal law was written and implemented in a fashion that provided significantly different penalties according to the race of the defendant. While blacks were automatically put to death or castrated for the rape of a white woman, no mandatory penalty existed for white defendants and very few states, if any, carried criminal penalties for the rape of a black woman. In addition to the crime of rape, black defendants were subject to the death penalty for a wide variety of criminal offenses compared to the significantly lesser penalties committed by white defendants for comparable offense.

Kennedy also reviewed the history of differential treatment of criminal offenders according to race and suggested that this legacy also has resulted in an indifference to criminal offending when the offender and victim were black.²³² Because of the Slave Codes, the Black Codes, the Jim Crow era, and other similarly crafted laws over time, Kennedy suggested that such laws led to a general indifference over time by the criminal justice system to black-on-black crime and a failure by the system to adequately protect the lives and property of black citizens. While criminal offenses involving black offenders and white victims tended to result in harsh criminal penalties, intra-racial crimes involving blacks were often downplayed. Kennedy also noted that harsh penalties related to the crimes involving black offenders and victims were more likely to result from some type of aggravating factor present in the particular offense. Myrdal's analysis of attitudes towards black-on-black crime in the South suggested that such views resulted in the creation of laws, customs, and other sentiments that would set the ground rules for social interactions between

²³²Kennedy, R. (1997). Race, Crime, and the Law. New York: Vintage Books.

members of different racial groups.²³³ In his analysis of outcomes in criminal offenses involving rape, LaFree linked the response by the criminal justice system toward offenders and victims to longstanding views of rape that implemented punishment according to the race of the victim and the offender.²³⁴ His findings suggested that cases that received the most severe criminal penalties involved sexual assaults where the victim was white and the offender was black. Additionally, cases involving black victims and black offenders received, on average, the least severe penalties. In attempting to explain the disparity in treatment of sexual assault cases, suggested the possibility that “racial distance” often inhibited jurors in criminal trials from completely identifying with certain victims, particularly if the victim’s race differed from the race of jury members.

b. Selective Law Enforcement Practices and Discrimination

Prior to the charging and sentencing processes in the criminal justice system, behaviors that are subject to criminal sanctions are initially handled by law enforcement officials. Because of the uneven history of police/minority citizen encounters over time, there has been speculation that racial bias on the part of the police may influence later charging and sentencing outcomes in capital cases. Wilbanks noted that the charges of racial discrimination are most likely to be directed at the police than at any other officials in the criminal justice process such as prosecutors, judges, probation officers or parole officers.²³⁵ Wilbanks also suggested that many of the charges of racism directed towards

²³³Myrdal, G. (1944). An American Dilemma. New York: Harpers & Row.

²³⁴LeFree, G. (1989). Rape and Criminal Justice: The Social Construction of Sexual Assault. California :Wadsworth Publishing Co.

the police include charges that the police are more likely to focus their deployment and investigative resources in predominately black communities, are more likely to arrest black citizens compared to white citizens who may involve in criminal activity at comparable rates of offending, are more likely to engage in acts of police brutality towards blacks, and are more likely to use deadly force against blacks. Whether these claims are based on experience, statistical data, perceptions, or vicarious negative experiences with the police of others, they have emerged as plausible factors in the discussion of the influence of race on charging and sentencing outcomes in criminal cases.

In his review of the practices of law enforcement over time, Kennedy suggested that race, from a historical standpoint, has been used as a law enforcement strategy over time as a signal that certain groups possessed a higher “risk of criminality”. Thus, certain minority groups, Kennedy argued, were more likely to be subjected to “reasonable” racial discrimination by the police.²³⁶ One of the more widely cited examples involved the mass detentions of persons of Japanese ancestry during World War II after the bombing of Pearl Harbor. During that period, federal authorities focused their efforts on persons of Japanese ancestry who were subjected to curfew, removed from their homes and detained in prison camps.²³⁷ Despite a lack of evidence suggesting that the Japanese detainees posed a threat

²³⁵Wilbanks, W. (1987). The Myth of a Racist Criminal Justice System. California: Brooks/Cole Publishing Company.

²³⁶“Reasonable” racial discrimination is used in the context that the perceived higher rates of criminality for members of minority group served as the justification for targeted enforcement geared towards the apprehension of “criminal” groups.

to the United States, Kennedy characterized the detentions as nothing more than racial hatred toward Japanese individuals.²³⁸

Also cited in his analysis were similar law enforcement operations which focused on the threats posed by several black individuals or groups. Kennedy noted that these incidents of targeted enforcement were particularly noteworthy because they involved the enforcement efforts of the Federal Bureau of Investigation on black political activists who were thought to pose a threat to the national security of the United States of America. In many of these instances, resources of the agency were used to target activists such as Marcus Garvey, Martin Luther King Jr. and the Black Panther Party. In each case, the FBI used a variety of tactics including wiretaps, informants, unsubstantiated charges of criminal activity, the dissemination of potentially embarrassing information, police surveillance, and the FBI's counter-intelligence program, COINTELPRO.

Tonry also points to the War on Drugs and other crime policies since 1980 that he argues have been disastrous because of their impact on black Americans.²³⁹ Tonry cites a number of racial disparities that have resulted from policies that, he argues, should have foreseen the problems that they eventually caused. First, because of a number of these

²³⁷The U.S. Supreme Court would uphold the majority of the measures taken by federal authorities in the detention of the Japanese detainees.

²³⁸Kennedy would also note that no such detention measures were taken against whites of German or Italian heritage despite that fact that the United States was at war with Germany, Italy, and Japan.

²³⁹Tonry, M. (1995). Race, Crime, and Punishment in America. New York: Oxford University Press.

policies, blacks are six to seven times more likely than white to be in jail or prison and a significantly high number of blacks under the control of the criminal justice system are young black males under the age of 24. Second, blacks are far more likely than their white counterparts to be in prison despite making up 13 percent of the general U.S. population. Tonry notes that urban black Americans bore the brunt of the War on Drugs policies, in part, because of the institutional nature of urban police departments that are found in disadvantaged minority communities. Unlike the drug activities in working class and middle class communities that often occur indoors, the bulk of drug dealing activities in lower class neighborhoods tends to be conducted outdoors. Therefore, the police are more likely to focus their resources in lower class neighborhoods and arrests for such activities are more likely to occur in lower class neighborhoods despite the fact that overall rates of offending may be similar in working and middle class neighborhoods. Also, the nature of drug dealing in lower class, disadvantaged neighborhoods made it easier for undercover narcotics officers to penetrate the social networks of friends and family members in lower class neighborhoods compared to the more stable networks that are found in middle and working class neighborhoods. Thus, the focus on arrests, which often serve as measures for police productivity and effectiveness, are more likely to take place in lower class, disadvantaged neighborhoods. This focus of law enforcement resources in disorganized, minority neighborhoods, Toney argues, has and will continue to produce racial proportions in arrests that do not correspond to racial proportions in drug use.

c. Prosecutorial Discretion, Indifference and Discrimination

Discretion is given to various entities in the criminal justice system that possess decision making powers that may influence arrest, charging, or sentencing outcomes.

However, prosecutorial discretion is commonly regarded as the most unlimited and uncontrolled. As previously noted in Chapter II, prosecutorial discretion is a constant and necessary fixture in the criminal justice system and prosecutors are entrusted with considerable, and often unfettered, power over exercising their judgment and conscience in decisions involving the filing or dismissal of charges, the number and types of charges filed, as well as potential plea bargains with defendants.

Although such discretion is vital to the administration of justice, it does not come without potential hazards. Prosecutors, who are often elected or appointed officials, have to be sensitive to the local conditions of the communities in which they serve. Additionally, the power of prosecutorial discretion is often exercised in response to reactions to the particular crime from citizens, the media, family members of the victim, the police, local politicians and other community leaders. To maintain community support and to win reelection or reappointment, prosecutors must often weigh community sentiment against the aggravating and mitigating factors present in the given case. Horowitz also noted that the continued focus on the community and reelection to office could, in certain instances, cause some prosecutors to treat a defendant harshly or leniently for political gain.²⁴⁰ This highlights concerns that such unchecked discretion can result in abuse though racial discrimination in determining how a case proceeds through the system.

Wilbanks (1987) noted that perceptions of many minority groups suggest that prosecutors often abuse the powers of their office are heightened by two additional factors.

²⁴⁰Horowitz, J. (1996). Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty. *Fordham Law Review*, 65, 2571-2610.

First, discretionary decisions made by prosecutors, unlike those made by the police or judges, typically take place outside of the public's view. Decisions made whether to prosecute, charge, or plea bargain, are rarely subject to independent review. Second, Wilbanks noted that prosecutors are less likely to be drawn from different minority groups and, therefore, are more likely to be white. Given the fact that prosecutorial decisions, at least in part, are a function of the sentiments of the community, it could be possible that those decisions also reflect racial bias on the part of the prosecutor. One additional factor that could influence the decisions made by prosecutors involves the history of racial discrimination in the United States that was previously discussed above in sections A & B.

Prosecutors have often been accused of racial discrimination in their charging decisions, at least in part, because of a racial animus in the United States and past selective law enforcement practices by the police. Wilbanks noted that many of the charges of racial bias directed towards prosecutors include commonly held perceptions that they are more likely argue for no bail in cases involving black defendants, less likely to recommend deferred prosecution for black defendants, less likely to approve more attractive plea agreements for black defendants, more likely to systematically exclude blacks from juries, more likely to prosecute black defendants resulting in a higher conviction rate compared to whites.

d. Making Sense of "Race" Effects

Early studies in the pre-*Furman* era suggested that race figured prominently in charging and sentencing outcomes. That is, studies on charging and sentencing rates in the early 20th century found that defendants who killed whites were more likely to have the death penalty requested in their cases and more likely to receive a sentence of death and less

likely to have those sentences commuted than defendants who killed blacks. Consistent with pre-*Furman* research in the area of racial disparities in sentencing, several more recent studies have concluded that defendants whose victims were white had the greatest likelihood of having the death penalty requested in their cases and were more likely to receive a death sentence (Bowers and Pierce, 1980; Jacoby and Paternoster, 1982; Baldus, Pulaski and Woodworth, 1983, 1985; Bowers, 1983; Gross and Mauro, 1984; Smith, 1987; Paternoster and Kazyaka, 1988; Vito and Keill, 1988; Paternoster and Brame, 2003; Pierce and Radelet, 2005;). However, the question that remains unanswered is how should these findings be interpreted? Are the race effects the product of racial animus, selective law enforcement policies focused on minorities, or racial bias on the part of prosecutors? A review of the findings in the current body of death penalty research suggests that the relationship between these factors and the race effects cited in the current body of death penalty research may be speculative, at best.

However, answers regarding the relationship between race and charging or sentencing outcomes may be found, at least in part, in the *Furman* and *McCleskey* decisions. In *Furman*, Justice Marshall, in a separate opinion, noted that the manner in which the death penalty was administered at the time, left him with the conclusion that it was discriminatorily imposed against “certain identifiable classes of people. Justice Marshall’s opinion would note:

“Regarding discrimination, it has been said that it is the usually poor, the illiterate, the underprivileged, the member of the minority group – the man without means, and is defended by a court-appointed attorney _ who becomes society’s sacrificial lamb....Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been

executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white, 1,630 were Negro: 455 persons, including 48 whites and 405 Negroes were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution is partially due to a higher rate of crime, there is evidence of racial discrimination. Racial or other discriminations should not be surprising. In *McGautha v. California*, this Court held that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is [not] offensive to anything in the Constitution. This was an open invitation to discrimination.”²⁴¹

Justice Marshall’s link between the statistical data on race that he cited in his opinion serves as an illustration of the difficulty in drawing conclusions from the race effects found in the early pre-*Furman* studies. Although a number of the earlier studies cited a relationship between either the race of the defendant or victim and charging or sentencing outcomes, many of the pre-*Furman* studies were characterized by poor or limited methodological approaches which made it difficult to draw conclusions of the effect of race on charging or sentencing outcomes. For example, many of the studies failed to include and control for key legal factors that would likely influence charging or sentencing outcomes. The main criticism being that the inclusion of other legal variables could reduce or eliminate the race found in a number of these studies. However, the post-*Gregg* studies significantly improved their methodological approaches to examine the role of race on outcomes in capital cases. Unlike the earlier studies, the more sophisticated approaches included a combination of legal, neutral, and suspect case characteristics in their analyses that could be

²⁴¹408 U.S. 238, 365.

considered in the charging or sentencing process.

Legal case characteristics were defined by the death penalty statutes and included factors such as the number of aggravating and mitigating circumstances present in a given case, the age of the victim, or whether the victim was a police officer or federal judge. Neutral case characteristics typically don't have an obvious link to charging or sentencing decisions, but may, nonetheless, influence those outcomes. Neutral characteristics may include the military status of the defendant or the relationship between the defendant and the victim. Finally, suspect characteristics include those factors that the U.S. Supreme Court has ruled to be in violation of the Constitution if they are found to have influenced charging or sentencing outcomes. Factors in this category include race of the defendant or victim, socioeconomic status of the victim, or the gender of the defendant or the victim.

As a result of the improvements in the methodological designs and increases in the number of variables collected, several of the studies that were conducted after the *Gregg* indicated a continued pattern of racial disparities at several stages in the death penalty process after the *Furman* decision and the post-*Gregg* statutory revisions to a number of death penalty statutes. The race effects that were assumed by the *Gregg* Court to have been reduced to insignificant level or eliminated continued to demonstrate significant influences on charging and sentencing outcomes. For example, cases involving white victims were found to have a higher likelihood of being charged or sentenced in death penalty cases. However, the *McCleskey* Court would rule that the statistical data submitted to the Court was insufficient to demonstrate that race influenced sentencing outcomes in capital cases. In their view, the Baldus study, which was submitted to the Court to demonstrate racial bias in the Georgia death penalty system, was deemed insufficient to prove that race played any

part in the Georgia jury's decision to impose the sentence of death in McCleskey's particular case. Although the Court would also require evidence to demonstrate “purposeful discrimination” on the part of the legislature, the Court also appeared to raise the issue that might be relevant to the issue of how to interpret the influence of race on charging and sentencing outcomes in capital cases. In its consideration of the Baldus data, which found that defendants who killed white victims were 4.3 times more likely to receive a sentence of death than defendants whose victims were black, the Court ruled that the results failed to demonstrate that the Georgia statute put the defendant at a constitutionally unacceptable level of risk to receive the death penalty based on racial case characteristics.

Chapter III

Methods

The present analysis will examine the role of race in charging decisions to seek the death penalty by the U.S. Attorneys and Attorney General in federal capital cases. Since the U.S. Supreme Court's decisions in *Furman* and *Gregg*, a body of empirical studies in a number of state jurisdictions has found the role of race to be statistically significant in charging and sentencing decisions. Although the race of the defendant was not found to be significant in the majority of these studies, the race of the victim has consistently emerged in the majority of these studies as an important predictor in decisions to seek the death penalty by prosecutors and in decision by sentencing authorities to impose the death penalty. At the same time that these analyses were conducted at state level, very few studies examined the role of race on charging or sentencing decisions at the federal level.

A. Empirical Analysis

1. The Data

This study will consist of a secondary analysis of data analyzed by the Rand Corporation to explore the role of race in charging decisions by U.S. Attorney and the Attorney General in the federal death penalty system. Data for the study was originally collected from several sources. Files from the Attorney General's Review Committee (AGRC) were reviewed for all cases received from January 1, 1995 to December 31, 2000.²⁴² The U.S. Attorney's Office (USAO) is required to make a recommendation

²⁴²Cases submitted for review by the Attorney General's Review Committee

whether or not to seek the death penalty for every defendant who is charged with a federal crime that is punishable by death. All recommendations and related information is forwarded to the U.S. Department of Justice's Capital Case Unit (CCU) for review by the Attorney General's Review Committee (AGRC). Materials from the USAO include a memorandum which provides details of the case, the Assistant U.S. Attorney's evaluation of the case and charging recommendation regarding whether or not to seek the death penalty, as well as a Factors Evaluation Form which provides information on all aggravating and mitigating factors present in each case. The CCU's database contains case information which included the federal judicial district where the case was filed, the date the case was received by the CCU, case number identification, names, genders and races of the defendant and victim, the death-eligible charge, and the Attorney General's decision. Disposition information on a number of cases was obtained the Administrative Office of the U.S. Courts, the Federal Bureau of Prisons, the Executive Office for U.S. Attorneys, and the Administrative Office of the U.S. Courts' criminal master file. All cases submitted to the AGRC involved all death-eligible cases regardless of whether the death penalty was being sought by U.S. Attorneys. Two cases containing ten defendants were removed from the data set because of missing seek/no-seek recommendations by the U.S. Attorneys.²⁴³ The

(AGRC) include all death-eligible cases includes those where the death penalty was not being sought by U.S. Attorneys.

²⁴³Cases in this category that were removed included cases where the defendant was either a fugitive or awaiting extradition from another country. Three additional espionage cases containing five defendants were also removed because no information could be coded for the race of the victims.

data collection process yielded two separate populations of cases with information on charging requests made by the U.S. Attorneys and final charging recommendations made the Attorney General. The first group consisted of 312 cases involving 652 defendants and 488 victims where U.S. Attorneys decided whether or not to seek the death penalty. The second group consisted of 294 cases involving 600 defendants and 469 victims where the Attorney General decided whether or not to charge the defendant with a death-eligible offense. In addition to the racial characteristics that were collected on each defendant and victim, researchers also collected an extensive number of variables believed to influence charging decisions of prosecutors in capital cases. Data collected on the defendants and victims in each case included age, employment, education, the defendant/victim relationship, the place and nature of the killing, co-defendants involved, weapons used, witnesses to the offense, and the availability of forensic or other evidence.²⁴⁴ Variables were also coded to analyze a number of aggravating, non-statutory aggravating and mitigating factors involved in each case which are typically instrumental in charging decisions by prosecutors.²⁴⁵

²⁴⁴Although a wealth of case characteristics and other variables related to charging decisions were collected, missing data, which typically is a problem in empirical research, presented a few challenges in the present study. Because of the complexity in the charging process, missing data related to legally relevant factors such as aggravating or mitigating factors, or suspect factors such as the race of the defendant or victim, can result in biased estimates which, in turn, can lead to incorrect or misleading interpretations of the final coefficients produced by the analyses. In such cases of missing data, one can either delete from the analysis either the variable for which the data is incomplete or the cases in which the data are missing. The data selection process will be discussed in further detail in Chapter IV.

²⁴⁵Aggravating factors for homicides cases included:

- a. Death during the commission of a crime.

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- b. Prior conviction of a violent felony involving a firearm.
 - c. Previous conviction of offense for which a sentence of death or life imprisonment was authorized.
 - d. Previous conviction of other serious offenses.
 - e. Grave risk of death to additional persons.
 - f. Heinous, cruel or depraved manner of committing the offense.
 - g. Procurement of the offense by payment.
 - h. Commission of the offense for pecuniary gain.
 - i. Substantial planning and premeditation.
 - j. Previous conviction of two felony drug offenses.
 - k. Vulnerability of the victim.
 - l. Previous conviction of serious Federal Drug offense.
 - m. CCE involving distribution to minors.
 - n. Offense against high public officials.
 - o. Previous conviction of sexual assault of child molestation.
 - p. Multiple killings or attempted killings.

Aggravating factors for Drug Offenses included:

- a. Previous conviction of offense for which a sentence of death or life imprisonment was authorized.
- b. Previous conviction of other serious offenses.
- c. Previous serious felony drug offenses.
- d. Use of a firearm in the offense or furtherance of CCE.
- e. Distribution to persons under twenty-one.
- f. Distribution near schools.
- g. Using minors in drug trafficking.
- h. Lethal adulterant.

Non-Statutory Aggravating factors included:

- a. Participation in additional uncharged murders.
- b. Obstruction of justice.
- c. Contemporaneous convictions.
- d. Future dangerousness.
- e. Victim impact evidence.
- f. Vileness of crime.
- g. Murder of two persons.
- h. Felonious cruelty to children.
- i. Other (specify)

Mitigating factors included:

- a. Impaired capacity.

Additionally, all cases collected consisted of one or more defendants who were charged by the U.S. Attorney's Office with one or more offenses that carried the death penalty. More than half of the cases collected involved two or more defendants, multiple victims, and almost 80% of the cases overall included multiple defendants.²⁴⁶ Finally, data was collected on the geographic distribution of cases in six regions which represented the 94 U.S. Attorney's Offices across the United States, Puerto Rico, and the Virgin Islands.²⁴⁷

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- b. Duress.
 - c. Minor Participation.
 - d. Equally culpable defendants.
 - e. No prior criminal record.
 - f. Disturbance.
 - g. Victim's consent.
 - h. Youth.
 - i. Victim's family against death penalty.
 - j. Positive institutional adjustment.
 - k. Provoked by victim.
 - l. Other.

²⁴⁶Data collected on the victims in the federal capital case data set excluded events where individual-level information could not be obtained on the victims. These events included the first World Trade Center, Oklahoma City, Dar es Salaam, and Nairobi bombings.

²⁴⁷The South region which included 31% of cases where U.S Attorneys recommended the death penalty and 32% of the cases where the Attorney General sought the death penalty consisted of Alabama, Arkansas, the District of Columbia, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. The Northeast which included 13% of cases where U.S Attorneys recommended the death penalty and 15% of the cases where the Attorney General sought the death penalty consisted of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. The Midwest region which included 25% of cases where U.S Attorneys recommended the death penalty and 28% of the cases where the Attorney General sought the death penalty consisted of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, and Wisconsin. The West region which included 27%

Overall, over 100 explanatory variables were collected through the data collection efforts of the researchers.

2. Decision Points to be Analyzed.

The current study will focus on charging decisions made by the U.S. Attorneys and the Attorney General in federal capital cases. Specifically, the current analysis will examine the impact of the race of the defendant and the race of the victim on the charging requests made by the U.S. Attorneys and the final charging recommendations made by the U.S. Attorney General in federal capital cases. Under current federal death penalty protocols, cases involving the decision by U.S. Attorneys to seek the death penalty advance through a number of levels prior to the final authorization or denial to seek the death penalty. After eligibility requirements have been met and charging decisions have been finalized, all U.S. Attorneys are required to submit any pending cases for which the death penalty is authorized regardless of whether or not the death penalty is being recommended. All cases are then forwarded the capital case review committee which consists of group of senior Justice Department lawyers designated by the Attorney General. After reviewing the case and meeting with several parties, the review committee presents its recommendation to the Attorney General who makes the final decision whether a capital case should be sought in

of cases where U.S Attorneys recommended the death penalty and 27% of the cases where the Attorney General sought the death penalty consisted of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. U.S. Attorneys on Puerto Rico recommended the death penalty on 14% of the cases and the Attorney General sought the death penalty on 17 of the case. No cases were recommended for the death penalty by U.S. Attorneys and the Attorney General did not seek the death penalty in any cases in the Virgin Islands.

the case.

Since the *Gregg* decision, a body of research has examined the role of race in charging and sentencing decisions in several jurisdictions. Chapter I cites several studies conducted primarily at the state level using a number of multivariate approaches which have explored the role of race on charging and sentencing outcomes while controlling for other variables believed to have factored into those decisions as well. Although there is the danger of overfitting models with too many variables, standard regression models typically analyze a number of aggravating, non-statutory aggravating and mitigating circumstances as individual factors in the analyses along with variables such race, sex, age, other non-statutory factors, and relevant case characteristics.

In 2002, one independent study was conducted to examine the role of race in the federal death penalty system. Similar to previous studies conducted at the state level, a series of multivariate analyses were conducted to examine the impact of several independent variables on charging decisions by U.S. Attorneys and the U.S. Attorney General in cases where the death penalty was an option. However, a number of these analyses departed from the methodological approaches cited in Chapter I.

For example, Klein, Freedman and Bolus collected over 100 explanatory variables to examine the impact on charging decisions in federal capital cases. Because they “saw no satisfactory way of choosing explanatory variables”, they totaled the number of aggravating factors for each defendant to create an “aggr” variable and totaled the number of mitigating factors for each defendant to create a “mitg” variable. The model that was constructed from this approach examined the role of race on charging decisions in an initial thirteen-variable regression model with several regional variables, the race of the victim, the race of the

defendant, a variable which represented a total sum of all aggravating variables in each case, and a variable which represented a total sum of all mitigating variables in each case.²⁴⁸

However, unlike many analyses conducted in the past, including those that have been recognized in terms of their validity by the U.S. Supreme Court, the analyses in the federal death penalty study did not include other variables that are more likely to influence charging decisions. The limited number of variables included in subsequent models failed to demonstrate any race effects on charging decisions.²⁴⁹ One plausible reason for the findings may be that race did not influence charging decisions of prosecutors in the cases under analysis. An alternative reason may be that the selection of variables in each of the models may have explained the lack of race effects on charging decision.

In the second of three analyses in the federal death penalty study, Berk and He also conducted a few preliminary conventional logistic regression models. Unlike the first set of regression models, Berk and He's models demonstrated evidence of the influence of race on charging decisions by U.S. Attorneys. However, there were a few items in the analysis that could be considered interesting and unexpected. First, a number of the variables that represented counts of mitigating factors, aggravating factors and non-statutory factors in the model emerged as statistically insignificant predictors on charging decisions by the U.S. Attorneys, but the role of race of the victim was statistically significant. Additionally, other

²⁴⁸The researchers did note that although the majority of their models showed not race effects, some, in fact did demonstrate race effects on charging decisions.

²⁴⁹Their analyses included an three-variable model (aggr, mitg, and the race of the victim) an eleven variable model (aggr, mitg, the race of the victim, and several regional variables) and a five variable model (aggr, mitr, race of the victim, the race of the defendant, and an interaction variable between white victims and non-white defendants).

aggravating circumstances were found to be insignificant while factors such as whether the victim had a skilled job or whose arm or hand was injured during the crime were statistically significant in charging decisions.²⁵⁰

3. Analytical Approach

The current study would extend the previous analysis conducted on the federal death penalty cases by focusing on more traditional logistic regression approaches conducted in many of the state studies cited in Chapter I. The analyses will focus on the recommend/no-recommend decisions of the U.S. Attorneys and the seek/no-seek decisions of the Attorney General after cases have been reviewed by the Attorney General's Review Committee.²⁵¹ The data would be fitted to several multivariate regression models to examine the role of race while controlling for relevant legal factors on charging decisions in the federal death penalty system. In conducting the present analyses, there are a number of points that have to be addressed.

First, the starting approach in the current study will be to examine the relationship between the race of the defendant and/or victim and the charging decisions by federal prosecutors. Hanushek and Jackson note that fitting models to a given data set begins with

²⁵⁰Berk and He conducted a random forest analysis on the federal data set and concluded that it provided a better fit for the data than traditional logistic regression models. However, their selection of this model came with two caveats. First, that the better fit did not necessarily mean less bias because the use of a predictor that should not be in the model could result in the association of race and charging outcomes being adjusted upward and downward inappropriately. Second, the random forest approach cannot compensate for predictors that are not included in the model.

²⁵¹A report released by the U.S. Department of Justice found that Attorney General's Review Committee and the Attorney General agreed with the charging recommendations of U.S. Attorneys in 88% of death-eligible cases.

the assumption that common causal relationships exists in theoretical and empirical models.²⁵² Assuming that this is the case, the analysis will examine statistical significance and empirical significance. In focusing on the role of race on charging decisions, an examination of the statistical significance will allow for a determination to be made as to whether the data appear to be consistent with each of the models constructed. Additionally, the assessment of the empirical significance will provide vital information related to the strength or magnitude of the coefficients. That is, the analysis will estimate the strength of the relationship between race characteristics in a given case and how that offense is ultimately charged. If race effects are found, subsequent analyses will be conducted to determine whether race effects are reduced after the introduction of legally relevant factors such as the number of aggravating and/or mitigating circumstances present.

Second, the variables that will be used in the analysis will have to be “fitted” to the selected models. In a bivariate analysis, a single variable is fitted to a model to explain its effect on the dependent variable. However, this is not typically useful in death penalty (or other) studies since there are several known variables that may effect outcomes in capital cases. Thus, the multivariate analytical approach becomes a more useful, and ultimately, preferred method to determine the strength of several independent variables on the dependent variable. Because of the high number of aggravating factors, mitigating factors, non-statutory aggravating factors, as well a significant number of case characteristics that were previously collected, the number of variables in each model will need to be reduced.

With so many variables in the analysis to choose from, one approach could be to

²⁵²Hanushek, E. and J. Jackson (1977). Statistical Methods for Social Scientists. New York: Academic Press.

“throw” large numbers of the variables into the multivariate analyses in order to control for every possible independent variable on charging decisions. For example, all of the known legal factors and other case characteristics could be analyzed in several models estimate their effects on the U.S. Attorney’s charging decisions. However, Hosmer and Lemeshow note that analyses examining a large number of independent variables on a relatively small sample of cases can run the risk of producing estimates that may be numerically unstable.²⁵³ Therefore, the present study will reduce the number of explanatory factors to a more manageable level.

Finally, all of the data in the analysis have been re-coded into dichotomous variables with values of 0 or 1. In this instance, each dichotomous response variable with outcomes can be thought of as an event or non-event. In the present study the event will be the decision to charge a death-eligible offense with the death penalty and the non-event will consist of the decision by the prosecutor to not charge the defendant with the death penalty. Accordingly, a logistic regression analysis will be employed to provide several coefficients that will estimate the effects of several of the independent variables selected on the dependent variable. This approach will provide statistical controls for a number of variables so that the independent effects of each variable on charging decisions can be estimated.

²⁵³Hosmer, D. and S. Lemeshow. (1989). Applied Logistic Regression. New York: John Wiley & Sons.

Chapter IV.

Empirical Results

The current chapter will address and discuss a number of points related to several analyses that were conducted to analyze the role of race in charging decisions by the U.S. Attorneys and the final charging decisions of the Attorney General. Section A will discuss how variables were selected and analyzed in several of the logistic regression models and section B will report results from two exploratory analyses. Additionally, section C will report preliminary, unadjusted estimates and section D will report the final, adjusted estimates from several logistic regression analyses which will examine the charging decisions of the U.S. Attorneys and the Attorney General. The final section will briefly discuss limitations related to the study.

A. Variable Selection

The starting point in the analytical process begins with the selection of independent variables thought to have an influence on the charging decisions of the U.S. Attorneys and the Attorney General. One of the common criticisms of early death penalty research studies stems from the lack of variables included in the models to adequately estimate charging or sentencing decisions made in capital cases. However, as statistical models became more sophisticated over time, efforts have been made to collect large number of case characteristics in addition to aggravating and mitigating factors in order to control for their influence when considering the impact of race on charging or sentencing outcomes. Although the collection of additional variables may be preferable from a preliminary standpoint, the selection of variables for inclusion in the analytical models can present

challenges to the researcher. In the current study, over 100 variables were considered for the analyses that will be discussed in the later sections.²⁵⁴ With so many potential independent variables relative to the sample of cases, the list of variables had to be pared down to a more manageable number.

Table 1 presents the initial variables that were considered for inclusion in the analyses. Hosmer and Lemeshow note that some type of univariate analysis may be employed to examine the relationship of each individual variable on the dependent variable. They also emphasized the importance of considering how variables are selected to build models to examine the role between different variables. In their view, too many variables into a regression model, also known as “overfitting the model”, can produce unrealistically large estimated coefficients and/or estimated standard errors. Therefore, part of the model-building process includes minimizing the number of variables in the model in order to produce results that are more likely to be numerically stable and generalizable.

In the current analysis, each independent variable was examined separately to estimate its relationship to the dependent variable. After the initial analysis, the choice of variables was reduced from 102 to 38.²⁵⁵ Table 2 presents a reduced list of covariates that were considered for the analyses. Many of the individual case characteristics were dropped

²⁵⁴Variables initially considered for the analysis were reviewed and selected if it appeared that they could be properly coded into dichotomous categories for the logistic regression analyses.

²⁵⁵The Rand Corporation study also analyzed a similar number of variables in their regression models. However, many of their variables selected were related to various case characteristics that were not include in the present study. It is important to note that the analyses in both studies produced similar race of the victim and race of the defendant coefficients at similar levels of statistical significance.

from consideration in the analysis due to weak associations to charging decisions in the federal process. Additionally, a number of the independent variables under consideration were found to have missing data, which produced coefficients that may not have reflected the true relationship between each independent variable and the dependent variable.

To address this problem with the data, the variables in the initial analysis were also screened for significant amounts of missing data and substantive relationships to the charging process. For example, a number of the variables were found to have 30 or more cases with missing data. Thus, the inclusion of these variables would have resulted in a loss of a number of cases in the logistic models examining the role of race on charging decisions. The concern of the potential loss of cases from the current sample of cases resulted in the decision to drop a number of variables with missing data. Many of the variables that were collected which reflected case characteristics related to the location of a gunshot or stab wounds to the victim had large amounts of missing data. This was also found in a number of case characteristics related to personal information related to the defendant (e.g., iq/intelligence level, history of serious head injury, history of mental illness or emotional problems, history of drug abuse, etc.). Additionally, a number of independent variables reflecting the manner in which the victim was killed (e.g., burning, bombing or explosion, drowning, suffocation, strangulation, etc.) had large amounts of missing data.²⁵⁶ Also, a

²⁵⁶The missing data from case files is a common problem in many instances where the information is not recorded by prosecutors or other staff in a systematic manner. It is also possible that variables which reflect case characteristics may not be collected in a consistent manner since the most important variables that influence charging decisions, by statute, are the aggravating circumstances submitted by the U.S. Attorneys that they believe can be proven beyond a reasonable doubt in court. Given this requirement, it is likely that charging decisions are based largely on this legal requirement rather than the presence of

number of variables were dropped from consideration if they were described with generic variable labels terms that would have made substantive interpretations between the independent and dependent variables difficult. For example, a number of the variables were defined with generic variables labels such as “before killing-any conditions reported” or “at crime scene-any conditions reported.” Variables with generic terms such as these were also dropped from the analyses due to a lack of clarity as to their substantive relationship to the charging decisions. Key variables with coding information may found in Table 3.

B. Exploratory Analyses

As previously discussed, prosecutorial discretion is one of the most constant fixtures in the criminal justice system. As a result of this tradition, prosecutors are entrusted with considerable, and often unfettered, power over exercising their judgment and conscience in decisions involving the filing or dismissal of charges, the number and types of charges filed, declination of charges, as well as potential plea bargains with defendants. At the state level, such discretion is often exercised in a broad nature and typically not subject to scrutiny in the public domain. This lack of visibility is in contrast to the scrutiny focused on other phases of the criminal justice system. The police often make arrests or stops which are required to be based on some legal definition such as reasonable suspicion or probable cause and justifications are often required to substantiate those actions. Also, judicial actions are

other case characteristics relevant to the offense. Not surprisingly, a large number of aggravating and mitigating factors were included and considered for inclusion in the logistic regression models.

typically subject to the review by other judicial boards at the appellate level.

However, the discretion afforded to prosecutors is often less visible and not subject to the scrutiny of other authoritative bodies. Additionally, charging decisions are not often based on formal guidelines created to structure the decision making process by prosecutors, nor are prosecutors required to follow any such charging guidelines. However, a lack of available guidelines can raise concerns that prosecutorial discretion can result in the consideration of suspect factors, such as race, in the charging process.²⁵⁷ At the federal level, prosecutors also have a significant level of discretion in determining how defendants are charged in capital cases. However, there are a few guidelines that have been put in place that govern those charging practices. The charging process begins with an internal assessment by prosecutors of eligibility of the offense for the death penalty. All death-eligible cases are generally required to meet three criteria: (1) the defendant is charged with an offense that is statutorily authorized to receive a death sentence; (2) the defendant intended or had a high degree of culpability with respect to the death of the victim; and, (3) one or more statutory aggravating circumstances must be present in the case. Additionally, the decision to seek the death penalty in federal capital cases may also be influenced by whether it is in the interest of the Federal government to pursue the case over the interest of

²⁵⁷The lack of structured guidelines in the sentencing process was one of the main points raised by the *Furman* Court. Although the Court did not suggest that the lack of guidelines would result in the consideration of suspect factors such as race, it did reason that the lack of such guidelines could make it difficult to determine whether race played a part in those sentencing decisions. The Court, however, would make no similar ruling that prosecutorial charging guidelines were required to prevent race from being considered in the charging process in capital case.

the state in which the offense initially occurred.²⁵⁸ After eligibility requirements have been met and charging decisions have been finalized, the U.S. Attorneys are required to submit any pending cases for which the death penalty is authorized regardless of whether or not the death penalty is being recommended. Finally, the U.S. Attorneys are required to identify all statutory and non-statutory aggravating circumstances that will be proven at trial. Thus, for the purposes of the analysis, the aggravating and mitigating factors present in the death-eligible cases should be expected to emerge as significant predictors in whether or not prosecutors seek the death penalty.

Since aggravating, mitigating and non-statutory aggravating circumstances are commonly believed to have an impact on the charging decisions made by prosecutors; a few exploratory analyses were conducted in the present study. During the variable selection process, it was determined that mitigating and non-statutory aggravating circumstances variables were missing large amounts of data which could have biased the coefficients in the logistic regression analyses. Therefore, two dummy variables were created and coded to control for the presence of any mitigating or non-statutory aggravating circumstances in each capital case.²⁵⁹ For purposes of consistency, an additional dummy variable was also

²⁵⁸In death-eligible cases where concurrent jurisdiction with a State of local government is found to exist, Section 9-10.090 of the *United States Attorney Manual* states that a Federal indictment should be obtained only when the Federal interest in the prosecution has been demonstrated to be more substantial than the interests of the State or local authorities. The determination of whether the Federal interest is more substantial than the interests of the State of local authorities is based on a number of factors including: (a) the relative strength of the State's interest in prosecuting the case; (b) the extent to which the criminal activity reached beyond the boundaries of a single local prosecutorial jurisdiction; and, (c) the relative ability and willingness of the state to prosecute effectively and obtain an appropriate punishment upon conviction.

created to reflect the presence of any aggravating circumstances in each capital case.

Table 3a presents exploratory estimates which include a number of legal factors that are relevant in charging decisions by prosecutors in capital cases.²⁶⁰ The analysis in this instance was only conducted to examine the direction of the relationships between the independent and dependent variables. In the first analysis, the defendant's prior criminal record, pending cases against the defendant, and total aggregate scores for aggravating, mitigating, and non-statutory aggravating factors were analyzed to determine their influence on charging outcomes. Although the defendant's prior record or pending cases did not appear to influence charging patterns, two of the aggregate factors scores were significant in their impact. However, the analysis produced a significantly large constant term and aggregate aggravating factors coefficient that was not statistically significant.²⁶¹ The

²⁵⁹Although there are eight mitigating circumstances and eight non-statutory aggravating circumstances that may apply in federal capital cases, only three of the mitigating circumstances were found to have no missing data. Additionally, all of the non-statutory aggravating circumstances were found to have significant amounts of missing data. The aggregate mitigating and non-statutory aggravating dummy variables were created to provide additional control variables to examine race effects and to determine if statistically significant differences existed between the full logistic regression models and the parsimonious models.

²⁶⁰From a procedural standpoint, the likelihood that a case is changed with a death-eligible offense has been found to be higher in cases where the defendant has a prior criminal record and/or other pending cases. In the present exploratory analysis, however, the prior record and pending case variables were only added to the model to examine whether the analysis would produce aggravating, mitigating, and non-aggravating factors coefficients in the expected directions. That is, aggravating and non-statutory aggravating factors would be expected to increase the likelihood of a request for the death penalty and mitigating factors would decrease the likelihood of the death penalty being requested by prosecutors.

aggregate aggravating factor coefficient estimate was somewhat unexpected since it was coded in a manner to reflect the overall number of aggravating circumstances present in a given case, which, in turn, would be expected to significantly influence whether or not the death penalty was requested. A second re-analysis of those variables listed in Table 3b produced estimates which showed a significant relationship between three of the five explanatory variables in the model.²⁶² Thus, prosecutors, according to the model, were more likely to request the death penalty in cases where aggravating and non-statutory factors were found. Alternatively, they were less likely to request the death penalty in cases where mitigating factors existed. These findings, thus far, are consistent with those previously cited in a number of death penalty studies at the state level. The remaining analyses in the next two sections will examine race effects and charging decisions made by the U.S. Attorneys and the Attorney General.

C. Preliminary Results – Unadjusted Estimates

This section will report preliminary, unadjusted estimates to examine whether any

²⁶¹The aggravating factor coefficient conflicts with the expected statistically significant effect since the presence of one or more aggravating factors in a capital case is more likely to result in a request for the death penalty by a U.S. Attorney. The fact that the aggravating factors dummy variable produced an unusually large and statistically insignificant effect suggested the possibility of a problem with the manner in which the aggregate aggravating factor was initially coded.

²⁶²Because of coding concerns, a variable in the original data set, which reflected the overall number of aggravating factors present in each case was re-coded into a dummy variable which dichotomized data points to distinguish cases where no aggravating factors were present (coded, 0) from cases where aggravating factors were present (coded, 1).

differences exist between the charging decisions by prosecutors to request the death penalty for cases involving non-white and white victims and cases involving non-white and white defendants. The purpose of the analyses in this section will be to assess whether any differences exist across cases involving whites and non-white groups. The estimates, however, will not attempt to account for any of the differences across the racial groups if they are found.²⁶³ Table 4 provides a description of the charging rates of prosecutors for cases involving white and non-white defendants. Among the cases where the prosecutors made the decision to request the death penalty, the data suggests that 20.5% (109/532) of the defendants were non-white and 31.2% (39/125) of the defendants were white.²⁶⁴ The preliminary estimates also reported differences among cases where prosecutors requested the death penalty for cases involving nonwhite v. white victims. In cases where the death penalty was requested, Table 5 presents exploratory information which indicates federal prosecutors requested the death penalty in 17.6% (81/461) of cases involving non-white victims and 34.2% (67/196) of cases involving white victims. Although these rates appear to indicate some racial differences in charging patterns, no conclusions can be drawn from these numbers since they are unadjusted figures and fail to take into account other legally relevant factors which might provide a reasonable explanation for the differences across the racial groups. For example, the higher relative rates of requests for the death penalty in

²⁶³The final, adjusted estimates will examine the role of race and other legally relevant factors on charging decisions made by federal prosecutors.

²⁶⁴Since there were only 652 cases in the initial analysis, the racial groups (Native American, Black, Hispanic, Asian, and Black Hispanic) were coded into dichotomous racial categories of white v. non-white. This coding procedure prevented the potential loss of a significant number of cases in the initial analyses.

cases involving white defendants or white victims may be explained by a higher number of aggravating and non-statutory aggravating factors and/or fewer mitigating factors which are likely influence charging decisions by prosecutors.

In order to examine the differences further, a number of preliminary regression analyses were conducted to examine the role of race on charging decisions by federal prosecutors. Specifically, the preliminary analyses will examine the relationship between race variables and charging decisions and assess the strength and statistical significance of the relationships found in the analyses. Table 6 presents the logistic regression coefficients of six variables with the race of the defendant included in the model. The variables were selected for the model based on their substantive relationship to charging outcomes in capital cases. For example, the number of legally relevant variables (aggravating, mitigating, and non-statutory aggravating factors), the prior record of the defendant, and any pending cases against the defendant would be expected to have an influence on charging decisions made by prosecutors.

The results showed a fairly strong and statistically significant effect between the race of the defendant and the charging decisions by prosecutors in capital cases. The estimates also suggested that cases involving white defendants were more likely to be charged with the death penalty than cases involving non-white defendants.²⁶⁵ As expected, the legally

²⁶⁵The logistic regression coefficient, by itself, may not offer the desired intuitive value in describing the relationship between the independent variable(s) and the dependent variable. For example, logistic regression coefficients demonstrate an increase or decrease in the predicted probability of having a certain characteristic or experiencing an event due to a one-unit change in the independent variable. However, expressing the results in the form of odds via an odds multiplier may be interpreted as a measure of relative risk of a likely outcome (dependent variable) given the presence of an independent variable. Therefore,

relevant factors also increased the likelihood that the death penalty would be requested by federal prosecutors. Cases with any aggravating factors present were more likely to have the death penalty requested and cases with non-statutory aggravating circumstances present were more likely to have the death penalty requests than cases where those factors were absent. Not surprisingly, the presence of mitigating factors decreased the likelihood that the death penalty would be requested. One important consideration in the present analysis is that the relationship between the race of the defendant and the charging outcomes was found to be significant when a number of legally relevant factors were included in the model.

Although the prior record of the defendant was not found to be statistically significant, the race of the defendant, any pending cases against the defendant, and the presence of aggravating and non-statutory aggravating factors were found to be significant predictors of charging decisions by federal prosecutors.²⁶⁶ While the estimates of the legally relevant factors seem to confirm similar findings in other death penalty cases, the estimate produced by the race of the defendant would appear to run counter to the majority of previous results presented in other death penalty studies. Although the race of the victim has been cited in a number of studies, relatively few of the post-*Furman* analyses have found a significant relationship between the race of the defendant and charging (or

each of the logistic regression coefficients produced in the final, adjusted results listed in Section D will include odds multipliers in each of the models. See Pampel, *Logistic Regression: A Primer* (2000) or Hosmer and Lemeshow, *Applied Logistic Regression* (1989).

²⁶⁶The presence of pending cases against the defendant was found to be statistically significant at the .10 level.

sentencing) outcomes. However, it is important to note that no conclusions can be drawn from the model results since there are still several variables that have not been included in the analysis. It is possible that the inclusion of other variables may reduce or eliminate its significant effect on charging decisions.

Table 7 presents similar estimates from the model which examined the role of the race of victim on charging decisions without the race of the defendant being included in the model. Similar to the results found in the previous analysis, three of the five legally relevant factors also showed a significant impact on whether federal prosecutors requested the death penalty in capital cases. Not surprisingly, cases where aggravating and non-statutory aggravating factors were present were more likely to have the death penalty requested, respectively. Also, cases with mitigating factors present were less likely to have the death penalty requested by prosecutors. Finally, the inclusion of victim's race variable yielded an additional influence in the charging process as well. The race of the victim, controlling for other legal factors, emerged as a statistically significant predictor of charging outcomes.²⁶⁷ That is, cases involving white victims were more likely to be charged with the death penalty than cases involving non-white victims.

In the last analysis which produced preliminary results, Table 8 presents five legally relevant variables with the sex of the defendant, the race of the defendant, and the race of the victim. In this instance, however, the race of the victim continued to show a significant effect on charging decision. Cases involving white victims were more likely to result in the

²⁶⁷P<.05.

prosecutor requesting the death penalty than cases involving non-white victim cases.²⁶⁸

This finding is consistent with several studies at the state level which were cited in Chapter II which found significant effects of the race of the victim on charging decisions made by prosecutors when controlling for legally relevant factors. An additional finding that was consistent with past studies involved the estimate for the race of the defendant which was found to have an insignificant impact on charging decisions.

Although the initial estimates are consistent with findings from several death penalty studies at the state level, the unadjusted estimates provide, at best, an incomplete description of the potential role that race may play in charging decisions by federal prosecutors. Since the preliminary analyses explored a few variables in each of the analyses, it is possible that the addition of other relevant variables may provide a better explanation in terms of which variables may be the best predictors of charging outcomes in capital cases. That is, the addition of individual aggravating, mitigating, and non-statutory aggravating factors into the models may prove to be better predictors of charging decisions and may, in turn, reduce race effects cited in the preliminary results to statistically non-significance. The final, adjusted estimates will be reported in Section D.²⁶⁹

²⁶⁸The significant finding of race of the victim effects were also noted in the Rand Corporation's analysis of the federal death penalty system in 2006. In that study, the regression coefficient cited in that study was .863 with a probability of .004.

²⁶⁹In addition to the logistic regression estimates, the final results will also include a Model Classification Table for each of the models which will include the percent of cases correctly classified by the model, which reflects the percentage of cases in which the model accurately predicted the decision to seek or not seek the death penalty; the percent of cases of cases correctly classified by chance, which reflects an assumption that the actual outcomes and predicted outcomes are independent; and, the proportion reduction in error relative to chance, which reflect the amount of error that is avoided by estimating the model

D. Final Results – Adjusted Estimates

1. U.S. Attorney Charging Decisions

Although the preliminary results appeared to be consistent with previous death penalty studies which have cited the potential role of race in charging (and sentencing) outcomes, the unadjusted estimates fall short of properly explaining the exact nature of that relationship. The purpose of the previous series of analyses was to examine whether any relationships existed between race and charging outcomes in the federal death penalty system. The preliminary, unadjusted estimates produced by the regression models, suggested the race of victim was statistically significant in its relationship to the decision to request the death penalty by federal prosecutors. In order to provide a better explanation of the role of race on charging decisions, it was necessary to conduct a series of analyses which estimated the impact of separate aggravating and mitigating factors on charging outcomes with race variables included.²⁷⁰ The final, adjusted estimates were produced by a series of logistic regression analyses which included additional variables to provide a better explanation of the role of race in charging outcomes. The final results will also report coefficients produced by a series of full regression models with a larger number of variables included as well as a number of reduced models which will limit the number of variables

rather than relying on chance to predict the outcome (charging decisions).

²⁷⁰Typically, a number of case characteristics may be included into the analyses with race variables to estimate which variables are more likely to influence charging outcomes. However, in the federal system, prosecutors are required to prove beyond a reasonable doubt that one of the death-eligible aggravating factors exists in a given case. Therefore, rather than focus the large number of case characteristics, the present analyses focused on the extent to any of the aggravating circumstances influenced charging outcomes.

included in those analyses.²⁷¹ Finally, the final results will examine the role of race on charging decisions when the race of the defendants and victims are combined together into distinct groups.

Table 9 presents estimates from the full model which examined the effect of a number of individual aggravating and mitigating factors as well as other variables such as the race of the defendant, race of the victim, and the sex of the defendant while controlling for legally relevant case factors.²⁷² Thus, the presence of aggravating and mitigating factors in each case may be able to explain race effects cited in a number of the initial analyses. That is, it is possible that once legally relevant factors are included, the role of race may disappear or be reduced to a statistically insignificant level.

As expected, the presence of a number of aggravating factors and non-statutory aggravating factors increased the likelihood that prosecutors would request the death penalty. Defendants who previously were convicted for an offense where a life sentence or

²⁷¹Given the concerns of overfitting the logistic regression models with a large number of variables relative to the number of cases in the present sample, comparisons were made to examine differences between the estimates produced by the larger models and reduced (and more parsimonious) models. Although there were over thirty variables under consideration to be included in the final analyses, a number were dropped due to missing data. Eight of the fifteen aggravating factors were included in the analyses and three of the eight mitigating factors were included. The remaining factors either were not found to have been present or had too many missing cases to be properly coded. Other variables, which had sufficient cases, were dropped if they lacked substantive variable information necessary for the final make interpretations of the final estimates.

²⁷²The sex of the victim is typically added as a control variable in past death penalty studies. In the present analysis, the variable contained missing data which resulted in a number of cases dropping out of the analysis. Although this variable was not included in the final analysis, it's overall effect was examined in a series of models and found to be statistically insignificant and did not influence the strength or significance of the coefficients when included in a separate model and compared to the estimates produced by the final analyses.

death was an option were 6.47 times more likely to have the death penalty requested in their cases compared to those cases where that aggravating factor was not present. Homicides committed during the distribution of illegal substances in violation of the Continuing Criminal Enterprise Act were found to be 4.07 times more likely to have the death penalty requested and homicides involving substantial planning and premeditation were 3.51 times more likely to have the death penalty requested relative to cases where that aggravating factor was not applicable. Also, homicides involving heinous, cruel, or depraved behavior were 2.23 times more likely to result in the death being charged and homicides committed for payment were 2.62 times more likely to have the death penalty requested.²⁷³ The presence of non-statutory aggravating factors was also found to be statistically significant in the charging process. Cases where any non-statutory aggravating factors were present were found to be 9.03 times more likely to have the death penalty requested compared to cases where no such factors were present. The estimates also suggested that the prior record of the defendant or number of pending cases was not found to be very good predictors whether the death penalty was requested by the prosecutors.²⁷⁴ Also, the presence of one of three mitigating factors included in the model decreased the likelihood that the death penalty

²⁷³Other aggravating factors were either moderately related to charging decisions made by prosecutors while others were found to be statistically insignificant.

²⁷⁴Because of the transparency in the federal charging process, compared to the charging processes at the state level, the weak relationship between the prior record or pending cases against the defendant and final charging decisions may not be very surprising. In the federal system, prosecutors are required to demonstrate their ability to prove the presence of an aggravating factor beyond a reasonable doubt before their request for the death penalty is approved. Therefore, other general case characteristics may not influence charging decisions compared to the statutory aggravating factors and non-statutory aggravating factors that are present in each capital case.

would be requested. Cases involving equally culpable defendants were .23 times more likely to result in prosecutors not requesting the death penalty compared to cases where one defendant was more culpable than the other.

However, it is important to note that when the aggravating and mitigating circumstances were considered in the model, the race of the victim continued to show a significant effect on charging outcomes.²⁷⁵ Cases involving white victims were 2.67 times more likely to have the death penalty requested than cases without white victims. This finding is consistent with past studies which have cited the race of the victim as a statistically significant factor on charging outcomes in capital cases. Additionally, the race of the defendant was not found to be a statistically significant factor on the decision to request the death penalty in capital cases. This finding is also consistent with a number of prior studies which have found that the race of the defendant does not typically influence the charging decisions in capital cases. The sex of the defendant, however, was significant and the estimates suggested male defendants were 5.48 times more likely to have the death penalty requested in their cases than female defendants.²⁷⁶ Finally, cases involving sympathetic victims were 2.16 times more likely to have the death penalty requested than cases without such victims present.²⁷⁷

²⁷⁵Unlike the aggravating and mitigating factors in the data set, a number of non-statutory aggravating factors were coded in the initial data set with a large number of missing case per variable. Therefore, the current analyses used the aggregate non-aggravating factor variable instead of individual non-statutory aggravating factors.

²⁷⁶ $P < .10$.

²⁷⁷This variable represented several types of victims including victims who defined as being good citizens, police officers, prison guards, non-criminals, or individuals

At this point in the current study, there a number of findings that emerged in the analyses that are noteworthy. First, the initial findings cited are consistent with assumptions that legally relevant factors typically determine whether the death penalty is requested by prosecutors in capital cases. Second, neither the race of the defendant nor the sex of the defendant was found to be a statistically significant factor in the charging process. Very few studies have found the defendant's race to be significant and gender bias would not necessarily be expected given the overwhelming involvement of males relative to females in death-eligible offenses. However, past studies have consistently cited effects of the race of the victim on outcomes and capital cases and the current findings, thus far, confirm these results at the state and federal levels.

Table 10 presents the estimates of the reduced model with a limited number of variables to examine and compare the estimates to those produced by the previous model which included a larger number of variables. For example, all of the individual aggravating factors that were examined in the full model for their effects on charging outcomes were omitted from the reduced model and replaced with the aggregate aggravating factor variable. Similarly, the individual mitigating factors were omitted from the model and replaced with the aggregate mitigating factor variable. The estimates produced by the reduced model were found to be consistent with the coefficients cited in Table 9. Neither the prior record nor any pending cases against the defendant were found to be significant in the decision by

supporting other dependents. Victims defined by a separate variable as being vulnerable – under the age of 17, over the age of 60, pregnant, physically handicapped, or grossly undersized compared to the defendant – were not found to be statistically significant.

prosecutors to request the death penalty. Similarly, the presence of aggravating factors, non-statutory aggravating factors and/or mitigating factors all had a significant influence on whether or not the death penalty was requested.

The coefficients in the reduced model also indicated that cases with non-statutory aggravating factors present had the highest likelihood of having the death penalty requested. Defendants were found to be 5.96 times more likely to have the death penalty requested compared to cases where no such factors were present. Also, prosecutors were 3.17 times more likely to request the death penalty in cases where any aggravating factors were present and .50 times less likely to request the death penalty if any mitigating factors were present. Cases with victims deemed to be sympathetic were 1.83 times more likely to have the death penalty requested and cases with victims who were found to be vulnerable did not have a statistically significant influence on charging outcomes. The remaining estimates in the analysis also yielded a number of findings that were consistent with those cited in the full model. The estimates in the model produced results which suggested that neither the race nor sex of the defendant had a statistically significant influence on the decision by prosecutors to request the death penalty. However, the race of the victim continued to be statistically significant in the charging process. That is, cases involving white victims were found to be 2.08 times more likely to result in requests by prosecutors to seek the death penalty than cases not involving white victims.

In order to examine the role of race on charging decisions further, a dummy variable was created to reflect an interaction between the race of the defendant and the race of the victim. Table 11 presents results which examined the influence of race when combinations of the race of the defendant and victim are considered together. Past studies have suggested

that the differences in charging and sentencing rates can often be explained by the nature of the offense that occurs between the defendant and victim. For example, if homicide cases involving black defendants and black victims are more likely to result from passion, such cases would not typically result in a request for the death penalty. Alternatively, if homicide cases involving black defendants and white victims were more likely to involve premeditation and planning, such cases would have a higher likelihood of being charged as a death-eligible offense. A number of pre-*Furman* studies which have focused on the interracial relationships between the offender and victim have found effects of the race of the offender and victim on whether a death sentence was imposed. By comparing the race of both the offender and the victim, these studies found a higher likelihood of the death sentence resulting in cases where the offender was black and the victim was white. In the present analysis, racial groups for defendants and victims were dichotomized into separate categories to examine race effects on charging decisions when the race of the defendant and victim are considered together.²⁷⁸ The present analysis will allow for the race of the defendant and victim to be considered in combination while controlling for a number of legally relevant factors that may exist in their cases to explain charging outcomes. In the present analysis, many of the results presented in the previous full model in Table 9 were found in the present analysis. Neither the prior record nor any pending cases against the defendants were statistically significant and the vulnerability of the victim lack significance

²⁷⁸In the present analysis, the race of the defendants and victims were initially coded to reflect four separate defendant/victim racial group categories. The four groups were then dichotomized into two separate comparison groups. The first three groups - white defendant/non-white victim, non-white defendant/non-white victim, white defendant/white victim groups were coded 0 – and the final group - non-white defendant/white victims - were coded 1.

as well. Additionally, the presence of aggravating factors and non-statutory aggravating factors were influential in charging outcomes. Cases with any non-statutory aggravating factors present were 9.12 times more likely to have the death penalty requested than cases where those factors were not present. Also, several of the aggravating factors increased the likelihood that the death penalty would requested compared to cases where those factors were not present. Homicides committed during the distribution of illegal substances in violation of the Continuing Criminal Enterprise Act were found to be 3.57 times more likely to have the death penalty requested and homicides involving substantial planning and premeditation were 3.69 times more likely to have the death penalty requested relative to cases where that aggravating factor was not applicable. Also, homicides involving heinous, cruel, or depraved behavior were 2.10 times more likely to result in the death being charged and homicides committed for payment were 2.71 times more likely to have the death penalty requested. The mitigating factors coefficients also yielded similar results. Additionally, the presence of mitigating factors decreased the likelihood of the death penalty being requested compared to cases where no such factors were present. Cases involving equally culpable defendants were .22 times more likely to result in prosecutors not requesting the death penalty compared to cases where one defendant was more culpable than the other.²⁷⁹ Finally, cases involving sympathetic victims were 2.16 times more likely to have the death penalty requested than cases without such victims present.

The analysis also produced a coefficient that showed a statistically significant relationship between the combination of the race of the defendant and victim on charging

²⁷⁹Two of the three mitigating factors were found to be statistically insignificant.

outcomes. In this instance, cases involving non-white defendants and white victims were 2.31 times more likely to have the death penalty requested, compared to cases involving white defendants/non-white victims, non-white defendants/non-white victims, or white defendants/white victims. The reduced model estimates listed in Table 12 were fairly similar to the reduced model estimates that were previously cited in Table 10. Neither the prior record nor any pending cases against the defendant were found to be significant in the decision by prosecutors to request the death penalty. However, the presence of aggravating factors, non-statutory aggravating factors and/or mitigating factors all had a significant influence on whether or not the death penalty was requested. The coefficients in the reduced model also indicated that cases with non-statutory aggravating factors present had the highest likelihood of having the death penalty requested. Defendants were found to be 5.89 times more likely to have the death penalty requested compared to cases where no such factors were present. Also, prosecutors were 3.17 times more likely to request the death penalty in cases where any aggravating factors were present and .52 times less likely to request the death penalty if any mitigating factors were present. Cases with victims deemed to be sympathetic were 1.98 times more likely to have the death penalty requested and cases with victims who were found to be vulnerable did not have a statistically significant influence on charging outcomes. The remaining estimates in the analysis also yielded a number of findings that were consistent with those cited in the full model. The estimates in the model also produced results which suggested that sex of the defendant did not have a statistically significant influence on the decision by prosecutors to request the death penalty. Finally, the race of the victim and defendant in combination with each other no longer showed a statistically significant effect on charging decisions by prosecutors. Although the change

in the relationship across the full and reduced models is not completely clear, the change in the effect could have resulted the fact too few variables were included in the model to adequately explain the true nature of the relationship between the racial group combinations and charging outcomes.

Table 13 also presented a similar analysis of racial group combinations involving black defendant and white victim combinations.²⁸⁰ Many of the findings cited when several racial groups were analyzed in combinations were also found in the present model. Similar to previous analyses discussed, the presence of aggravating factors continued to have a statistically significant influence on charging outcomes. The presence of aggravating factors in cases where defendants were previously convicted of an offense where death or life imprisonment was an option and cases involving substantial planning and premeditation heavily influenced the charging decisions by prosecutors. In those cases, prosecutors were 10.19 and 5.07 times more likely to request the death penalty, respectively. Prosecutors were also 3.66 times more likely to request the death penalty in cases committed for payment and 2.72 times more likely to request the death penalty if a homicide occurred during the commission of another crime. Prosecutors were also .13 times less likely to request the death penalty if the defendant's were equally culpable.²⁸¹ The extent to which the victim was determined to be vulnerable or sympathetic also produced relationship to

²⁸⁰This analysis was conducted in a sub-sample of the overall sample and consisted of 450 cases. Defendants who were Native American, Asian, Hispanic, or originally coded as "other" were removed from the analysis. In this analysis, cases involving white defendants/black victims, white defendants/white victims, black defendants/black victims, were compared to cases involving black defendants and white victims.

²⁸¹Two of the three mitigating factors were statistically insignificant and the third factor was weakly related to the decisions by prosecutors to request the death penalty.

charging decisions that were previously discussed. Although the vulnerability of the victim was not found to be statistically significant, prosecutors were 3.10 times more likely to request the death penalty in cases where the victim might draw more sympathy compared to cases without such victims. Finally, the model produced a race effect coefficient similar to the one previously discussed. When the three racial groups were compared to cases involving black defendants and white victims, prosecutors were 2.22 times more likely to request the death penalty for cases involving black defendants and white victims compared to cases where that racial combination of defendants and victims were not present.²⁸²

Similar to the estimates presented in Table 12, the reduced model estimates listed in Table 14 produced similar results when considering the role of the race of the defendant and victim in combination with each other on charging outcomes: the race of the victim and defendant in combination with each other no longer showed a statistically significant effect on charging decisions by prosecutors. Instead, legally relevant case characteristics emerged as having the strongest relationship on charging decisions in capital cases. Prosecutors were 13.81 times more likely to request the death penalty if several non-statutory aggravating factors were present and 3.50 times more likely to request the death penalty if any of the applicable statutory aggravating factors were present in a given case. Additionally, prosecutors were 1.78 times more likely to request the death penalty if other cases were pending against the defendant and 2.79 times more likely to request the death penalty if the cases involved the killing of a sympathetic victim. The final analysis discussed below will examine the final charging decisions made the Attorney General.

²⁸² P <.10.

2. Attorney General Charging Decisions

The final analysis was conducted to examine the final charging decisions of the Attorney General in federal capital cases. Since racial characteristics have all but been removed from the case files by the time that the Attorney General makes a final determination regarding whether he or she will seek the death penalty in a federal case, it may not make the most sense to look at charging decisions at this phase in the process. The Attorney General, in most instances, will not have any information on race in the case under consideration.²⁸³ However, the initial statistical data conducted by the Department of Justice noted that the agreement in charging requests by the U.S. Attorneys and final approval by the Attorney General was 88%. That is, the U.S. Attorneys and Attorney General agreed on decisions to seek the death penalty 88% of the time. Thus, the final decision by the Attorney General may simply reflect the initial charging requests made by the U.S. Attorneys given the high rate of agreement between the two parties. If this is the case, race effects on charging decision found at both decision making points may question the overall value of removing information on race from the case files during the charging process. In the present analysis, Table 15 presents coefficient estimates which yielded similar findings as those cited in the prior analyses. The race of the victim continued to indicate a statistically significant influence on final charging outcomes overall for the sample of cases reviewed. Cases involving white victims are 2.12 times more likely to have the death penalty approved by the Attorney General compared to cases where the victim is

²⁸³Racial characteristics may be cited in the file regarding an organization such as the “Latin Kings”, the “Black Guerilla Family”, or the “Aryan Nation”. However, all references with respect to the race of the defendant or victim have been removed from the case file by the time it is reviewed by the Attorney General.

not white. Again, the point is not that the Attorney General is making charging decisions based on the race of the victim in each case. Clearly, the Attorney General does not have access to this information. However, if race effects are found at the stage when the death penalty is requested by the U.S. Attorneys and there is a high rate of agreement U.S. Attorneys and the Attorney General, the intervening processes geared towards making the final charging decisions “race-blind” by removing race characteristics may not matter in the charging process.²⁸⁴

It is also important to note that many of the factors that influenced the charging requests by the U.S. Attorneys also found to be statistically significant predictors in the Attorney General’s final decisions to approve the death penalty in the applicable cases. The overall prior record or presence of any pending cases did not influence the final charging decisions, but the presence of non-statutory aggravating factors continued to have a statistically significant influence in the charging process. Cases where non-statutory aggravating factors were present were 16.30 times more likely to have the request for the death penalty approved compared to cases where those factors were absent. The presence of mitigating factors decreased the likelihood that the death penalty would be approved and a presence of a number of aggravating factors increased the likelihood that the death penalty would be approved by the Attorney General. Cases with sympathetic victims were also more likely to result in the death being charged, but cases with victims found to be vulnerable were not found to have an effect on the final charging decisions.

²⁸⁴The race of the defendant, as noted in a number of the previously discussed analyses, was not found to be a statistically significant factor in the final approval the Attorney General to seek the death penalty.

Although the findings in the full models produced results that were consistent with past death penalties which examined the race effects in capital cases, a few limitations of the study, which will be discussed below, must be addressed.

A. Study limitations

Overall, the findings cited above are consistent with a number of prior death penalty studies that were reviewed in Chapter II. Consistent with the majority of previous post-*Furman* death penalty research, two of the findings cited above regarding the role of race on charging decisions are noteworthy. First, the current study, using logistic regression procedures, examined the race of the defendant in the charging process in the federal death penalty system and found no statistically significant relationship between the defendant's race and the decision by the federal prosecutors to request the death penalty. Second, when the race of the victim was analyzed, cases involving white victims were found to be over 2 times more likely to have the death penalty requested compared to cases where no white victims were present. However, two issues related to the study must be addressed: the use of logistic regression approaches and sample selection bias. Both issues will be addressed below.

1. Logistic regression and the death penalty

Despite the overall sophistication and improvements in death penalty studies over time, recent questions have been raised as to whether multivariate analyses used in such studies are the appropriate method for examining the role of race on charging and

sentencing outcomes.²⁸⁵ To date, a number of re-analyses of data sets in several state jurisdictions where race effects have been found have used alternate statistical approaches and have found no significant relationships between race and charging or sentencing outcomes. In explaining the discrepancies between studies employing multivariate analyses and other alternative approaches, critics have suggested that race variables cannot be employed in a statistical analysis in a similar fashion as a treatment variable. Thus, the use of race in a causal model consists of a violation of the assumption the model that each predictor can be manipulated independently of all other predictors. It is argued, instead, that race cannot be manipulated which makes it impossible to assess the true relationship between those variables and charging outcomes.

Critics have also pointed to the potential limitations of regression diagnostics, such as model classification tables, which are typically used to assess the predictive ability of the regression model. Specifically, it is argued that the improvement of a model's ability to correctly predict outcomes over chance is often marginal at best. This is a valid point. In the present study, a review of several of the model classification tables produced by the full regression models showed an average improvement of 7.5% in the ability of the model to accurately predict charging outcomes over chance. Given the marginal contribution of the predictive ability of the model to accurately predict outcomes compared to that of the baseline model, it is argued that such a model may misclassify cases where the death penalty is requested compared to cases where the death penalty is not requested.

²⁸⁵Berk, R., A. Li, and L. Hickman (2005). Statistical Difficulties in Determining the Role of Race in Capital Cases: A Re-analysis of Data from the State of Maryland. Journal of Quantitative Criminology, 21, 365-390.

It should be noted, however, that the model classification tables are only one of a number of diagnostics used in logistic regression analyses. In the present study, several individual analyses produced fairly strong coefficients of the race of the victim which suggested a statistically significant relationship to charging decisions made by prosecutors in capital cases in the federal system. Additionally, the coefficients were considered with an odds multiplier which indicated a higher risk for cases to have the death penalty requested in cases where the victims were white. Although the focus of the current study was not to settle this question, the use of logistic regression analyses as an analytical approach to address issues regarding the role of race on charging and sentencing outcomes will likely present challenges to researchers and the findings produced by death penalty studies in the future.

2. Sample Selection Bias

Although the finding of a statistically significant relationship between the race of victim and charging decisions was found in the analyses and previously discussed, the problem of sample selection bias can make interpretations of race effects difficult. This problem can be understood by first examining the process of how cases begin at the arrest stage and end at the charging stage. The criminal justice system is composed of several autonomous organizations which make different decisions along the process involving decisions related to making an arrest, accepting a case for prosecution, declining a case for prosecution, seeking a specific case indictment, or seeking a charge and penalty for a given offense. The result of these various decision making points ultimately influence the number of cases analyzed at the charging phase (or other phases) in the process.

The present analysis presents a good example of this problem since a number of

cases likely dropped out at earlier stages in the process because of the discretion afforded to the U.S. Attorneys in making determinations of whether or not to accept cases for prosecution and, ultimately, whether or not to seek the death penalty. For example, O'Neill examined charging decisions by U.S. Attorneys to assess which factors were more likely to predict why prosecutors select certain cases for prosecution and disregard others.²⁸⁶ He found that charging decisions are based on a number of factors including pressures from communities in the U.S. Attorney's respective district, the size of the district, staffing levels in the U.S. Attorneys' Offices, existing resources, or the relationships that the U.S. Attorney's have with the federal law enforcement agencies in their districts. Thus, the universe of death-eligible federal cases in the present analysis represents a non-random subsample of a larger number of cases where prior decisions were made whether or not to arrest, accept the case for prosecution, and seek an indictment or to charge the defendant with a death-eligible offense. Berk²⁸⁷ suggests that the non-random exclusion of these cases presents a problem to the internal and external validity of the analysis. By examining the effect of race at the charging stage, the internal validity of the analysis is threatened by the exclusion of the larger number of cases in the population. This exclusion of cases may lead to causal interpretations that are actually the result of the random nature of the cases included in the analysis rather than an actual relationship between the race of the victim and

²⁸⁶O'Neill, M. (2004). Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factor. The American Criminal Law Review, 41 (4), 1439-1498.

²⁸⁷Berk, Richard A., (1983). An Introduction to Sample Selection Bias in Sociological Data. American Sociological Review, 48, 387-388.

the charging outcome (i.e., whether or not to seek the death penalty). Bishop and Frazier²⁸⁸ noted that bias created from the excluded or missing data may actually mask racial disparities in sentencing since single-stage analyses cannot account for the effect of race on earlier decisions in the legal process (i.e., the decision to arrest or indict). Also, single-stage analyses cannot assess the impact of race on earlier decisions where a small or no significant effect at any one stage in the process may produce a large cumulative effect at later stages in the legal process.²⁸⁹

Sample selection bias can be addressed in two ways. One way to add the problem would be to confirm that a high rate of cases were included in the sample of cases. If this determination can be made, the problem of sample selection bias can be reasonably ignored. Unfortunately, there is no way for the present study to confirm whether the present sample of case represents all but a few death-eligible cases in the federal system. The second approach might be to examine earlier stages in the criminal justice process that precedes the stage being analyzed. The approach suggests that race effects on decisions at earlier stages in the process may mask or partial mask race effects at later stages in the process. However, the aforementioned problems contained in studies addressing the issue of racial disparity in charging outcomes do not invalidate the previous findings, but make it necessary for additional research and proper controls in order to make valid inferences. Implications for this study will be discussed in the Chapter V.

²⁸⁸Bishop, Donna M., & Frazier, Charles E., (1988). The Influence of Race in Juvenile Justice Processing. Journal of Research in Crime and Delinquency, 25(3), 242-261.

²⁸⁹Id., at 243.

Chapter V.

Summary and Conclusions

A. The Role of Race and the Death Penalty

In 1972, the United States Supreme Court, in *Furman v. Georgia*, struck down the existing death sentencing statutes at that time because of a lack of guidelines deemed necessary to structure the decision making process of judges and juries in imposing the death penalty in capital cases. The Court believed that the absence of such guidelines increased the possibility that suspect factors such as race could enter into the sentencing process. Although the majority decision consisted of five separate opinions, the common theme that resonated in the *Furman* decision involved the concern that the system in place at that time could subject defendants to potential risk in capital cases.

Justice Douglas suggested the death penalty could be considered “unusual” if it discriminated against a defendant because of his race, wealth, religion, social position, or class. He also noted that any system that operated under procedures that allowed such prejudices to result in the imposition of the death penalty would be inconsistent with the principles of the 8th and 14th Amendments of the U.S. Constitution. Drawing upon a study of capital cases in the State of Texas, Justice Douglas noted what he referred to as ethnic disparities related to the manner in which black and white defendants were sentenced from 1924 to 1968. Specifically, he found that the death penalty was unequally imposed on “poor, young, and ignorant” and that black defendants, and black co-defendants who were given separate trials, were more likely to receive the death penalty than their white counterparts. While reserving comment on the culpability of the defendants or the appropriateness of the punishment in the cases before the Court, Justice Douglas noted that

the Court's scrutiny was not restricted to the individual cases, but also to the system that gave judges and juries the uncontrolled discretion to determine who should be sentenced to death or life imprisonment. In his view, sentencing statutes that allowed such discretion were unconstitutional, were "pregnant with discrimination" and ran contrary to the Cruel and Unusual Clause under the 8th Amendment and the Equal Protection Clause under the 14th Amendment.²⁹⁰

Justice Brennan also addressed the notion of that a system that subjected some to the risk of the death penalty over others could not be constitutionally permissible. Although he took the position that the death penalty was unconstitutional on all instances, he noted that any system that inflicted the death penalty on some people and not on others failed to show a basic respect for human dignity. To buttress his argument, Justice Brennan noted a steady decline in the imposition of the death penalty from 1930 to 1971. Given the reductions in executions over time, Justice Brennan concluded that one could draw an inference from the data that the death penalty was not being applied regularly or fairly and that the death penalty system smacked of little more than a lottery system.²⁹¹ Justice Brennan also expressed concern that state sentencing procedures were not constructed with safeguards against capriciousness and questioned whether the system in place at the time operated in a way that the "worst of the worst" were being sentenced to death.

Justice Stewart, like Justice Brennan, withheld comment on the guilt of the petitioners or the appropriateness of the punishment. Instead, he emphasized that the death

²⁹⁰408 U.S. 238, 257.

²⁹¹Id., at 294.

penalty was different from all other forms of punishment because of its irrevocability. Because of this view of the death penalty, Justice Stewart expressed concern that the system in place at that time was cruel in the sense that it allowed the imposition of sentences of death that went beyond the intent of the legislatures and unusual in the sense that it allowed death sentences to be infrequently imposed for the crime of murder. Justice Stewart also suggested that the sentence of death was imposed in a manner similar to being “struck by lightning, which he also found cruel and unusual. In his opinion, he concluded that the Constitution could not allow such a legal system to operate so wantonly and freakishly.”²⁹²

Justice White’s assessment of the cases before the Court also drew upon notions of fairness and the manner in which the death penalty was imposed. In his view, the death penalty was imposed with such a level of infrequency that the odds at the time were stacked against murderers and rapist receiving that punishment. Because of this infrequency, there was, in his opinion, no “meaningful basis for distinguishing the few cases in which it [the death penalty] is imposed from the many cases in which it is not.”²⁹³ Thus, he concluded the 8th Amendment’s prohibition against cruel and unusual punishment had been violated by the level of discretion given to sentencing authorities such as juries, which called into question how decisions of punishment were determined.

Finally, Justice Marshall who, like Justice Brennan, found the death penalty to be constitutionally impermissible in all instances noted the guilt and reprehensible behavior of the defendants in the cases before the Court. However, he also noted that not only were the

²⁹²Id., at 310.

²⁹³Id., at 314.

lives of the three defendants before the Court at stake, be so were the approximately 600 defendants on death row at that time. Justice Marshall's opinion drew upon notions of fairness by noting higher execution rates for blacks defendants for murder and rape compared to white defendants. In view of the differential rate in sentencing outcomes, Justice Marshall concluded that unstructured discretion given to juries to decide who lived or died was a recipe for discrimination.

The importance of the majority's opinions in *Furman* may be viewed in terms of focus that the Court took in the death penalty cases during this period. The Court's concern at the time focused on the manner in which the system imposed penalties which it found to be potentially problematic and contrary to the 8th and 14th Amendments. The Court also expressed concern that the system operated in a way that certain groups of defendants could be at a higher risk to receive the death penalty than other groups of defendants. While conceding the probable guilt of the defendants, the Court focused its scrutiny on the overall death penalty system instead of attempting to ascertain whether the defendant's in the cases before them were victims of discriminatory sentencing practices. Without evidence to support the claims of discrimination in the individual cases, the Court raised the possibility that discrimination could have played a part in the process due to the unstructured discretion that given to juries in capital cases. Because of this level of discretion, the Court would strike down existing death penalty statutes across the nation and states, wising to retain the death penalty in their respective jurisdictions, were required to revise their statutes to address the Court's concerns in *Furman*.

The Court would re-examine the nature of discretion, fairness and the death penalty four years later in *Gregg v. Georgia*. Specifically, the *Gregg* Court would ultimately

determine whether new statutory revisions to death sentencing schemes in Georgia, Florida, and Texas were consistent with the 8th and 14th Amendments of the Constitution.

Recognizing the *Furman* Court's concerns that discretion should be directed and limited to minimize the risk of arbitrary and capricious sentencing, the revised statutes offered promise over the former schemes that were struck down in *Furman* by structuring the discretion of the judges and juries in capital cases. The newly created sentencing schemes included a number of statutorily defined aggravating and mitigating circumstances that were required to be found beyond a reasonable doubt prior to the imposition of the death penalty by sentencing authorities. It was believed at the time that the new death penalty statutes would adequately structure the discretion of the judges and juries, add a level of transparency to the appellate review process, and reduce the threat of discriminatory, arbitrary, and capricious decision making practices. The *Gregg* Court, without evidence to the contrary, concluded that the new procedures appeared to satisfy the concerns of the *Furman* Court.

Although the new statutes structured the discretion of judges and juries in capital cases, the uncontrolled discretion of prosecutors was not addressed by the Court. The petitioner in *Gregg* suggested that many of the revisions to the new death penalty statutes were simply cosmetic and the failure of the statutes to address the discretion of the prosecutor would not adequately address concerns of discriminatory, arbitrary, or capricious decision making in capital cases. However, the Court stopped short of requiring the discretion prosecutors to be structured in the same manner as that of judges and juries. In fact, the Court believed that concerns that prosecutors would abuse their discretionary power were unsupported by any facts. Additionally, the Court would conclude that the assumption could not be made that prosecutors were motivated in their charging decisions by any other

factors than the strength of their respective cases in pursuing the death penalty. Thus, the Court, in absence of evidence that prosecutors were incompetent in their charging decisions, were satisfied that the limitless discretion afforded to prosecutors was within the permissible boundaries of the Constitution. Accordingly, the *Gregg* Court ruled that the new death penalty procedures were sufficient to address the concerns of the *Furman* Court.

However, since the Court's landmark decisions in 1976, a body of evidence has surfaced which has cast doubt on the effectiveness of the new sentencing guidelines to reduce, among other things, the influence of race on the sentencing disposition in capital cases. Several studies conducted after the Court's ruling in *Gregg v. Georgia* and the companion cases have consistently found racial disparities in their analyses which examined the role of race on charging and sentencing outcomes in capital cases. Specifically, the race of the victim on charging and sentencing outcomes has been consistently cited in studies where legal factors in each case such as the number of aggravating circumstances proven were properly accounted for in the respective analyses.

In 1987, after considering the argument that an emerging new body of evidence seemed to question the Court's prior belief that the role of race in sentencing would be reduced to constitutionally permissible levels by the new sentencing guidelines, the Court rejected 8th and 14th Amendment arguments in *McCleskey v. Kemp*, and upheld the constitutionality of the present death sentencing statutes. In rejecting statistical evidence of racial discrimination submitted by the petitioner, the Court held that the nature of the capital sentencing system was fundamentally different when considering statistical data which attempted to establish racially discriminatory practices. In such cases, the data, to pass the scrutiny of the Court, was required to present a "stark" pattern to be accepted as proof of

racial discrimination in a particular case. More importantly, the uniqueness of capital cases, in the Court's opinion, required that exceptionally clear proof had to be established by the statistical data submitted to the Court that discretion, which was held to be a necessity by the Court, had been abused by prosecutors, judges, or juries. Thus, given the number of safeguards contained in the Georgia death sentencing statute to reduce the taint of racial bias in sentencing, a defendant alleging equal protection violations had to demonstrate that "purposeful discrimination" existed in his or her case and that the death sentencing statutes were enacted by the state legislature in anticipation of a discriminatory effect on certain racial groups of defendants.

The Court would rule that the Baldus study, which was offered as proof of discrimination in the Georgia death penalty system, failed to prove that the state's capital sentencing statute was implemented with a "discriminatory purpose". Although the Baldus data introduced evidence to the Court which suggested that defendants who killed white victims were 4.3 times more likely to receive a sentence of death than defendants whose victims were black, the Court rejected the study for its failure to demonstrate the existence of racial bias in the petitioner's specific case. In the view of the Court, such a purpose could be demonstrated if the evidence established that the state legislature selected and enacted a particular statute with the knowledge that it would have an adverse effect on an "identifiable group".²⁹⁴ Thus, for a claim of racial discrimination to prevail, McCleskey had to demonstrate that the death penalty statute was administered with prior knowledge by the State of Georgia that it *would* have racially discriminatory effect.

²⁹⁴107 S.Ct. 1756, 1769.

Although the Court would concede that disparities in Georgia sentencing statute were an inevitable part of the criminal justice system, it believed that the disparities demonstrated by the Baldus study were insufficient to indicate a "constitutionally unacceptable risk of racial prejudice in the capital sentencing decisions".²⁹⁵ Additionally, the Court ruled that the sophisticated analysis submitted by the Baldus study merely demonstrated a "risk" that race could have entered into some of the capital sentencing outcomes in the state of Georgia. Thus, in light of the fact that the Court noted that certain discrepancies cited in the statistical evidence that appeared to correlate with race could not be fully explained, they declined to "assume that what was unexplained was invidious".²⁹⁶

By upholding the constitutionality of the existing statutes, the Court established the standard that any claims of discrimination on the part of the defendant involving his or her sentence of death had to be supported by a showing that lawmakers adopted death penalty legislation because of prior knowledge that the use of such legislation would lead to a discriminatory outcome in his particular case. Additionally, the petitioner in a given death penalty case would bear the responsibility of demonstrating that his race or that of his victim was the primary reason for the imposition of his death sentence.

This decision by the Court would represent a significant shift in the Court's guiding philosophy in death penalty cases where racial discrimination was raised as a constitutional claim. Thus, instead of the approach taken by the *Furman* Court which attacked the system as well as the manner in which the sentence of death was imposed in capital cases, the Court

²⁹⁵Id., at 1775.

²⁹⁶Id., at 1778.

in *McCleskey* took a more case-by-case approach in its ruling.

Although the *McCleskey* Court's definition of how "risk" in capital cases before the Court would considered represented a departure from the *Furman* Court, the dissent suggested the majority appeared to provide an opinion that appear to wobble somewhat on its view of the role of the Court's responsibilities in considering equal protection violations. In a critique of the majority's decision, Justice Brennan noted that the *Furman* Court held that the Constitution prevented the death penalty from being imposed under a set of sentencing procedures that created "substantial risk" that the punishment could be inflicted in a arbitrary or capricious manner. By focusing on the death penalty procedures, the *Furman* Court recognized the difficulty in attempting to uncover the jury's motives in an individual case and believed that the Court's responsibility was to evaluate the system as a whole in making the determination that it operated in a rational manner. Justice Brennan, in drawing upon the Court's history, noted that defendants who challenged their death sentences were never required to prove that suspect considerations entered into their particular sentencing outcomes. Instead, the Court required defendants to demonstrate that the risk of racial prejudice played a role in the death sentencing system. In view of this standard, the Baldus study, in Justice Brennan's opinion, was sufficient to establish a level of risk of racial consideration in his case.

Justice Brennan also suggested that the value of the Baldus study, which provided evidence of racial bias, also had to be considered with Georgia's legacy of racial discrimination and human experience. In his view, history demonstrated Georgia's longstanding dual system which distinguished crimes that were committed by and against blacks and whites. The system, which was created during the Civil War period, punished

blacks more harshly than whites for the commission of similar offenses and showed whites leniency on cases involving black victims. Justice Brennan also noted that the Court had struck down Georgia's capital sentencing scheme three times over a fifteen year period. In addition to his reference to Georgia's history of racial animus towards blacks, Justice Brennan noted that the discretion afforded to juries and prosecutors presented an opportunity for race to enter into the decisions made at various points in the process. Also, he charged that the results of the study called into question whether the statutory safeguards approved by the *Gregg* Court were sufficiently reliable to accomplish its stated goals.

In his rebuke of the majority's decision in *McCleskey*, Justice Blackmun also expressed disappointment in the Court's decision, which he believed represented a movement away from the necessary level of judicial scrutiny that was required in capital cases where equal protection claims were raised. In his opinion, Justice Blackmun noted that the Court, from a historical standpoint, had never placed an otherwise legitimate basis for a conviction before an equal protection violation. However, he noted that the Court's decision in *McCleskey*'s case appeared to suggest that legitimate explanations in his case outweighed his claim that his death sentence reflected a constitutionally impermissible risk of racial discrimination.²⁹⁷ One particularly interesting question that was raised Justice Blackmun involved the constitutional threshold at which disparities became unacceptable. In answering this question, Justice Blackmun examined various decision making points in the Georgia death sentencing scheme. First, he noted that the Baldus study found that the killing of a white victim was 4.3 times more likely to result in a death sentence. This

²⁹⁷ 481 U.S. 279, 349.

finding, in his opinion, was very compelling and led him to question whether this factor outweighed McCleskey's culpability and increased the likelihood of his sentence. Justice Blackmun also noted the role of the prosecutor in determining whether or not to seek the death penalty. It was at this decision making point in the Georgia death penalty system that Justice Blackmun cited the unstructured discretion afforded to state prosecutors which he believed to invitation for abuse in decision making. Justice Blackmun pointed to McCleskey's contention that the District Attorney's Office lacked guidelines for the state's assistant district attorneys to assist them in making decisions such as when to seek an indictment for murder as opposed to other charges, when to accept a guilty plea to murder, when to accept a guilty plea to a lesser charge, when to reduce or dismiss charges, or when the death penalty should be sought. Additionally, McCleskey pointed to the fact that very little formal oversight existed to examine how the assistant district attorneys reached their charging decisions. It was the lack of guidelines that, according to the dissent, could result in decisions being made in capital cases that could run contrary to the 8th and 14th Amendments.

The majority would make a final ruling on McCleskey's claims that seemed to send a mixed message to potential petitioners in capital cases seeking relief before the Court. Using a rationale that drew concerns from the dissenting Justices, the majority also appeared to shift away from the *Furman* Court's "death is different" philosophy that defined the Court's responsibility to evaluate how death penalty systems were administered. The *McCleskey* majority, in recognizing that the 8th Amendment was not solely tied to the death penalty, but to lesser penalties as well, expressed concern the upholding McCleskey's claims would open the door to claims from other groups. That is, the Court expressed

concern that unexplained discrepancies such as those produced in the Baldus study, could be used by other minority groups as a blueprint to use statistical data to attack discrepancies in other areas of the criminal justice system. Thus, the Court reasoned that future claims could extend beyond race or gender and could include other arbitrary factors such as the defendant's facial characteristics or physical attractiveness. Based, in part on these concerns, the *McCleskey* Court concluded that the best solution for the defendant's claims would be to present his equal protection claims of racial discrimination to the applicable legislative bodies that, in the opinion of the Court, were responsible for determining the appropriate punishment for criminal offenses.

B. From *Furman* to *McCleskey*: The Role of Death Penalty Research

When the road from *Furman* to *McCleskey* is navigated, there are a number of issues that illustrate the past, present, and future of death penalty research as it applies to examinations of the role of race in charging and sentencing decisions. First, at the time that the *Furman v. Georgia* was decided, there were no structured sentencing guidelines in place to assist judges and juries in capital cases in determining who should live and who should die. At the same time, the Court operated by a "death is different" philosophy which placed an emphasis on the Court's responsibility to scrutinize the manner in which a death penalty system operated to ensure that suspect factor such as race did not influence for final decisions in capital cases. However, the overall quality of research at that time criticized as being incapable to provide useful conclusions regarding the effects of race on charging and sentencing outcomes.

Critics pointed to the fact that many of the pre-*Furman* studies were characterized

by poor or limited methodological approaches which made it difficult to draw conclusions of the effect of race on charging or sentencing outcomes. For example, many of the studies failed to control for key legal variables such as the prior criminal record of the offender or included very crude measures of the defendant's prior record. Additionally, many of the studies that examined the role of offender/victim relationships on sentencing outcomes failed to consider the prior record of the offender or produced findings that were called into question by a series of later studies.

After the Court's decision in *Gregg v. Georgia*, key revisions were made a number of death sentencing statutes and the Court was satisfied that the revisions would adequately address the concerns of the *Furman* Court. That is, the Court expressed confidence that the death penalty statutes would reduce the risk of arbitrary, capricious, and discriminatory decision making in capital cases to constitutionally acceptable level. However, as improvements were made in the methodological designs of a number of death penalty studies and additional variables were collected for analysis, several of the studies that were conducted after the *Gregg* indicated a continued pattern of racial disparities at several stages in the death penalty process after the *Furman* decision and the post-*Gregg* statutory revisions to a number of death penalty statutes. The race effects that were assumed by the *Gregg* Court to have been reduced to insignificant level or eliminated continued to demonstrate significant influences on charging and sentencing outcomes. Specifically, cases involving white victims were found to have a higher likelihood of being charged or sentenced in death penalty cases.

By the time that *McCleskey* was decided, two equally important developments occurred. First, the Court's "death is different" philosophy which was a key characteristic

of the *Furman* Court's emphasis of the need for constitutional scrutiny of death sentencing schemes to determine whether they subjected certain groups to a higher risk of being sentenced to death relative to other groups began to shift over time. The *McCleskey* Court would hold petitioners to a different standard than the *Furman* Court. By 1987, any petitioners who sought to raise 8th and 14th Amendment claims based on racial discrimination were required to show purposeful discrimination in his or her specific case. The Court also appeared to take a strict stance on how statistical data submitted to the Court in support of a petitioner's claim of racial discrimination would be viewed. Absent a showing of a "stark pattern" or "purposeful discrimination" on the part of a legislative body, the Court likely rule that the statistical data submitted insufficient to demonstrate that race influenced sentencing outcomes in capital cases. Such a ruling might be expected to have significant implications for the future of death penalty research which focused on the role of race in such cases.

C. The Federal Death Penalty System & Study Findings

At the time that the federal death penalty system was put into operation, it included many of the procedural protections approved by the *Gregg* decision. Death penalty cases in the federal system were subjected to a separate, bifurcated hearing and prosecutors were required to provide written notice to defendants of their intent to seek the death penalty within a reasonable time before the trial proceeding. Additionally, Federal prosecutors were also required to specify which statutory and non-statutory aggravating circumstances they intended to prove at trial and are limited to those identified circumstances unless amended and approved by the court and defendants were afforded two defense lawyers in their capital

cases. Finally, an appeals process was put into place to determine, among other things, whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Despite the substantive and procedural changes, however, concerns of racial bias were also raised by opponents of the federal death penalty system when, initial statistics collected and analyzed in September 2000 showed ethnic and racial disparities in charging decisions made by the U.S. Attorneys across the United States. Specifically, the report found that of the 682 cases submitted for review to the U.S. Department of Justice between 1995 and 2000, 20% involved White defendants, 48% involved Black defendants, and 29% involved Hispanic defendants. Although the Attorney General at that time did not believe that the statistics presented established racial or ethnic bias in the charging process, a moratorium on the federal death penalty was declared pending a more rigorous analysis. Of particular importance was the need for the future studies to examine, (1) whether the evidence and the law justified the decisions in all cases to seek the death penalty, and (2) whether the studies show disparities, as opposed to bias, which could result from consideration of suspect factors such as race.

The current study was conducted to examine the role of race in charging decision made by the U.S. Attorneys across the 94 federal districts in the U.S.²⁹⁸ A number of models were conducted to examine the effect of a number of individual aggravating and mitigating factors as well as other variables such as the race of the defendant, race of the

²⁹⁸ Although descriptive statistics were provided in Chapter III which included information related to the different regions containing the 94 Federal Districts, the current study could not examine charging outcomes by region because that information was stripped from the original data set because of privacy concerns.

victim, and the sex of the defendant. These models were significant since they attempted to control for legal factors relevant to each case while examining the role of race on charging outcomes in capital cases. Thus, the presence of aggravating and mitigating factors in each case could have adequately explained the unadjusted race effects cited in a number of the initial analyses. That is, it is possible that once legally relevant factors were included, the role of race could have disappeared or been reduced to statistical insignificance.

As expected, the presence of a number of aggravating factors and non-statutory aggravating factors increased the likelihood that prosecutors would request the death penalty. The presence of a number of aggravating factors and non-statutory aggravating factors were found to increase the likelihood that federal prosecutors would request the death penalty compared to cases where those factors were absent.

The analyses also suggested that the presence of non-statutory aggravating factors were more likely to result in requests for the death penalty than the presence of aggravating factors. Not unexpectedly, the presence of mitigating factors decreased the likelihood that the death penalty would be requested. The study also found that neither the race of the defendant nor the sex of the defendant was found to be a statistically significant factor in the charging process. Neither of these findings was surprising since very few studies have found the defendant's race to be significant and gender bias would not be expected given the overwhelming involvement of males in death-eligible offenses.

Equally important were the findings related to the relationship between the race of the victim and charging decisions made by the U.S. Attorneys. A number of models were conducted to examine various aspects of the role that race may play in charging decisions. In the first model, the race of the victim was analyzed. Two subsequent models examined

the role of the race of the defendant and victim in combination with each other to determine what, if any, relationship that combination may have had on charging outcomes. In the first model, cases involving white victims were over 2 times more likely to result in the death penalty being requested compared to cases where no white victims were present. In the second model, cases involving non-white defendants and white victims were over 2 times more likely to have the death penalty requested than the other three groups that combined the race of the defendant and the race of the victim together. The third analysis, which looked at black and white defendants and victims, found the cases involving black defendants and white victims were over 2 times more likely to have the death penalty requested compared to the three other racial combination groups.

The findings listed above are consistent with several past studies at the state level which have examined the role of race on charging and sentencing outcomes. In each model, a number of legally relevant factors (aggravating factors, mitigating factors, and non-statutory aggravating factor) were analyzed along with other case characteristics, as well as a number of variables related to the race of the victim and the defendant. Given the nature of the findings, there are a number of implications in terms of contributions that can be made to the field and a number of future directions that this type of research can explore. These will be discussed below.

1. Implications

Although the findings previously discussed appeared to confirm prior findings of studies at the state level, the present study did not settle the issue related to the role that race may play in charging decisions. However, the findings suggest there are a number of implications that this study may have for the field.

a. Systematic Data Collection

One of the early criticisms of death penalty research focused on the lack of data points in pre-*Furman* studies which prevented researchers from critically assess the relationship between racial characteristics and charging or sentencing outcomes. However, as studies began to collect larger numbers of data points to consider potential influences on case outcomes, race effects continued to emerge as significant factors which, in turn, served to illustrate the need for better data. After concerns of racial bias in charging decisions were raised in the federal death penalty system, the U.S. Justice Department convened a technical advisory group of scholars in death penalty research to discuss the types of variables needed sufficiently examine the role of race on charging decisions in the federal system.

Unfortunately, a “wish list” of desirable variables needed to conduct a comprehensive examination race on charging decisions don’t often meet reality when conducting data analyses retrospectively. Upon review of a number of death penalty studies at the national, state, and local level, one of the glaring problems cited by the Government Accounting Office involved the finding that many of the weaker studies suffered from a number of variables being omitted from their analyses. This finding was critical in view of the fact that the effect of race on charging outcomes can be mistakenly interpreted if other variables thought to have a significant influence on charging outcomes are not controlled for in the analyses. Although the federal death penalty data that was analyzed in the current study appeared to contain a wealth of data, a number of the variables contained very few valid cases that could be reasonably coded for the analyses.²⁹⁹

²⁹⁹It should be noted that the original data collection system that was created by the

However, one area where improvements were made involved the requirement that all death-eligible cases accepted by the U.S. Attorney for prosecution be submitted for analytical comparisons. Prior to 1995, there was no formal review process for cases submitted with charging recommendations by the U.S. Attorneys to the Attorney General. Therefore, no comparisons could be made from the universe of death-eligible cases to distinguish those cases where the death penalty was being requested from those where the death penalty was not being requested. The creation of the U.S. Department of Justice's review process allowed further analysis to examine which factors were most likely to influence charging outcomes in the federal death penalty charging process. The logic of requiring the submission of all death-eligible cases for review could be followed by similar requirements to collect necessary data point for research purposes. Such improvements in systematic data collection could also result in an increase in the overall the quality of statistical analyses geared towards examining the role of race, and other suspect factors, in charging recommendations made by the U.S. Attorneys and final charging decisions made by the Attorney General.

b. Guidance for Policy and Practice at the State and Local Level

One of the unique features of the federal death penalty system involves the current review committee that operates as an oversight body which evaluates all charging requests for the death penalty made by the U.S. Attorneys in capital cases. The U.S. Attorney

Department of Justice to collect relevant case data did not require systematic data collection of many of the data points that were later identified as necessary to conduct a comprehensive analysis on the impact of race on charging decision.

General's Review Committee represents a critical oversight authority in the federal charging process and adds a level of transparency to the charging process that isn't typically seen at the state level. From a policy and practice standpoint, the system currently in place at the federal level could serve as a blueprint and could reasonably be adopted in some form by state authorities in district attorney's offices as a way to add structure and guidance to assist state prosecutors in making charging decisions in capital cases. Following the federal model, statewide (or county-wide) review committees could be structured in a way to provide a set of charging policies and procedures for state prosecutors to follow in death penalty cases. The review committees could be created in each county according to a set of policies that would be agreed upon and crafted by a committee of senior-level officials from across the state. Such a system might also contribute to addressing geographic variation in states where unexplained racial variation in charging patterns may exist. The primary benefit of such a system at the state level would be to structure, not eliminate, the discretion of the state prosecutors in a way that would control potential influences that could result in unexplained variation in charging decisions in a given state jurisdiction.

In reviewing the federal charging process, the consistency in the charging requests by the U.S. Attorneys and the final charging decisions of the Attorney General has been found to be quite high. One explanation for the consistency in charging decisions between the two parties may be related to strict oversight system currently in place which requires all U.S. Attorneys to explain their charging decisions to the Attorney General's Review Committee and the Attorney General before the final request to seek the death penalty is authorized. Such a system could have the result of adding overall consistency across a given state or local jurisdiction.

E. Future Directions in Research

1. Regional Variation and the Federal Death Penalty

One of the future directions in research that could result from the present study involves the need by the Department of Justice to have better understanding of how the local conditions in each of the 94 federal districts may influence charging decisions made by the U.S. Attorneys. Although the current study found a relationship between the race of the victim and charging decisions, this finding may only tell part of the story. As previously discussed, the only cases that were analyzed on the current study were those death-eligible cases that were accepted by the U.S. Attorneys for further consideration in the death penalty process. What is not especially clear, however, is whether the number of cases that never reached that stage had an impact on racial variations in charging requests across the country.

As the chief law enforcement official in each of the 94 federal districts, each U.S. Attorney has the primary responsibility for initiating and prosecuting federal death penalty cases. Additionally, the U.S. Attorneys also have significant discretion in determining which cases will be declined in favor of state or local prosecution. At the same time, the Department of Justice expects the federal laws to be applied fairly and consistently across the federal districts.³⁰⁰ However, the emphasis on national consistency by the federal authorities, while commendable, may be difficult to achieve when considering that charging decisions by the U.S. Attorneys are often based on the local conditions within each of the

³⁰⁰The fact that the federal government expanded the use of the death penalty to crimes that were historically prosecuted by state and local officials has added an extra challenge to federal government's notion of national consistency in charging across the 94 federal districts.

federal districts. For example, a statistical analysis by region in the current study could have revealed varying levels of bias by region. Since the local conditions often influence the manner in which cases are accepted or rejected for further prosecutorial consideration at later stages in the process, it may be reasonable to assume that racial effects on charging outcomes may not be equally distributed across the 94 federal districts.

O'Neill examined charging decisions by U.S. Attorneys to assess which factors were more likely to predict why prosecutors select certain cases for prosecution and disregard others.³⁰¹ He found that charging decisions are based on a number of factors including pressures from communities in the U.S. Attorney's respective district, the size of the district, staffing levels in the U.S. Attorneys' Offices, existing resources, or the relationships that the U.S. Attorney's had with the federal law enforcement agencies in their districts.

The finding that the existing relationships that the U.S. Attorneys have with federal agencies in their districts may influence charging outcomes illustrates the need for better data collection to examine the role of race in charging outcomes. For example, O'Neill noted that U.S. Attorneys were more likely to decline cases that were filed by the Federal Bureau of Investigation and more likely to file charges in cases submitted by the Drug Enforcement Agency, despite the fact that the FBI had more filings. Although no definitive conclusions could be drawn from the data for the differences in declination rates between the two agencies, O'Neill suggested that the rates could have been due to forged working relationships that prosecutors had with the DEA as opposed to the FBI. If this is in fact the

³⁰¹O'Neill, M. (2004). Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factor. The American Criminal Law Review, 41 (4), 1439-1498.

case, better data collection could separate potential suspect factors as race from other neutral factors that may account for bias in charging outcomes. That is, if the DEA is more likely to file charges involving drug murders where minorities may be represented in numbers disproportionate to the general population, the working relationships between prosecutors and the DEA may, controlling for race, provide a better explanatory factor influencing charging outcomes in capital cases.

Additionally, he noted that, consistent with the charging policies and procedures in the federal system, the U.S. Attorneys are also required to report their reasons for choosing to forgo a prosecution as well. The Department of Justice currently provides a standard form for all of the U.S. Attorneys to use to specify their reasons for not pursuing a prosecution. The thirty-four standard reasons within six main categories that offer the U.S. Attorneys an opportunity explain their reasons for declining to prosecute a case.³⁰² O’Neill noted that federal prosecutors declined to prosecute for a variety of reason including: a finding of minimal Federal interest, a lack of evidence of criminal intent, no Federal offense evident, weak or insufficient admissible evidence, witness problems, lack of investigative resources, prosecution by other authorities, or because of the suspects cooperation.

Thus, there are a great number of factors that determine how cases are accepted and declined for prosecution by the U.S. Attorneys. Future research in this area could yield useful information to better understand how these processes may or may not influence charging decisions in the federal death penalty system.

³⁰²Thirty-four standard reasons for declining to prosecute a case are contained in the following categories: policy, evidentiary, procedural, resources, suspect status, or an alternate disposition.

2. Theoretical linkages

Previous attempts to uncover the nature of racial bias in capital cases has typically focused on assessing the role of legal factors, case characteristics, and other suspect factors such as the race of the victim on charging and sentencing outcomes. However, there may be other forces at work that may provide alternative explanations to the race effects that have been cited in the literature. Specifically, there may be forces at work in mainstream society that may influence, at least in part, the outcomes in capital cases that are routinely attributed to the discretionary powers of prosecutors, judges and/or juries. In his power threat theory, Blalock suggested that the majority population will impose punitive sanctions on members of its minority population if it believes the minority has evolved into a threat to the existing social order.³⁰³ Linked to conflict theory, Blalock suggested that these forces are likely to occur as the majority perceives that members in the minority group are emerging as a threat to the existing social, political, and economic resources. For example, the theory posits that in areas where blacks outnumber whites, or constitute a powerful minority, one might expect to find social control measures taken and directed at minority groups that white may fear will threaten or diminish their respective power structure. Blalock also applied this theory to explain the use of punitive sanctions such as the death penalty, mandatory minimum or maximum sentencing or other such sanctions to incarcerate or execute members of the minority community as a way of eliminating the perceived threats to the majority's powerbase. Thus, power threat theory could provide a theoretical explanation for the higher likelihood of prosecutors requesting the death penalty in white victim cases relative to cases

³⁰³Blalock, H. (1967). *Toward a Theory of Minority Group Relations*. New York: John Wiley.

involving black victims. Additionally, the theory might be used to gain a better understanding of how local conditions such as conflicts between different racial groups may contribute to regional variations in charging decisions by the U.S. Attorneys.

A second theoretical approach that could be applied to death penalty research would involve an examination of different workgroups in the courtroom setting to gain a better understanding how the views by prosecutors, judges, or jury members of offenders can translate into varying outcomes in capital cases. Some researchers have suggested that negative stereotyping by white Americans is fueled, at least in part, by the continuing association of race and economic disadvantage in American society. This argument refers to the possibility that the existence of racial inequality may serve as a justification for the continued belief that members of certain groups in society are unmotivated or fail to try hard enough to succeed. A key notion of “status generalization” theory is that members of certain groups form performance expectations of themselves and others based on certain identifiable characteristics. As the association continues to be emphasized between a resource level (economic) and another characteristics such as race, the status generalization processes, according to the theory, may cause individuals from one minority group to be seen as less worthy than the individuals from the majority group.

Although these beliefs may differ significantly from other beliefs that members of certain groups are biologically inferior, this theory might explain variation in charging and sentencing rates for members of different racial groups. Thus, the differences in charging rates where the death penalty is requested by prosecutors may be the result of perceptions that white victims may possess a higher status than black victims. Presumably, such a perspective could examine possible origins of race effects found in capital cases by

extending the discussion and the focus of research efforts beyond traditional charges of racism as the cause of charging or sentencing outcomes.

One final perspective that could be linked to death penalty research in some form is social identity theory. Originally proposed by Henri Tajfel, social identity theory attempts to explain cognitions and behavior with the help of group processes. That is, members of a certain group often show various forms of behavior such as solidarity within the group and may display discrimination against members of other groups as a part of social identity processes. Based on the notion of self categorization, Tajfel suggested that as members join certain groups, intraclass differences among the members within those groups tend to be understated and restrained. However, the interclass differences between members of one group versus another tend to be emphasized and magnified. Thus, the intragroup members, according to the theory, are more likely to identify with members of their group versus members of other groups. Such a theoretical perspective might find that charging and sentencing outcomes might be influenced, in part by the fact that members of one group may be more likely to sympathize, consciously or unconsciously, with individuals that are perceived to be members of their groups. Alternatively, such in-group, out-group perspectives could also explain why cases involving white victims may be less likely to receive leniency in charging decisions made by prosecutors or sentencing decisions made by juries in their respective cases.

F. Final Conclusions

When the Federal Death Penalty Act (FDPA) of 1994 was passed, a number of substantive and procedural protections were put into place which addressed the concerns of

the *Furman* Court and probably exceeded the expectations of the *Gregg* Court. Under the current system, death penalty cases are entitled to a separate, bifurcated hearing to determine the penalty after a finding of guilt and prosecutors are required to provide written notice to defendants of their intent to seek the death penalty within a reasonable time before the trial proceeding. Federal prosecutors are also required to specify which statutory and non-statutory aggravating circumstances they intend to prove at trial and are limited to those identified circumstances unless amended and approved by the court. The statute also provides defendants with two attorneys who are experienced in death penalty law and all death sentences, upon request, are subject to appellate review for the purpose of determining whether their sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

An additional, and central feature in the process involves a number of procedures and policies that were put into place to bring consistency, oversight, and transparency to the decision making process involving the U.S. Attorneys request to seek the death penalty. The final authorization to seek the death penalty is made by the Attorney General after the case has made its way through several layers in the process to ensure that charging decisions are made consistently and without the influence of suspect factors such as race. Thus, the current system, which appears to have addressed the concerns of the *Furman* Court, could serve as a blueprint to assist state and local authorities in creating systems designed to improve their charging policies and practices. However, there is one caveat that must be considered.

The present study looked at the effect of race on charging decisions at the federal level and final results suggested that the race of the victim was one of a number of factors

that was related the charging requests by U.S. Attorneys for the death penalty in a number of capital cases. Several analyses in the current study appeared to be consistent with previous findings at the state level which found the race of the victim to have a statistically significant effect on charging outcomes. But what conclusions may be drawn from these (and other) findings? What are these race effects that are being found in several past analyses? At best, one conclusion that may be drawn is that potential “risk” is present in capital cases. That is, the race of the victim in a given case may increase the risk that the death penalty may be requested by state or federal prosecutors. Although this level of risk, given the opinion of the *McClesley* Court, appears to fall within constitutionally permissible boundaries, it remains a level of risk that should merit continued scrutiny by state and federal authorities.

One final point illustrates the need for continued research in this area. The present study could not examine whether regional bias in charging decisions existed in the federal system. Such an analysis could have found that the relationship of race on charging outcomes could have varied by region. Additionally, an examination of factors related to why federal prosecutors decline to charge certain cases may be critical in understanding how race figures into overall charging decisions in death-eligible cases. If prosecutors are responding to community concerns over guns, drugs, and gangs, these factors may add context to race effects found at later points in the processing stage of the criminal justice system. Federal officials should also be mindful of the fact that race effects may continue to have an influence on charging decisions as Federal government moves into areas of law enforcement that have been traditionally controlled by state and local authorities. Although there are currently significant procedural and substantive protections and safeguards in place, the consistency with which the effect of the race of the victim may have on charging

and sentencing outcomes continues to be cited in the death penalty literature and suggests the need for continued research and oversight in this area.

Appendix A: TABLES

Table 1		Correlation
List of Covariates Analyzed for the Federal Death Penalty Study		
1.	Other victims against the defendant not named in case summary	0.034
2.	IQ/Intelligence level	-0.090
3.	History of serious head injury of disorder	-0.246
4.	History of physical or sexual abuse as child	-0.015
5.	Defendant's history of mental illness or emotional problems	-0.101
6.	Defendant's history of drug abuse	-0.094
7.	Defendant's history of alcohol abuse	-0.128
8.	Defendant reportedly working in criminal activity/enterprise	-0.017
9.	Defendant occupation at time of the offense	-0.110
10.	Report of prior adult convictions against defendant	0.121
11.	Report of other cases against this defendant	0.135
12.	Report of intent by the defendant to the victim	0.163
13.	Report of any role by the defendant	0.030
14.	Reported motive by defendant against victim	0.050
15.	Victim killed	0.021
16.	Victim shot/stabbed – other	0.061
17.	Victim shot/stabbed in – other	0.066
18.	Victim shot/stabbed in – neck	0.021
19.	Victim shot/stabbed in – arms/hands	0.040
20.	Victim shot/stabbed in – head	0.018
21.	Victim shot/stabbed in – face	-0.001
22.	Victim shot/stabbed in – legs/feet	-0.045
23.	Victim shot/stabbed in – buttocks	-0.074
24.	Victim shot/stabbed in – trunk/torso	-0.065
25.	Victim shot/stabbed in – back	-0.004
26.	Victim shot/stabbed in – groin	0.022
27.	Victim shot/stabbed in – stomach	-0.045
28.	Victim shot/stabbed in – chest	0.127
29.	Victim injured/killed by – burned	0.036
30.	Victim injured/killed by – bombing or explosion	0.053
31.	Victim injured/killed by – drowned	-0.009
32.	Victim injured/killed by – suffocated/smothered	0.086
33.	Victim injured/killed by – strangulation with rope or other cord	-0.038
34.	Victim injured/killed by – strangulation with hands	0.020
35.	Victim injured/killed by – beaten or kicked with hands or feet	0.024
36.	Victim injured/killed by – blunt object (baseball bat, pipe, or brick)	0.160
37.	Victim injured/killed by – other blade or sharp-like instrument	-0.062
38.	Victim injured/killed by – other blade or sharp-like instrument	0.020

Table 1 (cont'd)

List of Covariates Analyzed for the Federal Death Penalty Study

Correlation

		Correlation
39.	Victim injured/killed by – ax	0.073
40.	Victim injured/killed by – knife	0.048
41.	Victim injured/killed by – other firearm	-0.163
42.	Victim injured/killed by – other firearm	0.019
43.	Victim injured/killed by – saw-off shotgun	-0.019
44.	Victim injured/killed by – shotgun	-0.032
45.	Victim injured/killed by – rifle	-0.042
46.	Victim injured/killed by – handgun/revolver/pistol	0.007
47.	Victim injured/killed by – automatic or semi-automatic gun	-0.028
48.	Gross difference in size or strength of defendant	0.064
49.	Victim under age of 17 or over age of 60	0.147
50.	Victim pregnant	0.073
51.	Victim physically handicap, disabled or ill, bedridden	-0.060
52.	Evidence of mental or emotional problems of victim	-0.068
53.	Victim developmental delayed, low IQ, or other cognitive problems	0.009
54.	Victim a police informant or witness	-0.048
55.	On-duty prison guard or correctional officer	0.104
56.	On-duty law enforcement officer	0.000
57.	Victim responsible for dependents	0.114
58.	Victim attending school/college at time of offense	0.051
59.	Victim a good citizen	0.164
60.	Defendant/victim relationship – current or former rival/competitor	-0.094
61.	Defendant /victim relationship – sexual rivals	-0.026
62.	Defendant/victim relationship – other family members	0.041
63.	Defendant/victim relationship – parent/guardian/partner's child	-0.064
64.	Defendant/victim relationship – current or former spouse, boyfriend, girlfriend, intimate, or sexual partner	0.079
65.	Defendant/victim relationship – current/former friends/acquaintances	-0.051
66.	Defendant/victim relationship – strangers	0.101
67.	Before killing – any conditions reported	0.070
68.	At crime scene – any conditions reported	0.101
69.	After killing – any conditions reported	0.190
70.	Current or former military or reservist	0.070
71.	Victim abused, insulted or antagonized the defendant	-0.097
72.	Defendant aided the victim	-0.062
73.	Number of aggravating circumstances offered/considered provable	0.289
74.	Number of aggravating circumstances minus number of mitigating circumstances	0.406

Table 1 (cont'd)		Correlation
List of Covariates Analyzed for the Federal Death Penalty Study		
75.	Mitigating factor – impaired capacity of defendant	0.007
76.	Mitigating factor – minor participation by defendant	-0.131
77.	Mitigating factor – equally culpable defendants	-0.233
78.	Number of mitigating circumstances offered/considered provable	-0.253
79.	Reported evidence in case against defendant (DNA, etc.)	0.139
80.	After killing – attempt to hide or conceal or dispose of defendant's body	0.217
81.	After killing – body set on fire	0.003
82.	After killing – victim mutilated/dismembered	0.076
83.	Gruesome crime scene	0.223
84.	Victim not found clothed	0.054
85.	Before killing – victim was begging/pleading for his or her life	0.146
86.	Before killing – victim started incident with defendant	-0.080
87.	Aggravating factor – prior conviction where life or death was authorized	0.062
88.	Aggravating factor – heinous, cruel, or depraved manner in offense	0.224
89.	Aggravating factor – previous conviction for prior serious offenses	0.059
90.	Aggravating factor – procurement of the offense by payment	0.161
91.	Aggravating factor – substantial planning and premeditation	0.283
92.	Aggravating factor – death during commission of another crime	0.146
93.	Aggravating factor – vulnerability of victim	0.156
94.	Aggravating factor – CCE involving distribution to minors	0.147
95.	Number of aggravating factors	0.183
96.	Number of aggravating factors: non-statutory	0.311
97.	Number of mitigating factors	-0.307
98.	Any victim under 17	-0.011
99.	Victim under 17, over 60, pregnant, physical handicap, gross size difference between defendant and victim	0.135
100.	Victim good citizen, in school, law enforcement, prison guard, or not criminal	0.190
101.	Victim works criminal activity, prison inmate, or current or former rival in criminal activity	-0.087
102.	Sex of the Victim	-0.118

Table 2 Reduced List of Covariates Analyzed in the Federal Death Penalty Study		Correlation
1.	Report of prior adult convictions against defendant	0.121
2.	Report of other cases against this defendant	0.135
3.	Report of intent by the defendant to the victim	0.163
4.	Victim shot/stabbed in – chest	0.127
5.	Victim injured/killed by – blunt object (baseball bat, pipe, or brick)	0.160
6.	Victim under age of 17 or over age of 60	0.147
7.	On-duty prison guard or correctional officer	0.104
8.	Victim responsible for dependents	0.114
9.	Victim a good citizen	0.164
10.	Defendant/victim relationship – parent/guardian/partner’s child	-0.064
11.	Defendant/victim relationship – current or former spouse, boyfriend, girlfriend, intimate, or sexual partner	0.079
12.	Defendant/victim relationship – current or former rival/competitor	-0.094
13.	Defendant/victim relationship – strangers	0.101
14.	At crime scene – any conditions reported	0.101
15.	After killing – any conditions reported	0.190
16.	Victim abused, insulted or antagonized the defendant	-0.097
17.	Number of aggravating circumstances offered/considered provable	0.289
18.	Number of aggravating circumstances minus number of mitigating circumstances	0.406
19.	Mitigating factor – minor participation by defendant	-0.131
20.	Mitigating factor – equally culpable defendants	-0.233
21.	Number of mitigating circumstances offered/considered provable	-0.253
22.	Reported evidence in case against defendant (DNA, etc.)	0.139
23.	Gruesome crime scene	0.223
24.	Before killing – victim was begging/pleading for his or her life	0.146
25.	Before killing – victim started incident with defendant	-0.080
26.	Aggravating factor – prior conviction where life or death was authorized	0.062
27.	Aggravating factor – heinous, cruel, or depraved manner in offense	0.224
28.	Aggravating factor – procurement of the offense by payment	0.161
29.	Aggravating factor – substantial planning and premeditation	0.283
30.	Aggravating factor – death during commission of another crime	0.146
31.	Aggravating factor – vulnerability of victim	0.156
32.	Aggravating factor – CCE involving distribution to minors	0.147
33.	Number of aggravating factors	0.183
34.	Number of aggravating factors: non-statutory	0.311
35.	Number of mitigating factors	-0.307

Table 2 (cont'd)		
List of Covariates Analyzed in the Federal Death Penalty Study		Correlation
36.	Victim under 17, over 60, pregnant, physical handicaps, gross size difference between defendant and victim	0.135
37.	Victim good citizen, in school, law enforcement, prison guard, or not criminal	0.190
38.	Victim works criminal activity, prison inmate, or current or former rival in criminal activity	-0.087

Table 3a
 Exploratory Estimates of Legally Relevant Factors only

Variable	Logistic Estimate	Prob.
Constant	-21.833	.996
Number of Prior Adult Convictions	-.012	.963
Other cases against defendant	.266	.287
Sum total of Aggravating Factors Present	19.663	.997
Sum of Total Mitigating Factors Present	-1.267	.000
Sum of Total Non-Statutory Aggravating Factors present	2.747	.000

Table 3b
 Exploratory Estimates of Legally Relevant Factors only (including recoded *Sum Total of Aggravating Factors Present* variable)

Variable	Logistic Estimate	Prob.
Constant	-3.025	.000
Number of Prior Adult Convictions	-.040	.869
Other cases against defendant	.407	.077
Sum total of Aggravating Factors Present	1.901	.000
Sum of Total Mitigating Factors Present	-.732	.004
Sum of Total Non-Statutory Aggravating Factors present	1.147	.000

Table 4
 Exploratory Results - Counts of U.S. Attorney Charging Decisions involving Death-
 Eligible Cases by the Race of the Defendant

USAO Final Recommendation by Race of the DEFENDANT cases

		CCU DEFENDANT RACE				
		0 = Non-White	1 = White	Total		
USAO Final Recommendation	0 =	Count	423	86	509	
		% within USAO Final Recommendation	83.1%	16.9%	100.0%	
		% within CCU DEFENDANT RACE	79.5%	68.8%	77.5%	
		% of Total	64.4%	13.1%	77.5%	
	1 =	Count	109	39	148	
	Seek	% within USAO Final Recommendation	73.6%	26.4%	100.0%	
		% within CCU DEFENDANT RACE	20.5%	31.2%	22.5%	
		% of Total	16.6%	5.9%	22.5%	
	Total		Count	532	125	657
			% within USAO Final Recommendation	81.0%	19.0%	100.0%
			% within CCU DEFENDANT RACE	100.0%	100.0%	100.0%
			% of Total	81.0%	19.0%	100.0%

Table 5
 Exploratory Results - Counts of U.S. Attorney Charging Decisions involving Death-
 Eligible Cases by the Race of the Victim

		USAO Final Recommendation by Any White Victims Cases			
		Any White Victims According to CCU Victim Race Information			
		0 = Non-white	1 = White	Total	
USAO Final Recommendation	0	Count	380	129	509
		% within USAO Final Recommendation	74.7%	25.3%	100.0%
		% within Any White Victims According to CCU Victim Race Information	82.4%	65.8%	77.5%
		% of Total	57.8%	19.6%	77.5%
1 = Seek		Count	81	67	148
		% within USAO Final Recommendation	54.7%	45.3%	100.0%
		% within Any White Victims According to CCU Victim Race Information	17.6%	34.2%	22.5%
		% of Total	12.3%	10.2%	22.5%
Total		Count	461	196	657
		% within USAO Final Recommendation	70.2%	29.8%	100.0%
		% within Any White Victims According to CCU Victim Race Information	100.0%	100.0%	100.0%

Table 6
Preliminary, Unadjusted Estimates (including the Race of the Defendant variable)

Variable	Logistic Estimate	Prob.
Constant	-3.200	.000
Number of Prior Adult Convictions	-.008	.974
Other cases against defendant	.420	.070
Sum total of Aggravating Factors Present	1.148	.000
Sum of Total Mitigating Factors Present	-.752	.003
Sum of Total Non-Statutory Aggravating Factors present	1.913	.000
Race of the Defendant	.714	.006

Table 7
Preliminary, Unadjusted Estimates (including the Race of the Victim variable)

Variable	Logistic Estimate	Prob.
Constant	-3.200	.000
Number of Prior Adult Convictions	-.028	.908
Other cases against defendant	.398	.092
Sum total of Aggravating Factors Present	1.162	.000
Sum of Total Mitigating Factors Present	-.767	.003
Sum of Total Non-Statutory Aggravating Factors present	1.892	.000
Race of the Victim	.958	.000

Table 8
Preliminary, Unadjusted Estimates (including the Race of the Defendant, Race of the Victim, and the Sex of the Defendant variables)

Variable	Logistic Estimate	Prob.
Constant	-4.504	.000
Number of Prior Adult Convictions	-.041	.868
Other cases against defendant	.406	.086
Sum total of Aggravating Factors Present	1.148	.000
Sum of Total Mitigating Factors Present	-.757	.003
Sum of Total Non-Statutory Aggravating Factors present	1.879	.000
Race of the Defendant	.163	.621
Race of the Victim	.934	.001
Sex of the Defendant	1.191	.147

Table 9

Final, Adjusted Estimates for the U.S. Attorneys Decisions to Request the Death Penalty
– Full Model Examining the Independent Effects of the Race of the Defendant and the
Race of the Victim

Variable	Logistic Estimate	Prob.	Odds Multiplier
Constant	-6.477	.000	
Number of Prior Adult Convictions	.425	.095	1.53**
Other Cases against Defendant	.423	.100	1.53
Sum of Total Non-Statutory Aggravating Factors Present	2.200	.000	9.03*
Sex of the Defendant	1.701	.071	5.48**
Race of the Defendant	-.134	.725	.87
Race of the Victim	.989	.003	2.67*
<u>Mitigating Factors</u>			
Defendant's Impaired Capacity	-.285	.560	.75
Minor Participation	-.731	.189	.48
Equally Culpable Defendants	-1.461	.000	.23*
<u>Aggravating Factors</u>			
Death during the Commission of another Crime	.654	.081	1.89**
Prior Conviction involving Potential Sentence of Life Imprisonment or Death	1.867	.002	6.47*
Prior Conviction of other Serious Offenses	.635	.221	1.89
Heinous, Cruel, or Depraved Manner of Committing Offense	.803	.006	2.23*
Procurement of Offense by Payment	.962	.006	2.62*
Substantial Planning and Premeditation	1.256	.000	3.51*
CCE involving Distribution to Minors	1.403	.009	4.07*
Vulnerability of Victim	.146	.734	1.16
Sympathetic Victim	.768	.013	2.16*

Model Classification Table:

Percent Correctly Classified by Model = 83.6%

Percent Correctly Classified by Chance = 77.2%

Percent Reduction in Error Relative to Chance = 45%

*p <.05. **p < .10.

Table 10

Final, Adjusted Estimates for the U.S. Attorneys Decisions to Request the Death Penalty – Reduced Model Examining the Independent Effects of the Race of the Defendant and the Race of the Victim

Variable	Logistic Estimate	Prob.	Odds Multiplier
Constant	-4.640	.000	
Number of Prior Adult Convictions	.068	.788	1.07
Other Cases against Defendant	.369	.125	1.45
Sum of Total Non-Statutory Aggravating Factors Present	1.786	.000	5.96*
Sum of Total Aggravating Factors Present	1.155	.000	3.17*
Sum of Total Mitigating Factors Present	-.693	.008	.50*
Sex of the Defendant	1.198	.154	3.31
Race of the Defendant	.220	.512	1.25
Race of the Victim	.733	.013	2.08*
Vulnerability of Victim	.516	.734	1.68
Sympathetic Victim	.605	.000	1.83

Model Classification Table:

Percent Correctly Classified by Model = 82.3%

Percent Correctly Classified by Chance = 77.2%

Percent Reduction in Error Relative to Chance = 35.5%

*p <.05. **p< .10.

Table 11
 Final, Adjusted Estimates for the U.S. Attorneys Decisions to Request the Death Penalty
 – Full Model Examining the Effects of the Race of the Defendant and the Race of the
 Victim combined (White v. non-White Racial Groups)

Variable	Logistic Estimate	Prob.	Odds Multiplier
Constant	-6.126	.000	
Number of Prior Adult Convictions	.414	.100	1.51
Other Cases against Defendant	.416	.103	1.52
Sum of Total Non-Statutory Aggravating Factors Present	2.210	.000	9.12*
Sex of the Defendant	1.478	.118	4.38
<u>Mitigating Factors</u>			
Defendant's Impaired Capacity	-.143	.768	.87
Minor Participation	-.744	.181	.48
Equally Culpable Defendants	-1.533	.000	.22*
<u>Aggravating Factors</u>			
Death during the Commission of another Crime	.762	.037	2.14*
Prior Conviction involving Potential Sentence of Life Imprisonment or Death	1.793	.003	6.01*
Prior Conviction of other Serious Offenses	.668	.192	1.95
Heinous, Cruel, or Depraved Manner of Committing Offense	.742	.010	2.10*
Procurement of Offense by Payment	.998	.004	2.71*
Substantial Planning and Premeditation	1.306	.000	3.69*
CCE involving Distribution to Minors	1.272	.017	3.57*
Vulnerability of Victim	.333	.423	1.40
Sympathetic Victim	.768	.013	2.16*
Non-White Defendant/White Victim	.838	.015	2.31*

Model Classification Table:

Percent Correctly Classified by Model = 82.9%

Percent Correctly Classified by Chance = 77.2%

Percent Reduction in Error Relative to Chance = 44.8%

*p <.05. **p< .10.

Table 12

Final, Adjusted Estimates for the U.S. Attorneys Decisions to Request the Death Penalty – Reduced Model Examining the Effects of the Race of the Defendant and the Race of the Victim combined (White v. Non-White Racial Groups)

Variable	Logistic Estimate	Prob.	Odds Multiplier
Constant	-4.109	.000	
Number of Prior Adult Convictions	.069	.781	1.07
Other Cases against Defendant	.364	.123	1.44
Sum of Total Non-Statutory Aggravating Factors Present	1.774	.000	5.89*
Sum of Total Aggravating Factors Present	1.155	.000	3.17*
Sum of Total Mitigating Factors Present	-.657	.011	.52*
Sex of the Defendant	1.198	.154	3.31
Vulnerability of Victim	.684	.070	1.98**
Sympathetic Victim	.683	.015	1.98*
Non-White Defendant/White Victim	.429	.161	1.54

Model Classification Table:

Percent Correctly Classified by Model = 80.3%

Percent Correctly Classified by Chance = 77.2%

Percent Reduction in Error Relative to Chance = 33.5%

*p <.05. **p< .10.

Table 13
 Final, Adjusted Estimates for the U.S. Attorneys Decisions to Request the Death Penalty
 – Full Model Examining the Effects of the Race of the Defendant and the Race of the
 Victim combined (White v. Black Racial Groups)

Variable	Logistic Estimate	Prob.	Odds Multiplier
Constant	-7.852	.000	
Number of Prior Adult Convictions	.517	.107	1.68
Other Cases against Defendant	.658	.040	1.93*
Sum of Total Non-Statutory Aggravating Factors Present	3.526	.000	33.99*
Sex of the Defendant	1.754	.090	4.38**
<u>Mitigating Factors</u>			
Defendant's Impaired Capacity	-.617	.335	.05
Minor Participation	-.569	.399	.57
Equally Culpable Defendants	-2.007	.000	.13*
<u>Aggravating Factors</u>			
Death during the Commission of another Crime	.999	.041	2.72*
Prior Conviction involving Potential Sentence of Life Imprisonment or Death	2.321	.002	10.19*
Prior Conviction of other Serious Offenses	.570	.345	1.77
Heinous, Cruel, or Depraved Manner of Committing Offense	.568	.149	1.76
Procurement of Offense by Payment	1.297	.005	3.66*
Substantial Planning and Premeditation	1.624	.000	5.07*
CCE involving Distribution to Minors	1.052	.082	2.86**
Vulnerability of Victim	.329	.511	1.39
Sympathetic Victim	1.131	.003	3.10*
Non-White Defendant/White Victim	.797	.070	2.22**

Model Classification Table:

Percent Correctly Classified by Model = 82.9%

Percent Correctly Classified by Chance = 74.9%

Percent Reduction in Error Relative to Chance = 55.3%

*p <.05. **p < .10.

Table 14
 Final, Adjusted Estimates for the U.S. Attorneys Decisions to Request the Death Penalty
 – Reduced Model Examining the Effects of the Race of the Defendant and the Race of
 the Victim combined (White v. Black Racial Groups)

Variable	Logistic Estimate	Prob.	Odds Multiplier
Constant	-4.992	.000	
Number of Prior Adult Convictions	-.010	.973	.99
Other Cases against Defendant	.577	.041	1.78*
Sum of Total Non-Statutory Aggravating Factors Present	2.625	.000	13.81*
Sum of Total Aggravating Factors Present	1.253	.000	3.50*
Sum of Total Mitigating Factors Present	-.614	.050	3.07**
Sex of the Defendant	.909	.284	2.50
Vulnerability of Victim	.573	.188	1.77
Sympathetic Victim	1.027	.002	2.79*
Non-White Defendant/White Victim	.429	.161	1.54

Model Classification Table:

Percent Correctly Classified by Model = 79.8%

Percent Correctly Classified by Chance = 74.9%

Percent Reduction in Error Relative to Chance = 41.3%

*p <.05. **p< .10.

Table 15

Final, Adjusted Estimates for the Attorney General's Decisions to Recommend the Death Penalty – Full Model Examining the Effects of the Race of the Defendant and the Race of the Victim combined (White v. non-White Racial Groups)

Variable	Logistic Estimate	Prob.	Odds Multiplier
Constant	-6.012	.000	
Number of Prior Adult Convictions	-.282	.319	.75
Other Cases against Defendant	-.098	.741	.91
Sum of Total Non-Statutory Aggravating Factors Present	2.791	.000	16.30*
Sex of the Defendant	.958	.231	2.61
Race of the Defendant	-.115	.784	.89
Race of the Victim	.751	.045	2.12*
<u>Mitigating Factors</u>			
Defendant's Impaired Capacity	-.848	.231	2.33
Minor Participation	-19.111	.997	.50
Equally Culpable Defendants	-2.026	.000	.13*
<u>Aggravating Factors</u>			
Death during the Commission of another Crime	.337	.422	1.40
Prior Conviction involving Potential Sentence of Life Imprisonment or Death	2.420	.003	11.25*
Prior Conviction of other Serious Offenses	1.057	.177	2.88
Heinous, Cruel, or Depraved Manner of Committing Offense	1.324	.006	3.76*
Procurement of Offense by Payment	.841	.030	2.32*
Substantial Planning and Premeditation	2.194	.000	8.97*
CCE involving Distribution to Minors	.795	.349	2.21
Vulnerability of Victim	.346	.491	1.41
Sympathetic Victim	.765	.028	2.15*

Model Classification Table:

Percent Correctly Classified by Model = 85.9%

Percent Correctly Classified by Chance = 75.9%

Percent Reduction in Error Relative to Chance = 55.6%

*p <.05. **p< .10.

Appendix B: Variable Coding Information

Code Sheet for Key Variables in the Federal Death Penalty Data Set

Variable: 1

Name: Report of Prior Adult Convictions against this Defendant

Code/Values: 0 = No prior felony convictions

1 = Prior felony convictions

Variable: 2

Name: Report of Other Cases Pending against this Defendant

Code/Values: 0 = No pending cases

1 = Pending cases against defendant

Variable: 3

Name: Defendant's Gender

Codes/Values: 0 = Female

1 = Male

Variable: 4

Name: Defendant's Race

Code/ Values: 0 = Non-white

1 = White

Variable: 5

Name: U.S. Attorneys Final Recommendation

Code/Values: 0 = Death penalty not sought

1 = Death penalty sought

Variable: 6

Name: Victim's Gender

Code/Values: 0 = Female

1 = Male

Variable: 7

Name: Victim's Race

Code/Values: 0 = Non-white

1 = White

Code Sheet for Key Variables in the Federal Death Penalty Data Set

Variable: 8

Name: Mitigating Factor: Impaired Capacity

Code/Values: 0 = Not present
1 = Present

Variable: 9

Name: Mitigating Factor: Minor Participation

Code/Values: 0 = Not present
1 = Present

Variable: 10

Name: Mitigating Factor: Equally Culpable Defendants

Code/Values: 0 = Not present
1 = Present

Variable: 11

Name: Number of Aggravating Factors Present

Code/Values: 0 = None present
1 = Any number of aggravating factors present

Variable: 12

Name: Aggravating factor: Death during Commission of another Crime

Code/Values: 0 = Not present
1 = Present

Variable: 13

Name: Aggravating factor: Previous conviction of offense for which a sentence of death or life imprisonment was authorized

Code/Values: 0 = Not present
1 = Present

Variable: 14

Name: Aggravating factor: Heinous, cruel, or depraved manner of committing the offense

Code/Values: 0 = Not present
1 = Present

Variable: 15

Name: Aggravating factor: Substantial planning and premeditation

Code/Values: 0 = Not present
1 = Present

Code Sheet for Key Variables in the Federal Death Penalty Data Set

Variable: 15

Name: Aggravating factor: Previous conviction of other serious offenses

Code/Values: 0 = Not present

1 = Present

Variable: 16

Name: Aggravating factor: Procurement of the offense by payment

Code/Values: 0 = Not present

1 = Present

Variable: 17

Name: Aggravating factor: Continuing Criminal Enterprise involving distribution to minors

Code/Values: 0 = Not present

1 = Present

Variable: 18

Name: Any Non-statutory aggravating factors

Code/Values: 0 = None present

1 = Any present

Variable: 19

Name: Aggravating factor: Vulnerability of Victim

Code/Values: 0 = Not present

1 = Present

Variable: 20

Name: Vulnerability of victim: Victim under 17 or over 60 or has a physical handicap or pregnant or gross difference in size with defendant

Code/Values: 0 = not present

1 = Present

Variable: 21

Name: Number of Mitigating factors present

Code/Values: 0 = No mitigating factors present

1 = Mitigating factors present

Code Sheet for Key Variables in the Federal Death Penalty Data Set

Variable: 22

Name: Sympathetic victim: Good citizen or in school or has dependents or is police officer or prison guard and not criminal

Code/Values: 0 = Not present
1 = Present

Variable: 23

Name: Race of Defendant and Victim (non-white and white combinations)

Code/Values: 0 = Non-white/non-white victim, white defendant/white victim, white defendant/non-white victim
1 = Non-white defendant/white victim

Variable: 24

Name: Race of Defendant and Victim (black and white combinations)

Code/Values: 0 = Black defendant/Black victim, white defendant/white victim, white defendant/black victim
1 = Black defendant/white victim

Variable: 25

Name: Attorney General Final Decision

Code/Values: 0 = Death penalty not sought
1 = Death penalty sought

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