No. 84-6811

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WARREN MCCLESKEY,

Petitioner,

v.

RALPH M. KEMP, Superintendent,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE CONGRESSIONAL BLACK CAUCUS, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AS *AMICI CURIAE*

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The Congressional Black Caucus, the Lawyers' Committee for Civil Rights Under Law, and the National Association for the Advancement of Colored People, respectfully

move the Court pursuant to Supreme Court Rule 36.3, for leave to file the attached brief as amici curiae in support of Petitioner. Petitioner has consented to this filing, but Respondent has refused its consent.

The Congressional Black Caucus is composed of all twenty black members of the United States House of Representatives. Its primary function is to implement and preserve the constitutional guarantee of equal justice under the law for all Americans, particularly black Americans.

The Lawyers' Committee for Civil Rights Under Law is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. Since then, the national office of the Lawyers' Committee and its local offices have represented the interests of blacks, Hispanics and women in hundreds of cases challenging state and private actions based on race discrimination. Over a thousand members of the private bar, including former Attorneys General, former Presidents of the American Bar Association and other leading lawyers, have assisted it in such efforts.

The National Association for the Advancement of Colored People is a New York nonprofit membership corporation, with some three million members nationwide. Its principal aims and objectives include eradicating caste or race prejudice among the citizens of the United States and promoting genuine equality of rights in the operation of its laws.

Amici have a long-standing interest in insuring that no one is denied equal justice on the basis of race. We believe it well-established that the unequal

application of criminal statutes on the basis of race is a violation of the Constitution. Yet in this case the Court of Appeals has held that a proven racial disparity in death sentencing does not in and of itself violate the Eighth and Fourteenth Amendments. In order to respond to this ruling we have asked to participate as amici. In our view, the holding of the Court of Appeals threatens the principle of equality under the law and undermines our efforts to realize this fundamental principle.

Because the issues raised by this case go beyond the interests of Petitioner alone, and the implications of the Court of Appeals' decision affect the rights of all Americans we are dedicated to preserve, we believe our participation will be of assistance to the Court.

For the foregoing reasons, we respectfully request that leave to participate as amici curiae be granted.

Respectfully submitted,

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INTEREST OF AMICI

The interests of amici in this case are set out in the preceding Motion for Leave to File this Brief.

SUMMARY OF ARGUMENT

The exhaustive scientific proof in this case shows that race has retained a powerful influence on capital sentencing decisions in Georgia, since Furman v. Georgia, 408 U.S. 238 (1972). That confirms what is evident to even a casual observer: Just as before Furman, "a look at the bare statistics regarding executions is enough to betray much of the discrimination." 408 U.S. at 364 (concurring opinion of Justice Marshall). The scientific evidence in this case tests every possible explanation for these apparent disparities, and shows nothing can explain them but the conscious or unconscious influence of race. It does so with a thoroughness and rigor which meet or exceed every standard this Court, or any other court, has ever set down for such proof. It cannot be simply explained away or ignored.

The Court of Appeals' suggestion tha the discrimination this evidence showed wa of a tolerable magnitude is inconsisten with everything this Court has said abou race discrimination in criminal justice It also ignores the true magnitude of th racial disparities here, which matched o exceeded those the Court has foun intolerable in related contexts.

The Court of Appeals' insistence o proof of an intentional act o discrimination by an identified acto imposes "a crippling burden of proof, Batson v. Kentucky, 106 S.Ct. 1712, 172 (1986) on claims of discrimination in thi context. There is no justification fo imposing such an extraordinary burden here Death sentencing is quintessential stat action; it involves such a range o discretion and such a multitude of decisio makers that proof of a particula discriminatory act or animus is unnecessar

and unrealistic. In such circumstances, the kind of strong statistical proof presented here, coupled with a history of discrimination, sufficiently shows "purposeful discrimination" under any established and realistic Fourteenth Amendment standard. Moreover, the separate requirements of the Eighth Amendment place on the states a duty to avoid discrimination in death sentencing which is independent of any particular actor's subjective intent.

The evidence here shows that the hope of Gregg v. Georgia, 428 U.S. 153 (1976) has not been realized. Georgia's uniquely discretionary post-Furman system has not removed discrimination from the imposition of death sentences in that state.

ARGUMENT

I. THE EVIDENCE IN THIS CASE SHOWS THAT RACE REMAINS A DRIVING FORCE IN THE IMPOSITION OF CAPITAL SENTENCES IN THE STATE OF GEORGIA.

Since this Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976), the State of Georgia has carried out seven executions. Six of the seven men executed were blacks convicted of killing whites; the victim in the seventh case was white, also.[1] If this Court affirms the Court of Appeals' decision in this case, it appears that pattern will persist: Of the fifteen men Georgia holds under death sentences now in force which precede Warren McCleskey's in time, thirteen are black; nine of the

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[1] The seven men executed were John Smith (white defendant, white victim); Ivon Stanley (black defendant, white victim); Alpha Stephens (black defendant, white victim); Roosevelt Green (black defendant, white victim); Van Solomon (black defendant, white victim); John Young (black defendant, white victim); and Jerome Bowden (black defendant, white victim). NAACP Legal Defense Fund, Death Row U.S.A., August 1, 1986 at 4.

thirteen had a white victim; so did both of the two white defendants in this group.[2]

These figures are particularly striking when one considers that black people constitute a substantial majority of the victims of all homicides in the state of Georgia, and black-on-white homicides are extremely rare.[3] Although these raw figures are certainly not scientific proof, no fair-minded observer who is aware of the history of race relations in this state can confront them without suspecting that racial inequities persist in the manner in which capital defendants are chosen for execution by the Georgia judicial system.

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[2] See Appendix I.

[3] Professor Baldus' data showed black people were the victims in 60.7% (1502/2475) of Georgia homicides; and crimes involving black defendants and white victims constituted only 9.2% (228/2475) of Georgia homicides, during the period he studied. See D.Ct. Exhibit DB 63. FBI Uniform Crime Reports confirm these percentages. See Gross and Mauro, Patterns of Death, 37 STAN.L.REV. 27, 56 (1984).

strict scientific proof; and it tragically, but unmistakably, confirms that suspicion. From Professor Baldus' most preliminary measures (which showed white victim cases nearly 11 times more likely to receive death sentences than black victim cases, D.Ct. Exhibit DB 62), to his most comprehensive and refined (which showed race of victim to multiply the odds of death some 4.3 times, D.Ct. Exhibit DB 82), the evidence presented here shows the influence of race in the Georgia system persists, however it is examined. All other observers have reached the same conclusions, whatever methods and data they have used.[4]

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[4] See Gross & Mauro, supra, n.2; Bowers and Pierce, Arbitrariness and Discrimination Under the Post-Furman Capital Statutes, 26 CRIME AND DELINQUENCY 563 (1980).

These persistent findings admit only three conceivable explanations: Either (1) some or all of the actors in the Georgia criminal justice system empowered to make decisions affecting the imposition of the death penalty are intentionally discriminating by race; or (2) the discretionary aspects of the Georgia death sentencing system allow subconscious racial biases to influence the outcome of death sentencing decisions; or (3) some unknown nondiscriminatory influence is at work, and accounts for these persistent disparities in a way no one has yet fathomed.

No one would deny the first of these possibilities violates the Constitution. As we will discuss in Part II below, in the context of the Georgia capital sentencing system, the second does as well. We must first pause, however, to consider the third possible explanation, which the Court of Appeals' majority seized upon when it

[illegible] supposedly "ignor[ing] quantitative differences in cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few...." McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985). With all respect, this remarkable assertion is wrong as a matter of fact, as a matter of law, and as a matter of common sense.

The factual error in the Court of Appeals statement is both striking and revealing. Striking is the fact that several of the precise variables the Court of Appeals pointed to were taken into account by Professor Baldus' data.[5] Revealing is the list of new variables the

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[5] Professor Baldus' questionnaire (D.Ct. Exhibit DB 38), accounted for the defendant's age (Foil 46), education (Foil 4.13) profession and employment status (Foils 61-69), and expressions of remorse (Foils 183, 274). Professor Baldus recorded similar factors regarding the victim as well. See Foils 111, 112-120.

Court of Appeals conjured up: "looks ... personality ... clothes ... and demeanor." Not only is it unimaginable that such criteria could serve as legitimate justifications for a death sentence; they would be obvious proxies for race prejudice if they were in fact used.[6] For as Judge Clark in his dissenting opinion below noted, "it is these differences that often are used to mask, either intentionally or unintentionally, racial prejudice." McCleskey v. Kemp, supra, 753 F.2d at 925 n.24. The Court of Appeals' resort to these farfetched hypotheticals illustrates how comprehensive Professor Baldus' data are: No one has yet suggested any factors he did not take into account which could

[6] Even the variables that the Court of Appeals identified and Professor Baldus did take into account--job, profession, and education--are not wholly race neutral. Any disadvantages black defendants may suffer in these respects are likely to be the result of past discrimination. Cf. Rogers v. Lodge, 458 U.S. 613, 625-6 (1982).

plausibly and fairly explain death sentencing outcomes.

As a matter of law, the Court of Appeals' error lies in its holding that even such thoroughness was not enough, demanding that statistical proof of discrimination eliminate such nebulous and speculative influences. The breadth of the Baldus studies--which accounted for over 230 nonracial variables--far exceeds any other ever offered to meet a prima facie standard of proof announced by this Court.[7] And as the Court has recently reiterated, one cannot dismiss or rebut a sophisticated regression analysis--or any prima facie proof of discrimination, for that matter--"declar[ing] simply that many factors go into making [the relevant decision]", without any "attempt ... to demonstrate

[7] Compare Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Hazelwood School District v. United States, 433 U.S. 299 (1977); Casteneda v. Partida, 430 U.S. 482 (1977).

that when these factors were properly organized and accounted for there was no significant disparity between ... blacks and whites." Bazemore v. Friday, 106 S.Ct. 3000, 3010-11 n.14 (1986).[8] Yet the Eleventh Circuit majority did just that.

The Court of Appeals' strain to find unexplained variables defies common sense because it ignores the social context and history in which the substantial racial discrepancies identified by Professor Baldus were found. The differing treatment of murder defendants in Georgia, based on their race and the race of their victim, is no newly-discovered phenomenon. In Georgia's earliest history, established law provided as follows:

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[8] Accord Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972); Whitus v. Georgia, 385 U.S. 545 (1967); Jones v. Georgia, 389 U.S. 24 (1967).

> Any slave who killed a white person in order to defend himself, his family, a fellow slave, or a white third party had to be executed. The courts or government could grant no mercy in such cases.
>
> * * *
>
> Death could likewise be imposed if a slave "grievously wound[ed], maim[ed], or bruise[d] any white person"; was convicted for the third time of striking a white person; or, ... if he attempted to run away from his master out of the province.

Yet conversely, when a white person killed a slave:

> Only on the second offense of willful murder did the 'offender Suffer for the said Crime according to the Laws of England except that he shall forfeit no more of his Lands and Tenemants Goods and Chattels than what may be Sufficient to Satisfy the owner of such Slave so killed as aforesaid....' Conviction for willful murder of a slave also required after 1755 the "oath of two witnesses" an extremely difficult burden of evidence for most criminal prosecutions.

HIGGENBOTHAM, IN THE MATTER OF COLOR: RACE IN THE AMERICAN LEGAL PROCESS 256, 253-4

(1978).[9]

This legal system--with its differential treatment of blacks as defendants and victims--was explicitly among the "discriminations which are steps toward reducing [blacks] ... to the condition of a subject race," that the Fourteenth Amendment was enacted to abolish. Strauder v. West Virginia, 100

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[9] See also Stampp, The Peculiar Institution: Slavery in the Antebellum South 210 (1956).

This history, though ancient, remains relevant. As Judge Fay wrote in Lodge v. Buxton, 639 F.2d 1358, 1381 n.46 (11th Cir. 1981), aff'd sub nom Rogers v. Lodge, 458 U.S. 613 (1982):

> The problems of Blacks in Burke County [Georgia] should not be viewed in a vacuum. The present treatment of Blacks in the South is directly traceable to their historical positions as slaves. While many individual political leaders have attempted to bring meaningful reforms to fruition, it is equally true that the White communities, for the most part, have fought the implementation of programs aimed at integration with every device available. A ... court ordering relief in a case such as this must take cognizance of that fact.

U.S. ..., ... (...), ...

has too often had occasion to recognize, for a hundred years that noble effort utterly failed to overcome the entrenched social conditions that the antebellum laws reflected and reinforced. Thus, in 1944--well within the lifetimes of most of the participants in Georgia's legal system today--Gunnar Myrdal observed:

> In criminal cases discrimination does not always run against a Negro defendant.... As long as only Negroes are concerned and no whites are disturbed, great leniency will be shown in most cases. ... The sentences for even major crimes are ordinarily reduced when the victim is another Negro. ...
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> * * *

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[10] The express intention of the framers of the Fourteenth Amendment to provide for the "equal protection" of blacks as victims of crimes, as well as criminal defendants, has been noted by this Court, Briscoe v. LaHue, 460 U.S. 325, 338 (1983), and recounted briefly in the Petition for Certiorari in this case (at pages 5-7). Because it has nowhere been questioned below, we will not reiterate it here.

> For offenses which involve any actual or potential danger to whites, however, Negroes are punished more severely than whites....
>
> * * *
>
> The jury, for the most part, is more guilty of obvious partiality than the judge and the public prosecutor. When the offender is a white man and the victim a Negro, a grand jury will often refuse to indict. Even the federal courts find difficulty in getting indictments in peonage suits, and state courts receive indictments for physical violence against Negroes in an infinitesimally small proportion of the cases. ... The petit jury is even less impartial than the grand jury, since its range of powers is greater.
>
> * * *
>
> There is even less possibility for a fair trial when the Negro's crime is serious. ... On the other hand, it is quite common for a white criminal to be set free if his crime was against a Negro. Southern whites have told the present author of singular occasions when a Negro got justice against a white man, even in a serious case, as something remarkable and noteworthy.

MYRDAL, AN AMERICAN DILEMMA, 551-553 (1944).

Such deeply-rooted biases die hard The lesson of Professor Baldus' data i that although the influence of these socia forces may have diminished and are n longer openly acknowledged, they stil weigh significantly in the balance tha decides life and death in Georgia' judicial system. As the Court noted in Ros v. Mitchell, 443 U.S. 545, 558-9 (1979):

> 114 years after the close of the Wa Between the States and nearly 10 years after Strauder, racial and othe forms of discrimination still remain fact of life, in the administration c justice as in our society as a whole Perhaps today that discriminatic takes a form more subtle than before But it is not less real or pernicious

To pretend race prejudice has vanishe or never existed, to conjure hypothetica explanations for persistent discrepancie that obviously reflect its influence, is t forget the reality that the Fourteent Amendment was enacted to address, and thi Court has long been vigilant to guar against.

II. SIGNIFICANT RACIAL INFLUENCES IN DEATH-SENTENCING DECISIONS--CONSCIOUS OR UNCONSCIOUS--VIOLATE THE CONSTITUTION.

The Court of Appeals' ruling goes beyond quibbling about hypothetical uncontrolled variables in the Baldus study. Indeed, the court's majority said it accepted, for purposes of its decision, the validity of Professor Baldus' study, and it "assume[d] ... that it proves what it claims to prove." McCleskey v. Kemp, supra, 753 F.2d at 886. Nonetheless, the court held that proof insufficient to raise even a prima facie case under the Eighth or Fourteenth Amendments. It gave two basic reasons for this: the supposedly insignificant magnitude of the racial disparities the evidence showed; and the lack of direct proof of a discriminatory motive. We will briefly address these each in turn.

A. Any Significant Quantum of Racial Discrimination in Death Sentencing Is Intolerable.

In part, the Court of Appeals seemed to agree McCleskey showed bias--just not enough bias. Absent proof of subjective discrimination by capital jurors or other decisionmakers in the sentencing scheme, it said statistical proof of racial bias

> is insufficient to invalidate a capital sentencing system, unless that disparate impact is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary, and capricious such that purposeful discrimination--i.e., race is intentionally being used as a factor in sentencing--can be presumed to permeate the system.

753 F.2d at 892. And here the court found McCleskey's proof lacking (id. at 895):

> The Baldus study statistical evidence does not purport to show that McCleskey was sentenced to death because of either his race or the race of his victim. It only shows that in a group involving blacks and whites, all of whose cases are virtually the same, there would be more blacks receiving the death penalty than whites and more murderers of whites receiving the death

penalty than murderers of [illegible]

(Emphasis added.)

That any court in this day and age could simply dismiss admittedly valid, comprehensive proof because it "only" demonstrated that race is an influential factor in capital sentencing is astounding. Amici have long understood that unequal enforcement of criminal statutes based upon racial considerations violates the Fourteenth Amendment. Such racial disparity, whatever its magnitude, has "no legitimate overriding purpose independent of invidious racial discrimination," Loving v. Virginia, 388 U.S. 1, 11 (1967); Yick Wo v. Hopkins, 118 U.S. 356 (1886); cf. Furman v. Georgia, supra, 408 U.S. 238, 389 n.12 (dissenting opinion of Chief Justice Burger). For well over 100 years, this Court has consistently interpreted the Equal Protection Clause to prohibit all racial discrimination in the administration

While questions concerning the necessary quantum of proof have occasionally proven perplexing, no federal court until now has ever, to our knowledge, seriously suggested that racial discrimination at any level of magnitude if clearly proven, can be constitutionally tolerated. Yet that is precisely the holding of the Court of Appeals.

Moreover, even if the magnitude of discrimination were relevant, the evidence here demonstrates an extraordinary racial effect. The regression models the Court of Appeals focused on, for example, showed the increased likelihood of a death sentence if the homicide victim is white, is .06, c

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11 See, e.g., Strauder v. West Virginia, supra; Carter v. Texas, 177 U.S. 442 (1900); Norris v. Alabama, 294 U.S. 55 (1953); Turner v. Fouche, 396 U.S. 34 (1970); Rose v. Mitchell, supra; General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 382-91 (1982); Briscoe v. LaHue, supra, 460 U.S. at 337-40.

six percentage points, holding all other factors constant. 753 F.2d at 896-7. Since the average death-sentence rate among Georgia cases is only .05, the fact that a homicide victim is white, rather than black, more than doubles the average likelihood of a death sentence (from .05 to .11).[12] In plainest terms, these

[12] It is important to note that these figures, and all those Prof. Baldus used to express the racial disparities he found, are different from the raw numbers used to measure racial disparities in jury challenges. In those cases, the Court has generally compared the raw percentages of minority persons selected for jury service with the population as a whole. See, e.g., Casteneda v. Partida, supra (40% disparity); Turner v. Fouche, 396 U.S. 346 (1970) (23% disparity); Whitus v. Georgia, supra (18% disparity).

Prof. Baldus' tables list smaller numbers, because they express a different ratio: the comparative percentages of persons in different racial categories selected for death sentences. A comparable calculation using the figures in Casteneda (430 U.S. at 486 n.7), for example, would show an arithmetic difference of .26% rather than 40%: The odds of a person in the population as a whole being selected for a grand jury was .54% (870/158690); the odds of a Spanish surnamed person being selected was .28% (339/120766).

homicide cases in Georgia, 5 would receive a death sentence if race were not a factor; in reality, where white victims are involved, 11 out of 100 do. Six defendants are thus sentenced to death, who would not be but for the race of their victims. "Stated another way, race influences the verdict just as much as any one of the aggravating circumstances listed in Georgia's death penalty statute." 753 F.2d at 921 (Clark, J., dissenting). The Court of Appeals' bland suggestion that race affects at most a "small percentage of the cases," 753 F.2d at 899, scarcely reflects this harsh reality. No analysis true to the Fourteenth Amendment can condone it.

B. In the Context of Sentencing Decisions, Proof of Actual Subjective Intent Is Not Required to Establish a Prima Facie Case of Discrimination.

The question Professor Baldus' data does not and cannot answer is whether the

impact of race on Georgia's death sentencing system is the result of deliberate discrimination or unconscious racial influences on the actors who are part of it. Can it be that resolution of this issue--on which proof may be impossible--is a prerequisite to relief? We believe not. The dispositive issue is whether, not why, race is a significant influence on sentencing decisions.

The Baldus study demonstrates that race is a significant influence. The Court of Appeals holds that this pattern affronts no constitutional principles. That cannot be the law. If race is a significant factor in capital sentencing outcomes, whatever subjective intent lies behind this factor--be it conscious or unconscious--is constitutionally irrelevant.

The significance of the subjective intent in claims of discrimination and cruel and unusual punishment has occupied

this Court's attention several times in recent years. See, e.g., Bazemore v. Friday, supra; Whiteley v. Albers, 106 S.Ct. 1078 (1986); Rogers v. Lodge, supra. In every instance, the Court's answer has reflected a realistic focus on the context in which the challenged governmental action occurs. Here, that focus militates against a holding that proof of an act of intentional discrimination by an identified decision maker should be essential to showing a constitutional violation.

Most fundamentally, requiring proof of subjective intent in the sentencing context raises an impossible burden. Jurors "cannot be called ... to testify to the motives and influences that led to their verdict." Chicago, Burlington & Quincy Railway v. Babcock, 204 U.S. 585, 593 (1907). Neither is it seemly or proper to so question judges about the motives for their decisions. Fayerweather v. Ritch

195 U.S. 276, 306 (1904). And as Justice Marshall recently observed, "[a]ny prosecutor can easily assert facially neutral reasons for [his actions] ... and trial courts are ill-equipped to second guess those reasons." Batson v. Kentucky, supra, 106 S.Ct. at 1728 (concurring opinion). Moreover, the influence of race prejudice may well be unconscious, unknown to the decision-makers themselves. Ibid.

"Defendants cannot realistically hope to find direct evidence of discriminatory intent." McCleskey v. Kemp, supra, 753 F.2d at 912 (Johnson, J., dissenting). Only last Term this Court reiterated that the Equal Protection Clause does not permit shouldering a defendant with "a crippling burden of proof" in order to make out a prima facie case of discrimination. Batson v. Kentucky, supra, 106 S.Ct. at 1720. There is no reason to except from that here.

The death sentence decisionmaking process is one controlled from stem to stern by the state; everything about capital sentencing is state action.[13] Nowhere does the "voluntary and unfettered choice of private individuals", Bazemore v. Friday, supra, 106 S.Ct. at 3012 (concurring opinion), intervene. At the same time, death sentencing decisions are highly discretionary, see Turner v. Murray, 106 S.Ct. 1683 (1986); and as we demonstrate in the following section of this brief, Georgia's statutory capital sentencing scheme does less to guide discretion than any other this Court has reviewed since Furman.

Where official grants of discretion provide "the opportunity to discriminate" and "the result bespeaks discrimination", this Court has found the Constitution is

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[13] Cf. Shelly v. Kramer, 334 U.S. 1, 15 (1948); Ex Parte Virginia, 100 U.S. 667, 669 (1879).

violated whether or not it was a conscious

decision on the part of any individual" to discriminate. Alexander v. Louisiana, 405 U.S. 625, 632 (1972). Even though "[t]he facial constitutionality of the ... system ... has been accepted" by this Court, "a selection procedure that is susceptible of abuse ... supports the presumption of discrimination raised by the statistical showings." Casteneda v. Partida, supra, 430 U.S. at 497, 494.

This is especially true where, as here, the discretionary decision is not an individual one, but the collective one involving a multitude of individuals. When decisionmaking responsibility is diffused,

> [r]arely can it be said that a [decisionmaking] ... body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.

Arlington Heights v. Metropolitan Housing Corporation, 429 U.S. 252, 265 (1977). In

is no difference between subjective intent and objective results. As Justice Stevens explained in Washington v. Davis, supra:

> Normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision making, and of mixed motivation.

426 U.S. at 253 (concurring opinion).

It is also significant that capital sentencing occurs in an arena in which blacks have traditionally lacked the means to defend themselves through participation in the process. Cf. Rogers v. Lodge, supra, 458 U.S. at 650-53 (dissenting opinion of Justice Stevens); Casteneda v. Partida, supra, 430 U.S. at 515-16 (dissenting opinion of Justice Powell). The legacy of past discrimination, if nothing else, has kept blacks from equal participation as prosecutors and judges,

the officials who can influence death penalty decisions in Georgia.[14] And one need not look beyond recent casebooks to find evidence that blacks--at least at the time of Warren McCleskey's trial--often lacked an equal voice on Georgia juries, as well.[15] This--and the history of discrimination in capital sentencing this Court acted on in Furman--highlights the significance of objective disparities:

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[14] Even today, there are no elected black District Attorneys anywhere in Georgia. Joint Center for Political Studies, Black Elected Officials: A National Roster 113 (1986). Only 2.3% (20/865) of Georgia judges are black. Ibid; Joint Center for Political Studies, Black Judges In The United States 38-40 (1986). At the time of Warren McCleskey's trial there were less than a quarter that number (4)--and not one in a court with jurisdiction over a capital case. Joint Center for Political Studies, Black Elected Officials: A National Roster 53 (1976).

[15] See, e.g., Bowden v. Kemp, 793 F.2d 273 (11th Cir. 1986); Spencer v. Kemp, 784 F.2d 458 (11th Cir. 1986); Ross v. Kemp, 785 F.2d 1467 (11th Cir. 1986); Amadeo v. Kemp, 773 F.2d 1141, 1143 (11th Cir. 1985); Davis v. Zant, 721 F.2d 1478 (11th Cir. 1984); Willis v. Zant, 720 F.2d 1212, 1217-18 (11th Cir. 1983).

> Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, but that they were abandoned when enjoined by courts ... and that they were replaced by laws and practices which, though neutral on their face, served to maintain the status quo.

Rogers v. Lodge, supra, 458 U.S. at 625; see also Bazemore v. Friday, supra, 106 S.Ct. at 3009; Hazelwood School District v. United States, 433 U.S. at 309-10 n.15.

Finally, it is significant that the discrimination here falls in the most central core area to which the Fourteenth Amendment was directed. "Discrimination on the basis of race, odious in all its aspects, is especially pernicious in the administration of justice." Rose v. Mitchell, 443 U.S. 545, 555 (1979). Denial of racial equality in the context of criminal justice "not only violates our Constitution and the laws enacted under it,

but is at war with our basic concepts of a democratic society and a representative government." Smith v. Texas, 311 U.S. 128, 130 (1940). And where the criminal law involves the death sentence,

> [i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 358 (1977).

The fact the death penalty is involved here, of course, means this is an area in which the Eighth Amendment must play a part in addition to the Fourteenth. Throughout its jurisprudence, the Court has found the touchstone of Eighth Amendment analysis in results, not intentions. See Rhodes v. Chapman, 452 U.S. 337, 364 (1981) (concurring opinion of Justice Brennan);

id. at 345-46 (plurality opinion).[16] "Deliberate indifference" to deprivations of constitutional magnitude has, in all but the rarest circumstances, been held sufficient to make out a claim under the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 105 (1976).[17] This Court's death penalty cases have repeatedly charged the states with the responsibility, not just to avoid "indifference", but to positively insure "that general laws are not applied

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[16] The lower federal courts have read this Court's decisions to mean that "wrongful intent is not a necessary element for an Eighth Amendment violation." Spain v. Procunier, 600 F.2d 189, 197 (9th Cir. 1979); see Gates v. Collier, 501 F.2d 1291, 1300-01 (5th Cir. 1974); Rozecki v. Gaughan, 459 F.2d 6, 8 (1st Cir. 1972).

[17] Obviously, the context here does not provide the kind of exceptional circumstance involving a "clash with other equally important governmental responsibilities" or a need to make a review of "decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance," in which the Court has held "ordinary errors of judgment" must be insulated from hindsight review. Whitely v. Albers, 106 S.Ct. 1078, 1084, 1085 (1986).

sparsely, selectively, and spottedly to unpopular groups." Furman v. Georgia, supra, 408 U.S. at 256 (concurring opinion of Justice Douglas); see also id. at 274 (concurring opinion of Justice Brennan). "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).[18] If nothing else, Furman made it clear that departures from that rule are intolerable, regardless of the motives that created them. See Furman v. Georgia, supra, 408 U.S. at 303 (concurring opinion of Justice White).

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[18] Accord, Gardner v. Florida, supra, 430 U.S. at 351 (1977) ("[T]he state must administer its capital sentencing procedures with an even hand."); Godfrey v. Georgia, 446 U.S. 420, 428 (1980) ("If a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty.")

[illegible] jurisprudence to date suggests that differential treatment by race in death sentencing should be the subject of the strictest judicial scrutiny of any governmental action. If, in this context, overwhelming, comprehensive proof of racial disparities--proof that excludes every plausible, legitimate explanation other than the influence of race bias--is not enough, where can it be?

The answer this Court has given before is that it is enough to prove that a state has failed to break a historical pattern of discrimination, and that discretionary decisions have produced "a clear pattern, unexplainable on grounds other than race." Arlington Heights v. Metropolitan Housing Corp., supra, 429 U.S. at 266. There is no reason to change that answer now.

III. BECAUSE GEORGIA'S UNIQUE DEATH SENTENCING SYSTEM HAS FAILED TO ELIMINATE THE INFLUENCE OF RACE, IT IS INCONSISTENT WITH THE EIGHTH AND FOURTEENTH AMENDMENTS.

Gregg v. Georgia expressed this Court's hope that a new Georgia death sentencing system could eradicate the inequities that had led to the invalidation of its predecessor in Furman. Of all the statutory schemes reviewed by this Court in 1972, the Georgia system differed the least from those struck down in Furman. But it was a new statute, and the Court understandably declined to "accept the naked assertion that the effort [to purge the system of discrimination] is bound to fail", 428 U.S. at 222 (concurring opinion). It is now apparent--from experience, not assertion--that it has.

The reason for this must lie in the way the Georgia statute is written or enforced. The enforcement of the law, of course, is the primary responsibility of

district attorneys. In Gregg, [illegible] refused to assume, without proof, "that prosecutors [will] behave in a standardless fashion in deciding which cases to try as capital felonies...." 428 U.S. at 225 (concurring opinion). The evidence in this case strongly suggests that they have.

Lewis Slayton, the District Attorney whose office tried Warren McCleskey, testified in this case that the decision-making process in his office in capital cases was "probably ... the same" before and after Furman. Slayton Dep., at 59-61. Other Georgia prosecutors have candidly admitted that their decisions to seek, or not to seek, death sentences are often based on a variety of "factors other than the strength of their case and the likelihood that a jury would impose the death sentence if it convicts," 428 U.S. at 225--including office resources, subjective opinions about the defendant, public

pressure, the standing of the victims, and even the desire "to obtain a more conviction prone jury through the Witherspoon qualification." Bentele, The Death Penalty in Georgia: Still Arbitrary, 62 WASH.U.L.Q. 573, 616-621 (1985). It is therefore hardly surprising that the outcome of these prosecutorial decisions often appears to be unfair (ibid.)--or that Prof. Baldus found them a source of substantial disparities based on race of both the defendant and the victim. See D.Ct. Exhibit DB 95-6.

When capital charges are pursued, the structure of Georgia's law gives juries uniquely broad and unguided discretion. Unlike virtually all other states, Georgia does not provide juries with lists of aggravating and mitigating factors, or any statutory formula for balancing them

against one another.[19] See Spivey v. State, 246 S.E.2d 288 (Ga. 1978). Unlike most states, Georgia does not limit its juries to consideration of statutory aggravating factors, Zant v. Stephens, 462 U.S. 862 (1983); and its broadest statutory factors often do not substantially narrow the class of persons eligible for a sentence of death.[20]

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19 Virtually all other states' death penalty laws list mitigating circumstances (except Texas, which is unique); the vast majority also provide guidelines for balancing them against aggravating factors. Gillers, Deciding Who Dies, 129 U. PA. L. REV. 1, 102-119 (1980). Of the four states that do not provide for a listing of mitigating factors by statute, three do by judicial decision. Whalen v. State, 492 A.2d 552, 560-2 (Del. 1985); State v. Osborn, 631 P.2d 187, 197 (Id. 1981); Burrows v. State, 640 P.2d 533 (Ok. Crim. 1982). The exception is South Dakota, which has had no death sentences and no appellate decisions.

20 See Godfrey v. Georgia, supra. Even apart from the (b)(7) aggravating circumstance addressed in Godfrey, Georgia is one of the few states that still makes conviction of unintentional felony murder--the crime of which William Henry Furman was convicted--a sufficient prerequisite for a death sentence. Ga. Code Ann. §27-2534(b)(2).

This discretion has not been controlled by the provision for special review by the Georgia Supreme Court, the major feature of the Georgia system which impressed this Court in Gregg, and appeared to distinguish Georgia's law from the pre-Furman statutes. Zant v. Stephens, supra, 462 U.S. at 876. Justice White's concurring opinion in Gregg emphasized the potential importance of this review:

> [I]f the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish, and has not even attempted to establish, that the Georgia Supreme Court failed properly to perform its task in this case or that it is incapable of performing its task adequately in all cases; and this Court should not assume that it did not do so.

428 U.S. at 224. But now, ten years after Gregg, that apparent protection has proven illusory. The Georgia Supreme Court has

never reversed a single death sentence based on a finding of passion, prejudice, or race discrimination. Nor has it reduced a murder sentence as disproportionate to the sentences imposed in other cases for comparable crimes.[21]

In light of the evidence in this case, that means that for thirteen years, the Georgia Supreme Court has presided over a system that demonstrably discriminates on the basis of race and done nothing to correct it. Whether this reflects a

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[21] Since 1974--when it partly anticipated Coker v. Georgia, 433 U.S. 584 (1977) by reversing a single rape death sentence as disproportionate, Coley v. State, 204 S.E.2d 612 (Ga. 1974)--the Georgia court has freed only two men from death judgments without finding legal error. One of them had received a life sentence in a previous trial. Ward v. State, 236 S.E.2d 365 (Ga. 1977). The other was a nontriggerman, whose codefendant received a death sentence. Hall v. State, 244 S.E.2d 833 (Ga. 1978). Although the Georgia court did not so hold --and three of its Justices dissented each time--both sentences were probably independently invalid under the federal Constitution. See Bentele, supra, 62 WASH. U.L.Q. at 594-5.

"deliberate indifference" to race discrimination or--more likely--a systemic inability to identify it when it occurs, the result is the same: The hope this Court expressed in Gregg has not been realized.

As Chief Justice Burger recognized in his Furman dissent (408 U.S. at 389 n.12):

> If a statute that authorizes the discretionary imposition of a particular penalty for a particular crime is used primarily against defendants of a certain race, and if the pattern of use can be fairly explained only by references to the race of the defendant, the Equal Protection Clause of the Fourteenth Amendment forbids continued enforcement of that statute in its existing form. Cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Georgia's post-Furman statute was not shown to fit that description in Gregg; but it has been now. The discriminatory pattern is more complex and involves both the race of the defendant and the race of the victim. But the proof of discrimination is clear and compelling.

This wide-open statutory system has permitted prosecutors and jurors, consciously or unconsciously, to "attach[] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process," Zant v. Stephens, supra, 462 U.S. at 885: the race of the defendant and victim. From Furman to Zant, this Court has said that the Constitution will not allow such discriminatory factors to govern the allocation of death sentences. It should so hold now.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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June 24, 1985

A.P. Draft JE

Memorandum — For Members Immediate Attention

TO: CBC MEMBERS

FROM: JOHN CONYERS

RE: AMICUS BRIEF FOR SUPREME COURT CASE ON RACE AND THE DEATH PENALTY

This October, the U.S. Supreme Court will decide whether or not it will hear the most important capital punishment case of the decade: McCleskey vs. Kemp.

The case, which was argued before the Eleventh U.S. Circuit Court in Atlanta earlier this year, has enormous Constitutional implications: It implicates the Eighth Amendment rights which outlaw cruel and unusual punishment and the Fourteenth Amendment rights which guarantee equal justice under the law. Because of the recurring issues of racism and arbitrariness in the application of the death penalty, which the McCleskey case focuses on, I propose that the Caucus submit an Amicus brief to the Supreme Court on this case. Enclosed is my final draft of the proposed brief for your review.

Statistical evidence, clearly demonstrating a pattern of racial discrimination in capital cases, is an essential aspect of the McCleskey case. A series of sociological and legal studies, some dating from the 1940s, inextricably link the application of the death penalty with the race of the defendant and the race of victim in both homicide and rape cases.

In 1984, the most sophisticated and comprehensive study to date, conducted by David Baldus, the nation's leading authority on legal use of statistics, unmistakably shows significant sentencing disparities in Georgia, from where the case originates: a black who kills a white is eleven times more likely to be executed than a white who kills a black. In the McCleskey case, the Supreme Court will evaluate the merits of the Baldus study among other aspects of unfairness in the death penalty issue.

The high Court's decsion to hear the case may be the last opportunity in this century to have a full airing of the issues. The deadline for submitting the Amicus brief is Friday, June 28, 1985 so I must know no later than Wednesday, June 26 at 5:00 pm whether you will sign on. I hope that every member can join us in this effort on this most fundamental issue. Julian Epstein of my staff (x55126) is the contact person.