March 22, 2021

# Second Supplement to Memorandum 2021-04

## Additional Written Submissions

Memorandum 2021-04 gave an overview of the death penalty in California, the topic of the next meeting on March 25-26, 2021. This supplement presents additional written materials received by the Committee from the organizations listed below.

Respectfully submitted,

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## Written Submissions by Non-Panelists

Exhibit H
California District Attorneys Association:
Ward Campbell, *Exoneration Inflation: Justice Scalia's Concurrence in Kansas v. Marsh*

# Exoneration Inflation: Justice Scalia's Concurrence in *Kansas v. Marsh*

*by Ward A. Campbell*

The ongoing debate about the risk of wrongful convictions in capital cases was recently and prominently displayed in the dueling separate opinions of Associate Justices Scalia and Souter in the Supreme Court's decision in *Kansas v. Marsh* (hereinafter *Kansas*).[1] *Kansas* was a surprising forum for this debate because the case did not involve an issue of guilt or innocence, but a sentencing issue for an already convicted capital murderer. The *Kansas* opinions were equally unexpected because both Justices had passed up an opportunity to address the issue of guilt and innocence in an earlier case in which actual liability was at issue, *House v. Bell* (hereinafter *House*).[2] In retrospect it makes sense that this debate waited to emerge fully in a case involving a death sentencing issue, since the debate about innocence is part of a strategy to abolish capital punishment.[3] Or as Justice Scalia explained, "[o]ne cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly."[4]

This article examines and analyzes Justice Scalia's challenge to the claims about "mistaken convictions" in death penalty cases. His concurring opinion raises important questions about the true nature and significance of "death row exonerations" in terms of evaluating our capital punishment system. The article will briefly examine how "mistaken convictions" have been part of the developing death penalty case law, describe the development of the claims about "actually innocent" condemned prisoners, and then discuss Justice Scalia's critique of these claims.[5] His opinion is a significant contribution to a more balanced perspective on this issue.

## The Role of the Risk of Mistaken Convictions in Modern Capital Case Jurisprudence

There is nothing new about this debate.

> [T]he argument that innocent people may be executed—in small or large numbers—is not new; it has been central to the centuries-old debate over both the wisdom and the constitutionality of capital punishment.[6]

The risk that innocent people may be convicted "is a truism, not a revelation."[7]

### *The Court's Consideration of "Mistaken Convictions" Prior to Kansas v. Marsh*

The potential for executing the innocent played a role in two of the separate opinions that comprised the United States Supreme Court's seminal decision invalidating all of the extant death penalty statutes in *Furman v. Georgia*.[8] The Court held that these statutes gave the sentencer such unbridled, standard-less discretion that the imposition of the death penalty was arbitrary, capricious, and freakish. However, *Furman* left the door open for states to enact new statutes which dealt with these concerns.

When the Court upheld various death penalty statutes in 1976 in *Gregg* and its companion cases, it approved of bifurcated guilt and penalty proceedings so that convictions would not be tainted by exposure to prejudicial aggravating evidence of the defendant's character–evidence which was ordinarily only relevant to sentence, not the underlying verdict of guilt.[9] The Court has also held evidence of "actual innocence" can excuse a defendant's failure to follow state procedures for making objections or raising claims on appeal.[10]

Public sentiment has long supported—and continues to support—the death penalty even though the populace is aware that the criminal justice system is not foolproof.[11] In the few years between *Furman* and *Gregg*, 35 states enacted new death penalty statutes.[12] Today, 37 states

1. *Kansas v. Marsh* (2006) 548 U.S. 163, 126 S.Ct. 2516.
2. *House v. Bell* (2006) 547 U.S. 518. A dissent in the *House* appeals court decision referred to studies about "mistaken convictions," including quoting now retired Justice O'Connor's comments about the possibility that innocent defendants might be executed. (*House v. Bell* (6th Cir. 2004) 386 F.3d 668, 708–709 (dis. opn. of Merritt, J.).)
3. York, *The Death of Death*, The American Spectator (Apr. 2000) p. 22.
4. *Kansas, supra*, note 1 at 2539 (conc. opn. of Scalia, J.).
5. A more detailed and complete examination of this topic by this author will be published electronically on the Web sites of both the California District Attorneys Association (*www.cdaa.org*) and the Institute for the Advancement of Criminal Justice (*www.iacj.org*).
6. *United States v. Quinones* (2nd Cir. 2002) 313 F.3d 49, 63 (hereinafter *Quinones II*), revg. *United States v. Quinones* (S.D.N.Y. 2002) 205 F.Supp.2d 256 (hereinafter *Quinones I*), cert. den. *Quinones v. United States* (2003) 540 U.S. 1051.
7. *Kansas, supra*, note 1 at 2539 (conc. opn. of Scalia, J.).
8. *Furman v. Georgia* (1972) 408 U.S. 238 (conc. opn. of Brennan, J.), 367 (conc. opn. of Marshall, J.).
9. *Ibid.*
10. *House, supra*, note 2 at 520.
11. Furthermore, the public has long understood that there is always an inherent risk that an innocent person could be convicted and sentenced to death. In 2006, the Gallup Poll found that 63 percent of those polled believed that an innocent person had been sentenced to death and executed. Gallup Poll, available at <*http://www.gallup.com/poll/1606/Death-Penalty.aspx*> (last visited Mar. 21, 2008). However, in October 2007, the Gallup Poll showed that 69 percent of the country supported the death penalty. (*Ibid.*)
12. See *Gregg v. Georgia* (1976) 428 U.S. 153, 179–180 (lead opn. of Stewart, Powell, and Stevens, JJ.).

and the federal government impose the death penalty for one or more especially heinous types of crime.[13]

The constitutionality of the death penalty has not seriously been questioned by the United States Supreme Court for over 30 years. In *Herrera v. Collins*, the Court declined to hold that federal courts could entertain so-called "freestanding" claims of actual innocence by capital prisoners (i.e., independent claims of innocence that did not depend on a specific constitutional violation).[14] The petitioner pointed out the obvious—that Constitutional protections "sometimes fail."[15] The late Chief Justice Rehnquist noted the scholarly debate surrounding studies of cases of "actual innocence" or "mistaken convictions"[16] (including a study cited by Justice Blackmun in dissent). When Justice Blackmun subsequently announced that he would no longer "tinker with the machinery of death," he opined on the "inevitability" of "factual, legal, and moral error." He cited an academic study to support his opinion and to criticize *Herrera*.[17] Since *Herrera*, the debate about "actual innocence" has continued.[18]

No reasonable prosecutor would ever claim an innocent person has never been convicted and sentenced to death. The Supreme Court already acknowledges the potential for fallibility.[19] There is always a risk of convicting the "actually innocent," since our criminal justice system requires proof of guilt "beyond a reasonable doubt," not to an "absolute certainty."[20] "Society assumed the risk when it approved the penalty of death that its search for truth might occasionally be inadequate."[21]

The Supreme Court has recognized a connection between determinations of guilt and innocence and the postconviction sentencing function. But the Court's concern was not about "mistaken convictions," but about the risk of "mistaken acquittals" under "mandatory" death penalty statutes. A "mandatory" statute required the sentencer automatically to impose the death penalty when a defendant was convicted of capital murder without any consideration of mitigating factors justifying a sentence less than death. In 1976, the Court found these statutes were flawed because of the risk that juries would decline to convict defendants of first-degree murder in cases they believed the death penalty was undeserved. Thus, in the Court's opinion, a conviction or acquittal was affected by the lack of any intermediate alternative.[22]

On the other hand, these mandatory statutes were also unconstitutional because they prevented sentencers from considering mitigating factors when juries did convict defendants of capital murder.[23] In the latter circumstance, it could not be certain whether a sentencer would have returned a death verdict, but for the non-discretionary command of the "mandatory" statute. The bottom line was that mandatory statutes gave no guidance to the sentencers about how to exercise their de facto sentencing power.[24]

Subsequently, the Court invalidated an Alabama capital statute because it prohibited the trial court from instructing a jury on lesser included offenses. Under this system, a jury was presented with an "all or nothing," "convict of capital murder or acquit" choice that could result in unwarranted convictions or unwarranted not guilty verdicts because of the jury's concern about the potential punishment.[25] Thus, the Alabama scheme had the same hazards as the unconstitutional "mandatory" statutes.

As Justice Thomas ultimately recounted in *Kansas*, the Court's jurisprudence requires that,

> a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. … In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here.[26]

The Eighth Amendment did not mandate a particular balance of aggravating and mitigating factors.[27]

13. New Jersey recently abolished the death penalty. N.J.S.A. § 2C:49-1 to 2C 49-12, repealed by L.2007, c. 204, § 7, eff. 12/17/07. New York's state courts have declared its statute unconstitutional as a matter of state law. (*People v. Taylor* (2007) 878 N.E.2d 969.)
14. *Herrera v. Collins* (1993) 506 U.S. 390, 427 (conc. opn. of Connor, J.); *Townsend v. Sain* (1963) 372 U.S. 293, 317; *Fielder v. Varner* (3rd Cir. 2004) 379 F.3d 113, 122; *House*, *supra*, note 2 at 554–555.
15. *Herrera*, *supra*, note 14 (conc. opn. of O'Connor, J.).
16. *Id.* at 415.
17. *Callins v. Collins*, cert. den. (1994) 510 U.S. 1141, 1145, 1158 & fn. 8 (dis. opn. of Blackmun, J.).
18. See Marquis, *The Myth of Innocence*, 95 J. Crim. L & Criminology 501 (2005).
19. *Herrera*, *supra*, note 14 at 415.
20. *Franklin v. Lynaugh* (1988) 487 U.S. 164, 188 (conc. opn. of O'Connor, J.).
21. Latzer, *Reflections on Innocence* (2005) 41 No.2 Crim.L. Bull. 3.
22. *Woodson v. North Carolina* (1976) 428 U.S. 280, 302–303.
23. *Id.* at 303–304.
24. *Beck v. Alabama* (1980) 447 U.S. 625, 639–640.
25. *Id.* See also *Schad v. Arizona* (1991) 501 U.S. 624; *Hopkins v. Reeves* (1998) 524 U.S. 88.
26. *Kansas*, *supra*, note 1 at 2524–2525.
27. *Ibid.*

In terms of its "mitigation jurisprudence," the Court has considered the question of guilt or innocence and penalty in various cases. For instance, the Court upheld using the same jury for both guilt and sentence because the defendant would have the advantage of any "residual doubts" about guilt held by the jury at the time of sentencing.[28] But the Court declined to hold that defendants are entitled to instructions on "residual doubt."[29] Interestingly, during the same term as the *House* and *Kansas* decisions, Justice Breyer wrote the lead opinion for a unanimous Court, upholding a state law that precluded introduction of new evidence supporting an alibi in the penalty phase. Justice Breyer's opinion noted that "sentencing traditionally concerns *how*, not *whether*, a defendant committed the crime."[30]

The Court, or an individual justice, has touched upon the fallibility of the system in other recent cases. In 2002, the Court declared that the execution of the mentally retarded substantively violated the Eighth Amendment. One of the reasons for this decision was the risk that the mentally retarded would falsely confess to murder. Justice Stevens' opinion stated

> we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. These exonerations have included at least one mentally retarded person who unwittingly confessed to a crime that he did not commit.[31]

Prior to *Kansas*, Justice Breyer referred to the debate about the potential unreliability of convictions as one of a number of reasons he favored jury determination of the appropriate sentence.[32]

***Kansas v. Marsh***

Members of the Court did not debate the risk of "mistaken convictions" as a systemic issue until *Kansas v. Marsh*. The events leading up to the *Kansas* opinions began with the earlier briefing the same term in *House*.

In that case, convicted murderer House filed a habeas corpus petition raising claims in federal court that the state court had rejected on procedural grounds. The rule is that federal courts will not hear such claims (the "procedural default" rule).[33] But federal courts will excuse the default if the petitioner produces compelling evidence of actual innocence.[34] In *House*, the Supreme Court considered whether the petitioner had submitted convincing evidence of his innocence. The petition for writ of certiorari referred to an "increasing number of exonerations" in capital cases and cited the Web site of the Death Penalty Information Center (hereinafter DPIC).[35] The American Bar Association and a separate group of criminal law professors and former prosecutors filed amici curiae briefs. The ABA asserted that "innocence exonerations" were "uncommon," but still "increasingly frequent" and cited various sources including the DPIC.[36] The brief filed by law professors and former prosecutors similarly claimed that the recent exonerations of death row inmates had "garnered significant publicity," and included the DPIC as a source.[37] The State of California and 14 other states filed an amicus curiae brief criticizing the DPIC's List of death row exonerations.[38] Ultimately, a majority of the Court held that House had made a compelling case of "actual innocence." But neither the majority nor dissenting opinions discussed the larger issue of exonerations raised in the amici curiae briefs. That issue waited for a case that related to capital sentencing itself.

Later that same term, in *Kansas*, the issue did not involve the guilt or innocence of a convicted murderer. Rather, the question before the Court was whether the state could require a jury to impose a death sentence if the aggravating and mitigating factors were evenly balanced or in "equipoise."[39] By a 5–4 majority, the Court upheld the Kansas state law requirement since the Eighth Amendment did not prevent a state from permitting a sentence less than death only when the mitigating factors actually outweighed aggravating factors.

In his *Kansas* dissent, Justice Souter (joined by Justices Stevens, Ginsburg, and Breyer) argued for extending "the thrust of mitigation jurisprudence"

28. *Lockhart v. McCree* (1988) 476 U.S. 162. See also *Buchanan v. Kentucky* (1987) 483 U.S. 402.
29. *Franklin v. Lynaugh* (1988) 487 U.S. 164.
30. *Oregon v. Guzek* (2006) 546 U.S. 517, 526.
31. *Atkins v. Virginia* (2002) 536 U.S. 304, 320 & fn. 25.
32. *Ring v. Arizona* (2002) 536 U.S. 584, 616–617 (dis. opn. of Breyer, J.) (citing Stanford Study, *infra*, note 58 and newspaper article citing Death Penalty Information Center List).
33. *Wainwright v. Sykes* (1977) 433 U.S. 72, 90.
34. *Schlup v. Delo* (1995) 513 U.S. 298, 327.
35. The List is located at the DPIC Web site, available at <*http://www.deathpenaltyinfo.org/article.php?scid=6&did=110*> (last visited May 5, 2008) [hereinafter DPIC List]. The List's history and its criteria are explained on the DPIC's Web site. The referenced DPIC publications are also located at this Web site. Currently, the DPIC List contains 129 "exonerated" defendants. In 2004, the DPIC relied on its list to proclaim a capital punishment "crisis." DPIC, *Innocence and the Crisis in the American Death Penalty* (Sept. 2004).
36. *House v. Bell*, Brief of American Bar Association as Amicus Curiae Supporting Petitioner, 2005 WL 2367032.
37. *House v. Bell*, Brief of Former Prosecutors and Professors of Criminal Justice as Amicus Curiae Supporting Petitioner, 2005 WL 2367033.
38. *House v. Bell*, Brief of Amici Curiae of The States of California, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Kansas, Louisiana, Mississippi, Montana, Pennsylvania, South Dakota, Texas, and Washington in Support of Respondent, 2005 WL 3226399 (hereinafter California *House* Brief).
39. *Kansas*, *supra*, note 1 at 2528.
40. *Id.* at 2544–2545 (dis. opn. of Souter, J.).

and the Court's Eighth Amendment capital jurisprudence in general. He relied on what he characterized as a remarkable and unimaginable number of exonerations in capital cases. Justice Souter cited the evidence of "repeated exonerations of convicts under death sentences" and argued that those concerns were of "cautionary" and "practical" relevance to the constitutionality of Kansas' procedure for determining a capital sentence.[40] Without referring to the briefing filed in *House*, Justice Souter relied upon the "growing literature" cited in the amici curiae briefs filed in that case.[41] He concluded that,

> the same risks of falsity that infect proof of guilt raise questions about sentences, when the circumstances of the crime are aggravating factors and bear on predictions of future dangerousness.[42]

Justice Souter's dissent also included a pregnant observation that it was still "far too soon for any generalization about the soundness of capital sentencing across the country."[43]

Justice Thomas' majority opinion dismissed Justice Souter's concerns as "irrelevant," except to note that their "logical consequence" was a standard of perfection that would result in the improper judicial abolition of the death penalty.[44] Justice Thomas noted various studies and reports about exonerations in capital cases and, with prescience, stated that they invoked an "incendiary debate" that was beyond the scope of the pure sentencing issue presented by Kansas.[45] Of course, Justice Souter had already ignited the debate, and Justice Scalia fired back.

Justice Scalia vigorously criticized Justice Souter's dissent and the "growing literature" he cited. First, he noted, there was no showing that an "actually innocent" person had been executed under contemporary capital punishment laws.[46] Second, he challenged the methodology of the studies cited by Justice Souter. Third, he agreed with Justice Thomas that the reasoning of Justice Souter's dissent amounted to a quest for "100% perfection" in capital proceedings that would lead to additional unjustified judicially-created encumbrances on the imposition of the death penalty.[47] Fourth, Justice Scalia believed it necessary to point out the insubstantiality of Justice Souter's concerns in order to minimize the risk that the dissent would be trumpeted as vindicating "sanctimonious" international "finger-waggers."[48]

In his *Kansas* concurring opinion, Justice Scalia acknowledged that "courts and juries are not perfect."[49] But while acknowledging that imperfection is inevitable, Justice Scalia offered perspective on the misleading methodology, temporal irrelevance, and exaggerated rhetoric behind current claims relating to death row "exonerations."

Justice Scalia's concurrence highlighted the deficiencies in the list of allegedly exonerated death row inmates maintained by the DPIC. In the "inflation of the word 'exoneration,'" he identified the DPIC List as the "best known" catalogue of "'innocence' in the death-penalty context."[50] In particular, Justice Scalia cited information that was contained only in the California amici briefing in *House*.[51]

***[W]hile acknowledging that imperfection is inevitable, Justice Scalia offered perspective on the misleading methodology, temporal irrelevance, and exaggerated rhetoric behind current claims relating to death row "exonerations."***

Both Justice Thomas' opinion and Justice Scalia's concurring opinion in *Kansas* establish a bright line between guilt and penalty phases in capital cases. To the extent that a consideration of guilt and innocence affects Eighth Amendment procedural jurisprudence, it is limited only to statutes that preclude a jury from considering factors that would mandate a sentence less than death (the concern about mistaken acquittals that rendered mandatory statutes unconstitutional). That concern will not extend further to embellish the procedural requirements of the Eighth Amendment for imposition of the death penalty because its impossibly perfectionistic premise would effectively abolish capital punishment.[52]

41. *Id.* at 2544.
42. *Id.* at 2544–2546.
43. *Id.* at 2545.
44. *Id.* at 2528–2529.
45. *Id.* at 2528.
46. *Id.* at 2533.
47. *Id.* at 2538.
48. *Id.* at 2532–2533.
49. *Id.* at 2539.
50. *Id.* at 2537. When Justice Scalia wrote his opinion in *Kansas*, the DPIC List contained 123 "exonerated" defendants. The number listed, as of May 5, 2008, is 129. DPIC List, *supra*, note 35.
51. *Id.* at 2531–2539 (conc. opn. of Scalia, J.); California *House* Brief, *supra*, note 38 at 13–16, 21 (discussing the Steven Smith, Jeremy Sheets, and Delbert Tibbs cases).
52. *Kansas*, *supra*, notet 1 at 2529 (maj. opn. of Thomas, J.), 2539 (conc. opn. of Scalia, J.).

But as already noted, the specific purpose of this article is to elaborate on, and expand upon, Justice Scalia's concurring opinion in *Kansas*. The article briefly sets forth the history and development of the DPIC List. In addition, it further buttresses Justice Scalia's criticisms of the DPIC List's definitions of "exoneration" and "actual innocence," and show how its approach artificially inflates the number of truly innocent defendants.[53]

## Background of the DPIC List

Although there are other studies and lists relating to innocence,[54] it is appropriate to focus on the DPIC List because it is concerned exclusively with capital cases since 1970. Most (though by no means all) capital cases tried since 1970 have been subject to the various procedural protections mandated by the Supreme Court's post-*Gregg* Eighth Amendment jurisprudence, and the DPIC List is the most prominent and frequently cited of the lists of allegedly innocent condemned inmates. Most significantly, the DPIC List is the leading edge of the current strategy for the abolition of the death penalty in the United States.[55]

According to its Web site, DPIC derives its List from court opinions, media reports, and conversations with unidentified participants.[56] Although the List was commissioned by the House Subcommittee on Civil and Constitutional Rights in 1993, it traces its origins to studies referenced in *Herrera*.[57] These studies were discussed in an academic exchange of articles in the 1988 Stanford Law Review.[58]

The Stanford study focused primarily on "wrong person" mistakes, cases in which the defendant was both legally and physically uninvolved. It excluded cases in which the defendant was acquitted on grounds of self-defense. The Stanford authors admitted that their study was not definitive and that their conclusions about innocence were based on their untested belief that a "majority of neutral observers" examining these cases would conclude the defendants named in their study were actually innocent.[59] The popular successor to the Stanford study is the 1992 book by the same authors entitled *In Spite of Innocence*.[60]

The most recent refinement of the Stanford study appears in Radelet, Lofquist & Bedau, *Doubts About Their Guilt*, published in the Cooley Law Review in 1996.[61] This article altered the criteria in the Stanford study. For instance, it included accomplices mistakenly convicted as actual perpetrators. More notably, Cooley

> includ[ed] cases where juries have acquitted, or state appellate courts have vacated the convictions of defendants, because of doubts about their guilt (*even if we personally believe the evidence of innocence is relatively weak*).[62]

Regrettably, the Cooley article does not identify all the cases which the authors believe are "relatively weak" examples of actual innocence.

The DPIC List amalgamates the cases listed in these studies with other cases. It has recently described its revised criteria for inclusion of cases on its list.

> The definition of innocence that DPIC uses in placing defendants on the list is that they had been convicted and sentenced to death,

53. Due to constraints of space, this article cannot conduct an exhaustive analysis of all 129 inmates currently named on the DPIC List. A more detailed and complete examination of this topic by this author will be published electronically on the Web sites of both the California District Attorneys Association (*www.cdaa.org*) and the Institute for the Advancement of Criminal Justice (*www.iacj.org*).
54. For instance, the amici in *House* and Justice Scalia in *Kansas* also cite Samuel Gross, *Exonerations in the United States 1989 Through 2003* (2004) 95 J. Crim. L. & Criminology 523. This study relies substantially on the DPIC List although it does not agree with the DPIC List regarding all defendants. The Gross study also includes cases other than capital crimes.
55. York, *supra*, note 3 at pp. 20–23.
56. DPIC Web site, *supra*, note 35.
57. *Herrera*, *supra*, note 14 at 415.
58. Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases* (1987) 40 Stan. L.Rev. 21 (hereinafter Stanford); Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study* (1988) 41 Stan. L.Rev.121; Bedau & Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell* (1988) 41 Stan. L.Rev.161 (hereinafter Stanford Reply).
59. Stanford, *supra*, note 58 at 23–24, 45, 47–48, 74. Ironically, the DPIC has now repudiated this "neutral observer" standard without acknowledging that it was originated by the Stanford study for cases now included on the DPIC List. See *Innocence and the Crisis in the American Death Penalty*, *supra*, note 35.
60. Bedau & Radelet, In Spite of Innocence (Northeastern 1992). Both the Stanford study and its immediate sequel were limited to "wrong person" convictions. However, most of the cases cited did not involve death sentences. They also included cases in which the defendant committed crimes for which the death penalty can no longer be sought. On the other hand, these studies also excluded cases in which the defendants were actual perpetrators, even if they acted in self-defense or were insane.
61. Radelet, Lofquist & Bedau, *Doubts About Their Guilt* (1996) 13 T.M. Cooley L.Rev. 907 (hereinafter Cooley).
62. *Id.* at 914 (emphasis added), 917 (identifying Samuel Poole as a "weak" example of an innocent defendant).

and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped; or b) they were given an absolute pardon by the governor based on new evidence of innocence.[63]

As will be shown below, these criteria do not accurately identify persons sentenced to death who are "actually innocent" of the underlying crime. They are not consistent with the "wrong person" criteria used in the original Stanford study nor are they consistent with popular understanding of true exoneration. To the extent that the DPIC's definition was intended to act like a presumption of "actual innocence," it fails since it will not reach the correct result most of the time.[64]

## The Expansion of Innocence: Why the DPIC List is Overly Inclusive

"A prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime."[65] The DPIC List criteria quoted above have obvious shortcomings in terms of identifying the "actually innocent" because appellate reversals, acquittals on retrial, and prosecutorial dismissals are not conclusive evidence of innocence.[66] The DPIC List is misleading for another reason: it includes defendants whose convictions were reversed due to legal insufficiency, not based on successful assertions to a judge or jury of actual "wrong person" innocence. Justice Scalia described this flaw as a failure to,

> distinguish[] between 'exoneration of a convict because of actual innocence, and reversal of a judgment because of legal error affecting conviction or sentence but not inconsistent with guilt in fact.[67]

The DPIC List, according to Justice Scalia, inflates the word "exoneration" by "mischaracteriz[ing] reversible error as actual innocence."[68]

### *The DPIC List Equates Acquittals and Dismissals with "Actual Innocence"*

When a jury acquits a defendant because the prosecution has not proven guilt beyond a reasonable doubt, that verdict does not mean that the defendant did not actually commit the crime, i.e., that the defendant is "actually innocent."[69] Even an acquittal based on self defense

63. DPIC List, *supra*, note 35. Due to this revision, the DPIC removed six defendants it had formerly classified as "exonerees," including Californians Jerry Bigelow and Patrick Croy. Both of these defendants had been listed on the DPIC List even though they were indisputably actual perpetrators or physically involved in the murders for which they had been sentenced to death. *Bigelow v. Superior Court (People)* (1989) 208 Cal.App.3d 1127 (jury acquitted Bigelow of first-degree murder, but found true that the murder occurred while Bigelow was committing or was an accomplice in the commission of robbery and kidnapping; court mistakenly excused jury before giving it the opportunity to clarify its inconsistent verdict; however, this verdict still established that the jury rejected Bigelow's defense and believed he was at least an accomplice to first degree murder); *People v. Croy* (1985) 41 Cal.3d 1 (Croy's conviction of conspiracy to commit murder was affirmed, but his first-degree murder conviction was reversed for instructional error, his defense at his first trial was intoxication); Talbot, *The Ballad of Hooty Croy*, L.A. Times (June 24, 1990) p. 16 (Croy abandoned intoxication on retrial and changed his defense to "cultural self defense" based on his status as a Native American). The DPIC has prudently chosen not to place another Californian, Lee Perry Farmer, on its List even though it has asserted that his case is one of "probable innocence." Farmer is not an appropriate candidate for a designation of "actual innocence." Farmer and an associate, Huffman, were tried separately for a 1981 burglary murder connected with their extortionate scheme to collect a drug debt from the victim's roommate owed to Farmer. Huffman was acquitted. At his trial, Farmer blamed Huffman for the killing and claimed he did not participate. Farmer was nonetheless convicted. His original death sentence was reversed because of instructional error in the penalty phase. (*People v. Farmer* (1989) 47 Cal.3d 888.) On retrial, Farmer was sentenced to life imprisonment without the possibility of parole. Thus, the normal appellate review process worked to reduce his sentence. Ultimately, Farmer's second trial was also reversed on federal habeas corpus for ineffective assistance of counsel, and he was acquitted of murder at his third trial, although he was found guilty of burglary and accessory to murder. (*Farmer v. Ratelle* (9th Cir. 1997) 133 F.3d 146, 1997 WL 730314 (unpublished disposition); Kataoka, *Retrial Jury Acquits Man Who Has Served 16 Years*, Riverside Press-Enterprise (Jan. 16, 1999) p. B1.) It was undisputed that Farmer and Huffman broke into the victim's apartment a first time and stole his roommate's gun and other valuables. According to Farmer, they returned to the apartment a few hours later to confront the debtor about the "collateral" they had collected. Over his objections, Huffman had reentered the apartment to steal more items when the murder occurred. However, the victim remained alive long enough to tell police that his killer had drug dealings with his roommate and that his name was in a "phone book." Farmer fit this description. By the time of the third trial, six witnesses from the first trial were unavailable and the prosecutor could only read their prior testimony into the record. The prosecution did not charge and convict the wrong people for murder—either Farmer or Huffman was the guilty party. Farmer was involved in the activities leading up to the murder and afterwards. The only issue is whether he or Huffman was the triggerman. That controversy centers on contradictory confessions and accusations by Huffman. Huffman made contradictory statements, but he never personally testified he was the actual killer, even after he was acquitted and could not be retried. Both men benefited from having separate trials when each could blame the other. At his final trial, Farmer presented evidence of his transformation from a drug maker into a "highly spiritual man." A year after his acquittal, he apparently transformed back to a life of crime and pled guilty to methamphetamine crimes in both Riverside and San Bernardino Counties. (Kataoka, *Slaying Suspect to Go in Front of Third Jury*, Riverside Press-Enterprise (Jan. 2, 1999) p. B1; Kataoka, *Ex-death Row Inmate Pleads Guilty*, Riverside Press-Enterprise (Nov. 2, 2001) p. B3; *People v. Farmer* (2004) 2004 WL 405901 (unpublished opinion affirming seven-year sentence for manufacturing methamphetamine).)
64. *Coleman v. Thompson* (1991) 501 U.S. 722, 737 ("Per se rules should not be applied, however, in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time.").
65. *Sawyer v. Whitley* (1992) 505 U.S. 333, 340; *Johnson v. Pinchak* (3d. Cir. 2004) 392 F.3d 551, 564.
66. Stanford Reply, *supra*, note 58 at 162.
67. *Kansas*, *supra*, note 1 at 2536.
68. *Id.* at 2537.
69. *Dowling v. United States* (1990) 493 U.S. 342, 249; *Graham v. City of Philadelphia* (3rd Cir. 2005) 402 F.3d 139, 145 ("an acquittal (i.e., not guilty beyond a reasonable doubt) following a criminal trial is not ipso facto a finding of actual innocence").

represents no more than the jury's determination that there was a reasonable doubt about guilt, not that the defendant was "actually innocent."[70]

Implicit in the "reasonable doubt" standard, of course, is that a conviction does not require "absolute certainty" as to guilt.[71] Equally implicit, however, is that many guilty defendants will be acquitted, rather than convicted, because the proof does not eliminate all "reasonable doubt."[72] A jury must acquit "someone who is probably guilty but whose guilt is not established beyond a reasonable doubt."[73]

> It is important to preserve the distinction between acquittal and innocence, which is regularly obfuscated in news media headlines. When acquittal is interpreted as a finding of innocence, the public is led to believe that a guiltless person has been prosecuted for political or corrupt reasons.[74]

Similarly, the dismissal or dropping of charges after reversal of a conviction does not necessarily mean that the prosecution has concluded that the defendant is innocent.

> Prosecutors sometimes fail to retry the defendant after a reversal not because of doubt about the accused's guilt, much less because of belief that the defendant is innocent or that the defendant is not guilty "beyond a reasonable doubt," but for reasons wholly unrelated to guilt or innocence (for example, the prosecution's chief witnesses may have died or disappeared).[75]

"Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible."[76] Finally, in egregious cases, a case may be dismissed due to prosecutorial misconduct even if the defendant is not actually innocent.[77]

As an example of a defendant whose name has been misplaced on the DPIC List, Justice Scalia's *House* concurrence focuses on the particularly notorious example of Jay C. Smith (48),[78] a defendant whose case was dismissed for reasons other than "actual innocence."[79] As a matter of Pennsylvania law, Smith escaped retrial for triple murder due to prosecutorial misconduct.[80] But when he sought damages from the government for false imprisonment stemming from his initial conviction, the federal appeals court conclusively retorted, "Our confidence in Smith's convictions for [triple-murder] is not the least bit diminished."[81] Yet Smith still remains on the DPIC List as an "exoneree."[82]

There are cases similar to Smith's on the DPIC List. For instance, the Florida Supreme Court explained that,

> evidence exists in this case to establish that [Robert Hayes (71)] committed this offense [rape-murder], physical evidence also exists to establish that someone other than Hayes committed the offense.[83]

The appeals court excluded evidence of Hayes' semen on the victim's shirt. Despite the presence of Hayes' semen in the victim's vagina, other circumstantial evidence pointing at another perpetrator raised a reasonable doubt about Hayes.[84] But Hayes' acquittal hardly establishes that the prosecution was trying the "wrong person."

Similarly, when the California Supreme Court vacated Troy Lee Jones' (66) murder conviction on grounds of ineffective assistance of counsel, the court noted that there was still evidence suggesting Jones' guilt even if that evidence was not overwhelming.[85] The court did not indicate that Jones was actually innocent. But due to the passage of time, the prosecution no longer had the evidence and witnesses available to retry Jones' case.[86]

Warren Douglas Manning (83) was tried five times before he was acquitted. The first four trials ended as either mistrials or convictions that were reversed for instructional and venue error.[87] But the jury's verdict was not based on "actual

70. *Martin v. Ohio* (1987) 480 U.S. 228, 233–234; *Beavers v. Saffle* (10th Cir. 2000) 216 F.3d 918.
71. *Jackson v. Virginia* (1979) 443 U.S. 307, 316 (a "subjective state of near certitude"); *Victor v. Nebraska* (1994) 511 U.S. 1, 16 (upholding California's "reasonable doubt" instruction and agreeing that "everything 'is open to some possible or imaginary doubt'").
72. *Smith v. Balkcom* (5th Cir. 1981) 660 F.2d 573, 580.
73. *Gregg*, *supra*, note 12 at 225 (conc. opn. of White, J.).
74. Schwartz, *"Innocence"—A Dialogue with Professor Sundby* (1989) 41 Hast. L.J. 153, 154–155, cited in Bedau & Radelet, *The Execution of the Innocent* (1998) Law & Contemporary Problems 105, 106, fn. 9.
75. Bedau & Radelet, *supra*, note 74 at 106.
76. *Engle v. Isaac* (1982) 456 U.S. 107, 127.
77. *Commonwealth v. Smith* (Pa. 1992) 615 A.2d 321, 325. See also *People v. Batts* (2003) 30 Cal.4th 660.
78. The parenthetical number refers to a defendant's numerical placement on the DPIC List as of May 5, 2008. See DPIC List, *supra*, note 35; Marquis, *supra*, note 18 at 516.
79. *Kansas*, *supra*, note 1 at 2536–2537.
80. *Smith v. Holtz* (3d Cir. 2000) F.3d 186, 188.
81. *Id.* at 201.
82. DPIC List, *supra*, note 35.
83. *Hayes v. State* (Fla. 1995) 660 So.2d 257, 266.
84. Florida Commission on Capital Cases, *Case Histories: A Review of 24 Individuals Released from Death Row* (Sept. 10, 2002) pp. 38–39 (hereinafter Fla. Comm'n).
85. *In re Jones* (1996) 13 Cal.4th 552, 588.
86. Herendeen, *Killer's Appeal Could Take Decades with Huge Backlog, Death Penalty Cases Creep Through System*, Modesto Bee (Mar. 17, 2005) p. A12.
87. *State v. Manning* (S.C. 1991) 409 S.E.2d 372; *State v. Manning* (S.C. 1997) 495 S.E. 2d 191.

innocence." Rather, as Manning's lawyer conceded to the jury:

> If there wasn't any case against Warren Manning, then we wouldn't be here. But the law requires that the state prove him guilty beyond a reasonable doubt. Without that, the law says you cannot find him guilty.[88]

Most recently, and despite Justice Scalia's criticism, the DPIC listed Curtis McCarty (124) as an exonerated death row inmate. McCarty was convicted and sentenced to death for a murder related to a sexual assault. McCarty's case was not dismissed because he was innocent. Rather, the trial court found that the actions of a former police chemist had tainted or destroyed forensic evidence in the case. Based on the other evidence, the trial court judge actually advised McCarty that she believed that McCarty was still involved in the murder for which he had been convicted.[89] The other evidence included McCarty's fingerprint at the scene of the crime, evidence that the rope wrapped around the victims' neck was similar to rope manufactured at McCarty's place of employment, evidence that he was in the vicinity of the murder the night it occurred and that he made admissions referencing the death of a girl and indicating a consciousness of guilt, and his own inconsistent statements. Although DNA testing showed that sperm in the victim was not McCarty's, both the trial court and the reviewing court found that McCarty was not exonerated since the testing did not eliminate the possibility that he had acted with an accomplice. The actions of the forensic chemist ultimately compromised the case, but there was still substantial evidence of McCarty's guilt.[90]

***The DPIC List Includes Defendants Whose Cases Were Reversed for Legal Insufficiency, Not Actual Innocence***

The DPIC List violates its own criteria by including cases in which convictions were reversed due to legal insufficiency, not because of actual innocence. The federal standard for legal sufficiency was articulated in *Jackson v. Virginia*.[91] But "[a]ctual innocence means factual innocence, not mere legal insufficiency."[92] A finding that the evidence could not reasonably prove guilt beyond a reasonable doubt is not the equivalent of an exoneration.[93]

Of course, if an appeals court reverses a conviction because the evidence of guilt was legally insufficient to prove guilt beyond a reasonable doubt, then the state cannot retry the defendant under the Double Jeopardy Clause.[94] The prosecution gets no second chance, even if there is better evidence of guilt available. But that does not mean that the defendant who is released is the "prototypical" example of "actual innocence," the "wrong person." Rather, it is a,

> vindication of [the capital justice system's] effectiveness in releasing not only defendants who are innocent, but those whose guilt has not been established beyond a reasonable doubt.[95]

When defendants' convictions are returned for legal insufficiency, they are not "innocent" under the DPIC List's own criteria. They were not "acquitted at a re-trial" nor were "all charges … dropped" due to their innocence nor were they pardoned based on innocence.

As Justice Scalia's *Kansas* opinion points out, the inclusion of Steven Smith's (79) case refutes any claim that the DPIC List distinguishes between pure "legal error" and "actual innocence."[96] He found significant that the Illinois Supreme Court reversed Smith's conviction for insufficiency of the evidence with the following caveat:

> While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. They find them guilty or not guilty. A not guilty verdict expresses no view as to a defendant's innocence. Rather, it indicates simply that the prosecution has failed to meet its burden of proof.… When the State cannot meet its burden of proof, the defendant must go free. This case happens to be a murder case carrying a sentence of death against a defendant where the State has failed to meet its burden. It is no help to speculate that the defendant may have killed the victim.[97]

Interestingly, Justice Souter's dissent simply cited Smith as an example of an exoneration without any particular explanation or analysis.[98]

Other cases on the DPIC List echo Justice Scalia's point about the Steven Smith case. For instance, Andrew Golden's (55) conviction was reversed because of legal insufficiency of the

88. *Man Found Innocent in Trooper's Death*, Associated Press (Sept. 30, 1999).
89. Camp, *Convicted Murderer is Freed in Wake of Tainted Evidence*, N.Y. Times (May 22, 2007) p. A16.
90. *McCarty v. State* (Okl.1995) 904 P.2d 110; *McCarty v. State* (Okla. 2005) 114 P.3d 1089.
91. *Jackson v. Virginia* (1979) 443 U.S. 307.
92. *Bousley v. United States* (1998) 523 U.S. 614, citing *Sawyer, supra*, note 65 at 340 (stating that the prototypical example of actual innocence is the "wrong person"); *United States v. Ramos* (3rd Cir. 1998) 147 F.3d 281, 286.
93. *Jackson, supra*, note 91 at 33.
94. *Burks v. United States* (1978) 437 U.S. 1, 16–18.
95. *Kansas, supra*, note 1 at 2536.
96. *Id.*
97. *People v. Smith* (Ill. 1999) 708 N.E.2d 365, 371.
98. *Kansas, supra*, note 1 at 2545.

evidence, not "actual innocence." "The finger of suspicion points heavily at Golden. A reasonable juror could conclude that he more likely than not caused his wife's death."[99]

Similarly, the appeals court reluctantly reversed John C. Skelton's (42) conviction.

> Although the evidence against appellant leads to a strong suspicion or probability that appellant committed the capital offense, we cannot say that it excludes to a moral certainty every other reasonable hypothesis except appellant's guilt …. Although this Court does not relish the thought of reversing the conviction in this heinous case and ordering an acquittal, because the evidence does not exclude every other reasonable hypothesis, we are compelled to do so.[100]

Jimmy Lee Mathers (44) was released after his conviction was reversed by a sharply split Arizona Supreme Court for legal insufficiency of the evidence. The contrasting majority and dissenting opinions that debate the substantiality of the evidence demonstrate that Mathers was not found "actually innocent."[101]

### *The DPIC List Includes Defendants Who Benefited From the Exclusion of Evidence of Their Guilt*

Defendants who cannot be retried because they have benefited from the "windfall" of suppressed or excluded evidence of their guilt are not "actually innocent."

> [I]t has long been clear that exclusion of illegally seized but wholly reliable evidence renders verdicts less fair and just, because it "deflects the truthfinding process and often frees the guilty."[102]

Yet the DPIC List contains defendants whose cases were dismissed because evidence of their guilt was excluded on retrial, not because they were the "wrong persons."

In particular, Justice Scalia singled out Jeremy Sheets (97).[103] The Nebraska Supreme Court reversed Sheets' conviction because the trial court should have excluded some prosecution evidence. However, there was no showing that this excluded evidence was unreliable. In light of this state court ruling, the prosecution did not retry Sheets. But the Nebraska State Victims' Compensation Fund denied Sheets' request for compensation because the dismissal of his case was not based on innocence.[104] The Eighth Circuit Court of Appeals dismissed Sheets' civil rights suit because there was no showing that the evidence of Sheets' guilt, including the excluded evidence, was unreliable.[105]

When he was interrogated about the murderous sexual assault of a six-year-old boy in the little boy's bedroom, Jonathan Treadaway (13) made a number of incriminating statements to police and failed to explain other incriminating evidence including the presence of his two palm prints outside the victim's locked bedroom window. The evidence of his statements was suppressed because of a technical violation of *Miranda v. Arizona*.[106] Of course, the exclusion of a statement on *Miranda* grounds does not mean that the statements were unreliable.[107] The exclusion of these statements precluded evidence of a "consciousness of guilt" by Treadaway that could have affected the jury's ultimate acquittal of him on retrial since jurors were concerned that the prosecution had not presented enough evidence to establish that Treadaway was inside the boy's home.[108] The acquittal did not mean that Treadaway was "actually innocent."

The trial court excluded evidence of Dale Johnston's (43) guilt that was seized as the "fruit of the poisonous tree" of an unconstitutionally coercive interrogation.[109] Subsequently, a state trial court rejected Johnston's request for compensation for wrongful imprisonment because his innocence was not established.[110]

Benjamin Harris (70) made incriminating statements that he committed a contract killing to the police, which he then contradicted on the witness stand when he denied that the killing was contractual. The incriminating statements were then suppressed on

99. *Golden v. State* (Fla. 1993) 629 So.2d 109, 111.
100. *Skelton v. State* (Tex. Crim.App. 1989) 795 S.W.2d 162, 168–169.
101. *State v. Mathers* (Ariz. 1990) 796 P.2d 866.
102. *Kimmelman v. Morrison* (1986) (conc. opn. of Powell, J.); *In re Neely* (1993) 6 Cal.4th 901, 922–925 (conc. opn. of Arabian, J.) (suppression of tape recording of defendant's admissions renders retrial "inherently less reliable").
103. *Kansas*, *supra*, note 1 at 2537.
104. Nebraska Op. Att'y Gen., No. 01036 (Nov. 9, 2001).
105. *Sheets v. Butera* (8th Cir. 2004) 389 F.3d 772.
106. *State v. Corcoran* (Ariz. 1978) 583 P.2d 229 (citing *Miranda v. Arizona* (1966) 384 U.S. 436).
107. *Dickerson v. United States* (2000) 428, 444.
108. Bedau & Radelet, *supra*, note 60 at 349. At Treadaway's first trial, he had testified that he had not looked in the victim's window that night or anytime shortly before. However, the testimony of the victim's mother that she washed the front windows of the house the day before the murder raised the inference that Treadaway's palm prints were fresh. (*State v. Treadaway* (Ariz. 1977) 568 P.2d 1061, 1062–1063.) Treadaway had also been arrested for a similar sexual attack of a boy in the boy's bedroom three months before the murder for which he was initially convicted and sentenced to death. A physical examination of Treadaway's pubic area and clothes revealed the presence of "rare" crab louse sacks. When Treadaway was interrogated after his arrest for murder, he admitted he had "crabs." However, even though the court admitted evidence of Treadaway's prior bad similar act, the later admission about his lice was suppressed. (*State v. Corcoran*, *supra*, note 106.) Thus, on retrial, the jury heard about Treadaway's prior crime, but did not hear the evidence about the infestation that identified him as the perpetrator of both crimes.
109. *State v. Johnston* (Ohio 1990) 580 N.E.2d 1162.
110. *Conviction Reversed, But Money Denied*, Cleveland Plain Dealer (Aug. 11, 1993) p. B3.

the ground that Harris's attorney was ineffective for permitting Harris to talk to the police.[111] Harris was not retried.[112]

### *The DPIC List Includes Defendants Who Were the Actual Perpetrators or Principals*

Contrary to the original Stanford Study, the DPIC List now includes defendants who were involved in the murders they were charged with committing, even if they were not the actual perpetrators. Richard Neal Jones (34) was acquitted of murder, but remained implicated in the conspiracy leading to the murder.[113]

Similarly, the evidence was insufficient that Ricardo Aldape Guerra (69) was the actual triggerman in the murder of a police officer, but the evidence remained that he was an accomplice.[114] Since Guerra was not prosecuted under Texas' "law of parties," he could not be retried.[115]

The DPIC List also abandons the criteria of the Stanford Study and includes defendants who were not the "wrong persons," but were acquitted on grounds of justified or excusable homicide: Michael Linder (18) (self defense) and Robert Wallace (33) (accidental shooting/self-defense).[116]

### *The DPIC List's Criteria Precludes Critical Review of Cases of Alleged "Actual Innocence"*

Justice Scalia criticized Justice Souter's dissent, and impliedly the DPIC List, for being "willing to accept anybody's say-so" in "identifying exonerees," and without engaging in any "critical review."[117] As a result, the DPIC List includes some "dubious candidates."[118]

The DPIC List includes defendants who were acquitted based on recantations that are "properly viewed with great suspicion." For instance, the DPIC List includes defendants who ultimately benefited when witnesses in their cases repudiated or recanted their earlier testimony or statements. Yet, recantations "are properly viewed with great suspicion."[119] Notwithstanding the inherent unreliability of recantations, the DPIC List includes defendants who were acquitted or who had their cases dismissed because of recanted testimony and statements.

For instance, Joseph Green Brown (27) could not be retried because of the multiple recantations of the prosecution's witness.[120]

Oscar Lee Morris (93) was found ineligible for the death penalty due to insufficient evidence.[121] Ultimately, he was released due to a "deathbed recantation" given by a prosecution witness under "suspicious circumstances."[122] After Morris's unsuccessful civil rights suit, the Los Angeles City Attorney referred to the recantation as "an under-the-cover recitation with nobody who can verify it one way or another."[123]

When Joaquin Martinez (96) was returned for retrial, his ex-wife recanted the testimony she gave against him at the first trial. The taped statements that could have contradicted her recantation were excluded.[124]

Recently, in May 2008, the DPIC posted Levon Jones (129) on the "Innocence List." A federal district court vacated Jones' conviction and death sentence for murdering Leamon Grady due to ineffective assistance of counsel for failure to adequately impeach the prosecution's main witness, Lovely Lorden, and present evidence of another suspect. Significantly, the federal district court refused to find that Jones was actually innocent, only that this new evidence

> may well have caused one or more of the jurors to have a reasonable doubt … however, [the evidence was

111. *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432.
112. O'Hagan, *Exonerated but Never Set Free Is Benjamin Harris Mentally Ill or Sane*, Seattle Times (Mar. 31, 2003) p. B1.
113. See *Jones v. State* (Okla.Crim.App. 1987) 738 P.2d 525; *Mann v. State* (Okla.Crim.App.1988) 749 P.2d 1151; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 817, 859; *Thompson v. State* (Okla.Crim.App. 1986) 724 P.2d 780 (separate trial of co-defendant with evidence directly implicating Jones).
114. *Guerra v. Johnson* (5th Cir. 1996) 90 F.3d 1075, 1076.
115. *Plata v. State* (Tex.Crim.App. 1994) 875 S.W.2d 344, 347 (under the "law of parties," "a person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." If a defendant is tried only as an actual perpetrator and then the conviction is reversed, he or she cannot be retried under the "law of parties.").
116. *Cooley*, *supra*, note 61 at 948, 961–962.
117. *Kansas*, *supra*, note 1 at 2536.
118. *Id.* at 2537.
119. *Dobbert v. Wainwright* (1984) 1233 (dis. opn. of Brennan, J.). See also *Allen v. Woodford* (9th Cir. 2005) 395 F.3d 979, 994.
120. Fla. Comm'n, *supra*, note 84 at 18. In fact, Justice Brennan actually cited Brown's case for the proposition that recantations should be viewed with great suspicion. *Dobbert*, *supra*, note 119 at 1233, citing *Brown v. State* (1980) 381 So.2d 690.
121. *People v. Morris* (1988) 46 Cal.3d 1. Thus, the state court had already found him legally ineligible for the death penalty.
122. *People v. Oscar Lee Morris* (Super. Ct. L.A. County, 2000, No. BH001152).
123. Russell, *L.B. Wins Suit over Ex-Inmate; Court, Jurors Quickly Decide that Officers didn't Violate Man's Civil Rights*, Long Beach Press-Telegram (Nov. 21, 2002) p. A4.
124. *Martinez v. State* (Fla. 2000) 761 So.2d 1074; Fla. Comm'n, *supra*, note 84 at 70–71.

not] so compelling as to establish that *no* reasonable juror could have found [Jones] guilty of murder.[125]

Witness Lorden had testified against Jones because she was afraid of him and wanted to make certain he was never released.[126] When the prosecution decided not to seek the death penalty on retrial, the North Carolina sentencing law made Jones eligible for release after 20 years. Lorden immediately recanted. Since another witness and investigator who could have provided incriminating testimony against Jones had died during the 15 years since the trial, the prosecution dismissed the case. Accordingly, this is not a case in which Jones was found actually innocent. The main witness recanted under suspicious circumstances consistent with her fear of his pending release and other evidence was no longer available. The federal court which vacated the original conviction did not find evidence of Jones' innocence sufficiently compelling to preclude a retrial. "As a result of this delay, the State has been severely handcuffed in its obligation to prosecute Mr. Jones for the murder of Leamon Grady."[127]

The DPIC List ignores evidence from co-defendant's trials that is inconsistent with claims of "actual innocence." When co-defendants are tried separately, evidence admissible against a defendant in one trial may not be admissible in the other co-defendant's trial. This may include evidence of the co-defendant's guilt.[128] An analysis of an allegedly exonerated prisoner's co-defendant sometimes provides a more complete picture of the offense and casts doubt on an a prisoner's innocence claim. In several cases, the evidence elicited in other trials casts doubts on the "actual innocence" of defendants listed on the DPIC List.

James Robison's (53) conviction was reversed due to evidentiary error, and he was acquitted on retrial. However, evidence incriminating Robison was introduced at the separate trial of his alleged accomplice.[129]

Muneer Deeb (54) was acquitted of a bungled murder for hire after his case was reversed for hearsay error. A previous witness also refused to testify.[130] But evidence at the separate trial of Deeb's alleged co-conspirator still connected Deeb with the murder.[131]

The DPIC List ignores media reports inconsistent with "actual innocence."

> Defendants are acquitted for many reasons, the least likely being innocence. A defendant may be acquitted even though almost every member of the jury is satisfied of his guilt if even one juror harbors a lingering doubt.[132]

Although the DPIC List cites media reports as sources for its information, it disregards statements by jurors inconsistent with the conclusion that a defendant is "actually innocent." While such statements are not admissible as evidence, these contemporaneous post-verdict explanations illustrate the distinction between acquittal and "actual innocence."

The jurors who acquitted Robert Charles Cruz (58) explained their not guilty verdict as a matter of "reasonable doubt."

> Jurors admitted that they had doubts as soon as they voted unanimously for acquittal, with some saying they walked into the courtroom with aching stomachs. Some said they were consoled by the thought that if Cruz was involved, he had spent nearly 15 years in prison.[133]

Similarly, a juror in the Alfred Rivera (84) trial characterized the acquittal as only a matter of reasonable doubt.[134]

Sabrina Butler (61) was acquitted after the state court reversed her conviction because the prosecutor improperly commented on her failure to testify at her trial for murdering her infant son Walter by inflicting fatal abdominal injuries.[135] She was acquitted on retrial, but not necessarily because she was not the actual killer of her young baby. There were alternative explanations for the baby's death, and the jury foreperson indicated only that the jury had a "reasonable doubt" that Butler administered the fatal blow. Butler's own attorney stated that he "doesn't know what the truth is." Butler's co-counsel indicated that, at best, the case should have been prosecuted as a manslaughter, hardly an endorsement of Butler's innocence. Butler's acquittal on retrial does not represent a finding that she did not administer the deadly trauma that killed Walter.[136]

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125. *Jones v. Polk* (N.C. No. 5:00-HC-238-BO), Order denying Motion to Alter/Amend Judgment at p. 17 (Dec. 11, 2006).
126. *State v. Jones* (N.C. 1996) 466 S.E.2d 696, 698–699.
127. Berendt, *Charges Dropped in Murder Case*, The Sampson Independent (May 3, 2008), available at <*http://www.clintonnc.com/articles/2008/05/06/news/doc481bdc03be172283963282.txt*> (last visited May 15, 2008).
128. See, e.g., *Deeb v. State* (Tex.Crim.App. 1991) 815 S.W.2d 692, 696 (incriminating statements of co-conspirator inadmissible in other conspirator's trial since statements were made after conspiracy had terminated).
129. *State v. Dunlap* (Ariz.App. 1996) 930 P.2d 518, 535.
130. *Deeb v. State*, *supra*, note 128 at 696; Kessler, *Fighting the System Ex-Inmate Acquitted of Waco Murders Embraced by Rights Advocates, But Skeptics Doubt Innocence*, Dallas Morning News (Nov. 4, 1993) p. A1.
131. *Spence v. Johnson* (5th Cir. 1996) 80 F.3d 989, 1004 fn. 12.
132. Schwartz, *supra*, note 74 at pp. 154–155.
133. Brown, *Man Freed in 5th Murder Trial Served 14 Years, Faced Execution for Slayings*, Arizona Republic (June 2, 1995) p. B1.
134. *Ex-Death Row Inmate Acquitted in Retrial*, Charlotte Observer (Nov. 24, 1999) p. C5.
135. *Butler v. State* (Miss. 1992) 608 So.2d 314.
136. Simmons, *Mom Struggling to Adjust After Being Freed in Controversial Death of Child but Prosecutor calls Sabrina Butler Verdict a Miscarriage of Justice*, Mississippi Clarion-Ledger (Jan. 22, 1996) p. 1.

***The DPIC List Includes Cases in Which the Conventional System of Appellate Review Worked to the Defendant's Benefit***

Cases in which convictions were reversed "in the normal course of appellate review" without the "fortuitous discovery of new evidence" should have no "legitimate role to play in attacks on the death penalty."[137] As Justice Scalia elaborated:

> Reversal of an erroneous conviction on appeal or on habeas … demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.[138]

The DPIC List includes many cases in which defendants were acquitted on retrial after reversal on direct review or were released on grounds of insufficient evidence due to the idiosyncrasies of state laws that are even more stringent than the federal standards for sufficiency of the evidence.[139] Delbert Tibbs (11) was convicted and sentenced to death for murdering the boyfriend of the woman he raped. On appeal, Tibbs benefitted from a now obsolete Florida rule that "carefully scrutinized" the testimony of the rape complainant since she was the sole witness in the rape case "so as to avoid an unmerited conviction."[140] Thus, despite the evidence of Tibbs' guilt as stated in this Court's opinion in *Tibbs v. Florida*[141] his conviction was reversed—an action that the Florida Supreme Court later regretted as "clearly improper."[142]

Annibal Jaramillo (21) was released after his conviction was reversed for insufficient evidence because of Florida's peculiar state law which required circumstantial evidence to be inconsistent with any reasonable hypothesis of innocence. This demanding standard of certitude is not required by the Constitution or utilized in other states.[143] Similarly, Robert Cox's (38) conviction was also reversed because of insufficient evidence.

> Circumstances that create nothing more than a strong suspicion that the defendant committed the crime was not sufficient to support a conviction. Although state witnesses cast doubt on Cox's alibi, the state's evidence could have created only a suspicion, rather than proving beyond a reasonable doubt, that Cox, and only Cox, murdered the victim.[144]

Finally, John Robert Ballard's (123) conviction was reversed for reasons similar to Cox's.[145]

Juan Ramos (32) was acquitted after his conviction was reversed because of inadequate foundation for the admission of dog scent evidence.[146] It should be noted that with proper foundation that dog scent lineup identifications are admissible evidence in many states.[147]

Thomas Kimbell (101) was acquitted after his case was reversed because the trial court did not permit him to impeach a witness with prior inconsistent statements. "[T]he reality is that we don't know for sure why the two Kimbell juries came to two different conclusions."[148]

Carl Lawson's (67) case is an "example of the system working well."[149] He was acquitted on retrial after his case was reversed because the trial court denied him funds for a shoeprint expert and because his attorney had a conflict of interest.[150]

"Steven Manning [(85)] is another case in which it appears that the system itself worked."[151] Manning's case was reversed for evidentiary error, and he was acquitted on retrial.

Wesley Quick's (109) multiple murder convictions were reversed because the trial court impeded the cross-examination of prosecution witnesses. Quick had testified he had been on LSD and did not remember what happened during the murders.[152] When Quick was retried, he changed his version of events and impeached the witnesses. His subsequent acquittal is another example of the state appellate system properly working. But Quick's changing testimony does not support a conclusion that he was the prototypical "wrong person."[153]

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137. Marshall, 86 Judicature 83, 84 (Sept.–Oct. 2002) (analyzing "exonerations" in Illinois).
138. *Kansas*, *supra*, note 1 at 2536.
139. *Id*. at 2537–2538.
140. *Tibbs v. State* (Fla. 1976) 337 So.2d 788, 791. See, e.g., *People v. Rincon-Pineda* (1975) 14 Cal.3d 864 (cautionary instruction about assessing credibility of accusers in sex offense cases no longer performed any "just function.").
141. *Tibbs v. Florida* (1982) 457 U.S. 31, 33–35.
142. *Tibbs v. State* (Fla. 1981) 397 S.2d 1120, 1126.
143. *Holland v. United States* (1954) 348 U.S. 121; *Jaramillo v. State* (Fla. 1982) 417 So.2d 257; *Fox v. State* (Fla.App. 1985) 469 So.2d 800, 803.
144. *Cox v. State* (Fla. 1989) 555 So.2d 352.
145. *Ballard v. State* (Fla. 2006) 923 So.2d 475.
146. *Ramos v. State* (Fla. 1986) 496 So.2d 121.
147. *People v. Mitchell* (2003) 110 Cal.App.4th 772; *People v. Willis* (2004) 115 Cal.App.4th 379.
148. Kurtis, *The Death Penalty on Trial* (2004) p. 195.
149. Marshall, *supra*, note 137 at p. 89.
150. *People v. Lawson* (Ill. 1994) 644 N.E.2d 1172.
151. Marshall, *supra*, note 137 at p. 88; York, *supra*, note 3 at p. 20–21.
152. *Quick v. State* (Ala.App. 2001) 825 So.2d 246.
153. *Once Convicted of Murder, Man Acquitted in New Trial*, Associated Press (Apr. 22, 2003).

***The DPIC List is Artificially Expanded to Include Irrelevant Cases of Defendants Who Were Convicted Under Unconstitutional Death Penalty Statutes***

The years of 1973 through 1976 were a watershed in death penalty jurisprudence.[154] Prior to the Supreme Court's decisions in *Furman* and *Gregg*, many death judgments were imposed under unconstitutional statutes. Death judgments that were imposed under pre-*Furman*/*Gregg* era statutes or under post-*Furman* laws, such as "mandatory" statutes, which limited consideration of mitigating evidence were unconstitutional. In any of these cases, the defendants were either sentenced under unpredictable and standard-less pre-*Furman* statutes or under post-*Furman* statutes that either precluded or limited consideration of mitigating evidence. These defendants were convicted and sentenced to death without the benefit of recent innovations in capital proceedings described by the authors of *In Spite of Innocence* as follows:

> Current capital punishment law already embodies several features that probably reduce the likelihood of executing the innocent. These include abolition of mandatory death penalties, bifurcation of the capital trial into two distinct phases (the first concerned solely with the guilt of the offender, and the second devoted to the issue of sentence), and the requirement of automatic appellate review of a capital conviction and sentence.[155]

Justice Scalia agreed,

> Capital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed. And of course capital cases receive special attention in the application of executive clemency.[156]

Justice Scalia stated that it was a matter of "obsolescence" to rely on cases that predate "our current system of capital adjudication" and "cast no light" on its functioning.[157] His point, of course, is underscored by the fact that his concurrence appears as part of the decision in a case about capital sentencing, not guilt and innocence. Justice Souter's dissent made an issue of these cases in order to argue for modifications of modern Eighth Amendment jurisprudence. But the studies he cited included cases in which death judgments were not even imposed under current standards. Following Justice Scalia's reasoning, to the extent that the DPIC List names cases in which the defendants were convicted and sentenced to death under statutes that did not meet the standards set forth by the Supreme Court in *Furman* and *Gregg*, those cases are irrelevant.[158]

The inclusion of these constitutionally anachronistic cases artificially inflates the number of "actual innocent" defendants on the DPIC List. They are irrelevant because they were convicted and sentenced under defunct statutes. Since it is totally speculative whether these defendants would have been convicted and sentenced to death under today's rules, they are irrelevant to assessing modern capital punishment schemes and do nothing to advance any strategy about reexamining our current system. It is speculative whether these defendants would have been convicted and sentenced to death under today's jurisprudence that requires states to narrow the field of eligible murderers for capital punishment and to permit the sentencer to consider all potential mitigating evidence.

Accordingly, on its face, based on the year of the defendant's offense and statute in effect at that time, the DPIC List includes the following irrelevant cases:

- David Keaton (1)—pre-*Furman* Florida statute[159]
- Samuel A. Poole (2)—North Carolina mandatory statute[160]
- Wilbur Lee (3)
- Freddie Pitts (4)—pre-*Furman* Florida statute,[161]
- James Creamer (5)—pre-*Furman* Georgia statute[162]
- Christopher Spicer (6)—North Carolina mandatory statute[163]
- Thomas Gladish (7)
- Richard Greer (8)
- Ronald Keine (9)
- Clarence Smith (10)—mandatory New Mexico statute[164]
- Gary Beeman (14)—Ohio's pre-*Lockett v. Ohio*, 438 U.S. 586 (1978) statute[165]
- Johnny Ross (19)—mandatory Louisiana statute[166]
- Ernest (Shujaa) Graham (20)—mandatory California statute[167]

154. *United States v. Taveras* (E.D.N.Y. 2006) 424 F.Supp.2d 446, 457 (referencing the "modern death penalty era of *Furman* and *Gregg*").
155. Bedau & Radelet, *supra*, note 60 at p. 279.
156. *Kansas*, *supra*, note 1 at 2538.
157. *Id*. at 2534.
158. Markman & Cassell, *supra*, note 58 at p. 147–152.
159. *Keaton v. State* (Fla. 1973) 273 So.2d 385.
160. *State v. Poole* (N.C. 1974) 203 S.E.2d 786 (statute declared unconstitutional in *Woodson v. North Carolina* (1976) 428 U.S. 280); Cooley, *supra*, note 61 at 919 (also identified as a "weak" example of actual innocence).
161. *Pitts v. State* (Fla.App. 1975) 307 So.2d 473.
162. *Creamer v. State* (Ga. 1974) 205 S.E.2d 240 (Creamer sentenced to four consecutive life terms); *Emmett v. Ricketts* (N.D.Ga. 1975) 397 F.Supp. 1025.
163. *State v. Spicer* (N.C. 1974.) 204 S.E.2d 641.
164. Stanford, *supra*, note 58 at p. 118 (Gladish, Greer, Keine, and Smith were sentenced in 1974 under New Mexico's mandatory death penalty statute); *State v. Rondeau & Beaty* (N.M.1976) 553 P.2d 688 (declaring the New Mexico mandatory statute unconstitutional).
165. Stanford, *supra*, note 58 at p. 96 (Beeman convicted in 1976).
166. *People v. Ross* (La. 1977) 343 So.2d 722.
167. *Graham v. Superior Court* (1979) 98 Cal.App.3d 880.

- Lawyer Johnson (22)—pre-*Furman* Massachusetts statute[168]
- James Richardson (40)—pre-*Furman* Florida statute[169]
- Peter Limone (94)—pre-*Furman* Massachusetts standard[170]
- Timothy Howard (111)
- Gary Lamar Jones (112)—pre-*Lockett v. Ohio* statute[171]
- Laurence Adams (117)—pre-*Furman* Massachusetts statute[172]

## Conclusion

The cases cited by Justice Scalia in his concurring opinion in *Kansas v. Marsh*, and the additional cases discussed above, refute any notion that the DPIC's criteria for defining "exoneration" truly distinguishes between convicts who were freed because they were actually innocent and other convicts who were released because of legal error in their cases that were not "inconsistent with guilt in fact."[173] The four cases Justice Scalia discussed, all of which are on the DPIC List, barely scratched the surface. Furthermore, the only judicial analysis of the DPIC List [*Quinones I*] concluded in 2002 that only 31 out of 101 convicts on the list were "factually innocent."[174]

Justice Scalia's *Kansas* concurrence is noteworthy because he refused to accept the conventional wisdom about exonerations stemming from the DPIC List. For too long, the List created the false impression that all of its named 128 convicts were the "prototypical" wrong persons.

In other forums, this misimpression leads to hyperbolic rhetoric.[175]

> When dozens of innocent people are being sentenced to death, and dozens of guilty people are working [walking] free because the State has convicted the wrong person, we must ask ourselves what went wrong in that trial process.[176]

Similarly,

> [t]here is one other thing we should keep in mind. If the wrong person is on death row for a murder, if somebody is convicted of a murder they did not commit, that means that the real murderer is still running loose. Maybe everybody can feel comfortable that we have locked up somebody for the murder, but if there is still a killer on the loose, everything has broken down. Not only is an innocent man on death row, but a guilty man is running free.[177]

As explained in the text, the fact that a defendant is acquitted or a case is dismissed does not necessarily mean that a "guilty person" is still "walking free" or "running loose." Even in its most recent report, the DPIC cannot resist insinuating that its list demonstrates that the wrong person was convicted of the crime:

> Besides the danger of establishing a class of individuals who are placed under permanent suspicion, the failure to acknowledge the innocence of those who have been exonerated retards the search for the real perpetrator.[178]

At the confirmation hearings for Judge John G. Roberts as Chief Justice of the United States, the 121 inmates then mentioned on the DPIC List were cited as "121 people who we know were sentenced to die for crimes they did not commit."[179] The briefing in *House* perpetuated this myth with statements that "for every innocent person left imprisoned, a guilty one remains at large" and "of course the State wins, too, when exonerations permit it to prosecute and punish the true perpetrators of crime."[180]

It is not true that simply because a defendant was acquitted on retrial or a case was dismissed that he or she was the "wrong person" and there is some other guilty criminal roaming around. Rather, it frequently means the prosecution cannot prove the guilt of the "right person." As Justice Scalia explained, the DPIC List and its ilk ignore this distinction.

To compile its list, the DPIC relies on inexact standards, such as acquittals

168. *Stewart v. Massachusetts* (1972) 408 U.S. 845; *Commonwealth v. O'Neal* (Mass. 1975) 339 N.E.2d 676; *Limone v. Massachusetts* (1972) 408 U.S. 936; *Commonwealth v. Johnson* (Mass. 1974) 313 N.E.2d 571.
169. *Richardson v. State* (Fla. 1989) 546 So.2d 1037.
170. *Limone v. Massachusetts* (1972) 408 U.S. 936.
171. According to the DPIC List Web site, *supra*, note 35, both Howard's and Jones' death sentences were reduced to life when Ohio's death penalty statute was held unconstitutional in 1978. See *Lockett v. Ohio* (1978) 438 U.S. 586 (Ohio statute declared unconstitutional because it did not permit the type of individualized consideration of mitigating factors required by the Eighth Amendment.).
172. *Commonwealth v. Adams* (Mass. 1978.) 375 N.E.2d 681 (murder occurred in 1972).
173. *Kansas*, *supra*, note 1 at 2536.
174. *Quinones I*, *supra*, note 6 at 265 & fn. 11. This study was confined just to the actual descriptions of the cases on the DPIC Web site and the reviewing court used an undefined "conservative criterion."
175. For an extensive discussion of the nature and effect of the "histrionics of innocence advocates," see Hoffman, *The Myth of Factual Innocence* (2007) 82 Chi-Kent L.Rev. 663.
176. Remarks of Sen. Leahy, 146 Cong. Rec. S4669-03, S4675 (June 7, 2000).
177. Remarks of Sen. Leahy, 148 Cong. Rec. S889-02, S891 (Feb. 15, 2002).
178. *Innocence & the Crisis in the American Death Penalty*, *supra*, note 35 at Pt. IV.
179. Transcript, Senate Judiciary Committee Hearings on the President's Nomination of Judge John G. Roberts as Chief Justice of the United States, September 14, 2005 (remarks of Sen. Feingold)
180. *House v. Bell*, Brief of American Bar Association as Amicus Curiae Supporting Petitioner, 2005 WL 2367032; *House v. Bell*, Brief of Former Prosecutors and Professors of Criminal Justice as Amicus Curiae Supporting Petitioner, 2005 WL 2367033.

on retrial, dismissals by the prosecution, and reversals for legal insufficiency of evidence, to exonerate released death row inmates. But there is a big difference between "reasonable doubt" and the kind of "wrong person mistake" that was the genesis of the original Stanford study. Moreover, the DPIC uses old cases in which the defendants did not receive the modern protections that "probably reduce the likelihood of executing the innocent." It ignores the fact that the criminal justice system includes a system of review which gives defendants repeated opportunities to test the fairness and reliability of their convictions.

On its own terms, the DPIC List claims "actual innocence" for only 1.6 percent of the approximate 7,887 death sentences imposed between 1973 and 2008.[181] The more conservative approach of the court in *Quinones I* only recognized "actual innocence" in one-half of one percent of the 7,084 death sentences imposed between 1973 and 2001.[182] And as Justice Scalia emphasized, no "actually innocent" person has been identified as having been executed.[183]

Justice Scalia closes his *Kansas* concurrence by stating a self-evident proposition that death penalty opponents still ignore:

> The American people have determined that the good to be derived from capital punishment—in deterrence, and, perhaps most of all, in the meting out of condign justice for horrible crimes—outweighs the risk of error.[184]

By deflating the DPIC List, Justice Scalia's concurring opinion in *Kansas v. Marsh* contributes to an honest and realistic assessment of that actual risk.[185]

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181. Bureau of Justice Statistics Bulletin, *Capital Punishment 2005*, App. Table 2; DPIC Web site, *supra*, note 35. The inclusion of the 20 irrelevant cases that predate current death penalty statutes impacts this calculation. Without those cases, the "actual innocence" cases on the DPIC List drops to only 1.3 percent of the approximate 7,887 death sentences since 1973. Although a complete survey cannot be done in this limited article, the author estimates that 90 of the 129 inmates currently listed on the DPIC List are not meaningful examples of "actual innocence"—the remaining 39 constitute less than one-half of 1 percent of the approximately 7, 887 death sentences imposed since 1973.
182. *Quinones I*, *supra*, note 6 at 265 & fn. 11. Recently, Judge Morris B. Hoffman estimated that the total percentage of wrongful convictions for the entire criminal justice system fell somewhere between 1.95 percent and .0016 percent of total dispositions. Hoffman, *supra*, note 175 at 672–673.
183. *Kansas*, *supra*, note 1 at 2539.
184. *Ibid*.
185. Recently in *Baze v. Rees* (2008) __ U.S. __, 128 S.Ct. 1520, Justices Scalia and Stevens both concurred in upholding Kentucky's lethal injection protocol. Justice Stevens, however, also concluded based on his "experience" that the death penalty was unconstitutional. One of his concerns was the "risk of error" in capital cases. He specifically cited the "equipoise" rule in *Kansas* as an example of the Court putting the "thumb" on the prosecution's side of the scales. Justice Stevens acknowledged there was no evidence that an actually innocent person had been executed, but he still found that the rate of exonerations was unacceptable and that the risk could be "entirely eliminated" with a maximum sentence of life imprisonment without the possibility of parole. (*Id*. at 1550–1551 (conc. opn. of Stevens, J.).) As he did in *Kansas*, Justice Scalia responded to Justice Stevens' concerns: "Justice Stevens' final refuge in his cost-benefit analysis is a familiar one: There is a risk that an innocent person might be convicted and sentenced to death-though not a risk that Justice Stevens can quantify, because he lacks a single example of a person executed for a crime he did not commit in the current American system." (*Id*. at 1554 (conc. opn. of Scalia, J.).) Justice Scalia specifically referred to the recent body of scholarship indicating that the death penalty has a deterrent effect. (*Id*. at 1553.) Finally, he also notes that all of Justice Stevens' concerns proved too much, since they could be applied to invalidate any punishment, not just the death penalty. (*Id*. at 1554–1555.)

Exhibit I
California District Attorneys Association: Kent Scheidegger, *Rebutting the Myths About Race and the Death Penalty* (originally published in the Ohio State Journal of Criminal Law)

# Rebutting the Myths About Race and the Death Penalty

Kent Scheidegger*

> The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either [the prosecutor's or the jury's] decisions in the State of Georgia.[1]

This is the least-known holding from the best-known case on race and the death penalty, a case that eventually went to the Supreme Court.[2] It is very strange that this holding is so little known, given the prominence of the Baldus study in debates over race and the death penalty. Just this year, a report of the American Bar Association began its factual discussion of race and the death penalty with what the Baldus study supposedly "showed."[3] Yet the report made no mention at all of the fact that the study had been thoroughly examined in a full trial, with expert testimony on both sides, and found to show nothing of the sort.

This skewed perception is not limited to the Georgia Baldus study. It extends across the field. Any "finding" by a study of any racial "disparity" is trumpeted as proof that the system of capital sentencing is deeply racist, even though it may be the product of flawed methodology, a biased source, or both. Meanwhile, contrary indications from other studies, or sometimes even within the same study, are buried and never brought to the public's attention.

The subject of what these studies show and do not show is a complex one, and a comprehensive treatment is beyond the scope of this short article. The article will trace the development through the principal cases and best-known studies to show that the truth, to the extent we can know it, is quite different from the common perception.

## I. *McGAUTHA* TO *PENRY*: THERE AND BACK AGAIN

In 1971, in *McGautha v. California*,[4] the U.S. Supreme Court considered an argument that due process required standards for capital sentencing, along the lines

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1 McCleskey v. Zant, 580 F. Supp. 338, 368 (N.D. Ga. 1984) (emphasis omitted).

2 McCleskey v. Kemp, 481 U.S. 279 (1987).

3 AMERICAN BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE MISSOURI DEATH PENALTY ASSESSMENT REPORT 332 (2012).

4 McGautha v. California, 402 U.S. 183 (1971).

suggested by the American Law Institute's draft Model Penal Code. After a characteristically thorough discussion of the history by Justice Harlan, the Court rejected the claim, 6–3. In so doing, the Court rejected the idea that the aggravating and mitigating factors in capital sentencing can be reduced to a defined list.

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider *a variety of factors*, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for *no list of circumstances would ever be really complete.* The *infinite variety of cases and facets to each case* would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need.[5]

Yet only a year later, the Court made one of the most dramatic flip-flops in its history in *Furman v. Georgia.*[6] A brief *per curiam* statement (it can hardly be called an opinion) said only "that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[7] There was not a word about why. Instead, the reasons why had to be gleaned from the five separate opinions of the justices in the majority. One of the most important laws the states had—the law punishing murder—had been thrown out, and the states had to guess why. For an institution created for the purpose of clarifying the law,[8] this was an institutional failure of massive proportions.

Why the abrupt reversal? Although racial discrimination is not given as the reason in the *Furman* opinions, it is there between the lines. Among the most perceptive analyses of *Furman* is Justice Thomas's concurring opinion in *Graham v. Collins.*[9] After tracing the references to racial discrimination in the opinions and the various Justices' conclusions that the case for discrimination in the cases before the Court had not been proved,[10] he concludes, "[i]t cannot be doubted that behind

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5 *Id.* at 207–08 (emphasis added).

6 Furman v. Georgia, 408 U.S. 238 (1972).

7 *Id.* at 239–40.

8 *See* THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Ian Shapiro, ed. 2009).

9 Graham v. Collins, 506 U.S. 461 (1993) (Thomas, J., concurring).

10 *Id.* at 479–83.

the Court's condemnation of unguided discretion lay the specter of racial prejudice—the paradigmatic capricious and irrational sentencing factor."[11]

Did the justices in the majority in *Furman* think that they did not need to specify how to fix the statutes because there would be insufficient interest in reinstating capital punishment, and the practice would die? If so, they were very much mistaken. By 1976, restoration legislation had been passed by Congress and the legislatures of thirty-five states.[12] Public support for the death penalty, which had dipped below a majority a few years before *Furman*, shot upward in the years following, reaching a peak of 80% by 1994.[13]

Yet all these legislative bodies had to guess what was constitutional, due to the failure of the Court to specify. The legislatures with the largest and most sophisticated resources—Congress, California, and New York—all believed that mandatory sentencing was required. Making the sentence apply mechanically based on a few, objective circumstances would eliminate the potential for discrimination that was the real basis of *Furman*. It was a well-founded belief,[14] but the Court would soon declare forbidden what it previously implied was required.[15]

Georgia made the least change in its pre-*Furman* statute. Eligibility for the death penalty was narrowed to a subset of murders by a finding of aggravating circumstances, but from that point those circumstances had no special role, and the jury can consider all relevant circumstances in reaching its final decision. To the surprise of many observers, this system—only one step removed from the ones struck down in *Furman*—drew praise from the Court.[16]

Texas sought to meet the structure requirement by making the sentencing decision turn on the answers to specific questions, while Florida adopted a system quite similar to the Model Penal Code draft, directing the jury to weigh. The Supreme Court initially approved both systems with no hint that juries needed to be instructed on any factors other than those in the approved statutes,[17] but the Court would eventually betray both states and effectively strike down what it had previously approved.[18] In *Lockett v. Ohio*, a plurality held that states are not only

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[11] *Id.* at 482.

[12] *See* Gregg v. Georgia, 428 U.S. 153, 179–80 (1976) (lead opinion). For *Gregg* and its companion cases, the joint opinions of Justices Stewart, Powell, and Stevens are cited in this article as the "lead opinion." These are the opinions that announced the judgment of the Court and have been treated by the Court as embodying the holdings of the cases.

[13] Jeffrey M. Jones, *Support for the Death Penalty 30 Years After the Supreme Court Ruling*, GALLUP NEWS SERVICE, June 30, 2006, http://www.gallup.com/poll/23548/Support-Death-Penalty-Years-After-Supreme-Court-Ruling.aspx.

[14] *See* Rockwell v. Superior Court, 556 P.2d 1101, 1117 (Cal. 1976) (Clark, J., concurring).

[15] *See* Roberts v. Louisiana, 428 U.S. 325, 356 (1976) (White, J., dissenting).

[16] *Gregg*, 428 U.S. at 203–04; *see also* Zant v. Stephens, 462 U.S. 862, 878–79 (1983).

[17] Jurek v. Texas, 428 U.S. 262, 268 (1976) (lead opinion); Proffitt v. Florida, 428 U.S. 242, 247 (1976) (lead opinion).

[18] *See* Kent S. Scheidegger, *Capital Punishment in 1987: The Puzzle Nears Completion*, 15

permitted to let the jury consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," they are required to do so.[19] That holding has been reaffirmed and amplified in multiple decisions since.[20]

Did the Supreme Court in *Lockett* and its progeny wipe out whatever antidiscriminatory good it had achieved with *Furman*? Justices White, Scalia, and Thomas thought so.[21] In any event, for better or worse, an individual weighing of all relevant factors is not a state's choice, it is the way a state is constitutionally required to operate its capital sentencing system. A mathematical model of capital sentencing that fails to weigh or leaves out relevant factors is simply wrong. That is one of many troubles with mathematical models of human behavior.

## II. THE TROUBLES WITH MODELS

Mathematical models have a prominent role in the debate over race and the death penalty. Because most lawyers and judges know so little about them, I will give a very brief and simplified introduction here, making no pretense of being an expert on the subject.

"All models are wrong but some are useful" is a saying in the social sciences, attributed to statistician George Box.[22] In physics, mathematical models can represent reality exactly. Pass a one milliamp direct current through a 1000 ohm resistor, and the voltage across it is given exactly by the simple formula V = IR, one volt. People are not so easily or so reliably modeled. We are less numerous, more complex, and more varied than the electrons in the previous example. In modeling human behavior, "we are trying to force the ugly stepsister's foot into Cinderella's pretty glass slipper. It doesn't fit without cutting off some essential parts."[23] The wisdom in Box's maxim is that models can be useful for some purposes if we are constantly aware of their limitations. Forgetting those limitations can be disastrous. Too much faith in models was a contributing factor in the 2008 subprime loan meltdown.[24]

A very common misuse of studies is to take a result that says two things are correlated (A tends to go with B) and jump to the conclusion that A causes B. The

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W. ST. U. L. REV. 95, 115 (1987).

[19] Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion).

[20] *See* Eddings v. Oklahoma, 455 U.S. 104, 113–16 (1982); Penry v. Lynaugh, 492 U.S. 302, 328 (1989).

[21] *See Lockett*, 438 U.S. at 622 (White, J., concurring); Walton v. Arizona, 497 U.S. 639, 662 (1990) (Scalia, J., concurring); Graham v. Collins, 506 U.S. at 493–94 (Thomas, J., concurring).

[22] Julian J. Faraway, Practical Regression and Anova using R, 47 (July 2002) (unpublished manuscript) (on file at The Comprehensive R Archive Network), *available at* cran.r-project.org/doc/contrib./Faraway-PRA.pdf.

[23] EMANUEL DERMAN, MODELS.BEHAVING.BADLY: WHY CONFUSING ILLUSION WITH REALITY CAN LEAD TO DISASTER, ON WALL STREET AND IN LIFE 196 (2011).

[24] *See id.* at 150.

classic, albeit apocryphal, example is a study showing a correlation between sales of ice cream and crimes of violence.[25] This proves that ice cream causes crime, and therefore ice cream should be banned. This obviously false conclusion is the result of the kind of error that is regularly committed in public policy discussions when the falsity of the conclusion is less obvious.[26]

There are other reasons two numbers might go up and down together. One possibility is that A and B can be correlated if both are caused by C, in this example, hot weather. When the temperature climbs, people who like ice cream tend to buy more ice cream, and people prone to violence tend to commit more acts of violence. Banning ice cream would therefore do nothing to help the problem. It might make it worse.

Multiple regression is a technique used to explain or model the relationship between a variable, called the dependent variable, and multiple other variables, called independent variables.[27] If a relationship is found, it is called an "effect." That is an unfortunate term because it implies to the uninitiated that a cause-and-effect relationship has been found. Regression cannot tell us that.

Regression begins by building a mathematical model. The simplest kind would plot on a graph as a straight line and so is called a linear model. So for the ice cream example we might hypothesize:

$$C = A_1 + A_2*I + A_3*T + e$$

where C is the crime rate on a given day, I is sales of ice cream on that day, and T is the peak daily temperature. The As are constant across all days, to be determined in the regression procedure. The e is the error term, the difference between each value of C and the predicted value from combining the other terms. It includes all the factors going into the crime rate, which we hope are random with respect to the variables we are interested in.

We load the data into the regression computer program, and it gives us estimates for the coefficients (the As) and some statistics to help us decide if we can have confidence in the result. If all goes well, the results tell us that the daily variation in crime is actually related to temperature, and the ice cream has no independent relation to crime. In other words, there is no correlation between ice cream and crime once we have controlled for temperature.

What can go wrong? Many things.[28] Some are too technical to explain here. One problem is an insufficient number of data points to be confident the relation

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[25] For one real, but tongue-in-cheek, study along these lines, see Eugene Volokh, *Academic study reveals:*, THE VOLOKH CONSPIRACY (July 13, 2004) www.volokh.com/2004/07/13/academic-study-reveals/.

[26] *See generally* Arnold Barnett, *How Numbers Can Trick You*, TECH. REV., Oct. 1994, at 38, 39 (misuse of statistics in public policy debates).

[27] *See* Faraway, *supra* note 22, at 13.

[28] *See id.* at 46–47.

we observe is not pure chance. There is a test for that, and the rule of thumb is that we declare the result "statistically significant" if the chance of the observed relation happening at random is less than five percent. That is only a rule of thumb, not Revealed Truth as it is too often treated.[29]

The data may be suspect. Some of it may be just plain wrong. Sometimes there are missing data for some points in the study. More fundamentally, the concept we are really interested in may not be a simple number or a yes/no, as the technique demands. Is peak daily temperature really the measure of how hot a day is for the purpose of flaring tempers? What about humidity, breeze, or the extent to which it cools off in the evening?

We know our model does not include everything that goes into the result. What if the omitted factors predominate, so that the factors in our model explain very little of the result? Even worse, what if an omitted factor is related to the one we are trying to measure? Suppose in the above example we left out temperature but included other factors, say weekend/weekday, phase of the moon, and whether a locally important sporting event was on. Then the spurious relation between ice cream and crime might well reappear. Can we just throw in every factor conceivably relevant and build a model with a huge number of factors? That creates problems of its own.[30]

The simple point here is that mathematical modeling is not magic. Just because the numbers come out of the computer with lots of statistics and graphs does not mean we can depend on the conclusion being true. A lot can go wrong, and studies need to be challenged by someone with the incentive and expertise to do so.

## III. THE *MCCLESKEY* CASE

The best known case on race and the death penalty is the case of Warren McCleskey,[31] a habitual criminal[32] who shot and killed police officer Frank Schlatt in the course of robbing a furniture store in Atlanta, Georgia.[33] On federal habeas corpus review, McCleskey claimed that his sentence was tainted by racial discrimination. The principal evidence for this claim was a pair of studies by David Baldus and others, the second one commissioned by the NAACP Legal Defense and Education Fund for the specific purpose of attacking the death

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[29] *See* Jacob Cohen, *Things I Have Learned (So Far)*, 45 AM. PSYCHOLOGIST 1304, 1304 (1990).

[30] *See id.* at 1304–05.

[31] His name is spelled McClesky in the earlier cases and McCleskey in the later ones, including the federal cases discussed in this article.

[32] *See* McCleskey v. Kemp, 753 F.2d 877, 882 (11th Cir. 1985), *aff'd*, 481 U.S. 279 (1987) (three prior armed robbery convictions).

[33] McCleskey v. Zant, 580 F. Supp. 338, 345 (N.D. Ga. 1984), *aff'd in part*, *McCleskey*, 753 F.2d at 885.

penalty.[34] The case is best known for the Supreme Court's holding that *even if* the Baldus study showed what it claimed to show, McCleskey did not have a case.[35] This article will begin with the important, but largely forgotten, findings of the District Court.

A. *The Trial*

The study used multiple regression analysis, discussed in the previous section, a technique then "relatively new to the law."[36] Judge Owen Forrester heard experts on both sides: Baldus, George Woodworth, and Richard Berk for McCleskey and Joseph Katz and Roger Burford for the state.[37]

Judge Forrester noted, "no statistical analysis, much less a multivariate analysis, is any better than the accuracy of the data base."[38] A more common way of saying this in the computer business is "garbage in, garbage out." To be fair to the researchers, extracting reliable data on the many factors that go into a capital sentencing decision from the case files is a huge task, perhaps an impossible one. But we are concerned with the quality of the product, not the quality of the effort. After a thorough review, Judge Forrester concluded that "the data base has substantial flaws and . . . petitioner has failed to establish by a preponderance of the evidence that it is essentially trustworthy."[39]

Even assuming the validity of the data base, Judge Forrester found further problems. The statistical test for showing how much of the variation in the result is accounted for by the model found that only half was accounted for, and the rest was unexplained. "None of the models presented have accounted for the alternative hypothesis that the race effects observed cannot be explained by unaccounted-for factors."[40]

Another problem, difficult for nonexperts to understand, is the problem of multicolinearity. Suffice it to say that when two variables in the equation are related to each other, the regression technique is not very good at separating out the effect of one versus the effect of the other. Katz's analysis of the Georgia data show that victim race is strongly correlated with legitimate sentencing variables and offender-victim race combinations are even more so. Killings during armed robberies were 33.3% of the white-victim cases and only 7.4% of the black-victim

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[34] *See* DAVID C. BALDUS, GEORGE G. WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 44 (1990).

[35] McCleskey v. Kemp, 481 U.S. 279, 291, n.7 (1987) (assuming, not deciding, validity of the study); *id.* at 298–99 (study does not establish an equal protection claim); *id.* at 312–13 (study does not establish Eighth Amendment claim).

[36] *McCleskey*, 580 F. Supp. at 350.

[37] *Id.* at 352–53.

[38] *Id.* at 354.

[39] *Id.* at 360.

[40] *Id.* at 362.

cases. The killer was a stranger to the victim in 35.8% of white-victim cases but only 18.8% of black-victim cases. Looking at black-perpetrator, white-victim cases, robberies are a staggering 67.1% and stranger-murders are 70.6%.[41] Crimes of predation, where the victim is chosen simply because he has something the perpetrator wants, strike particular fear into people's hearts. "That could have been me." This is an entirely legitimate factor, strongly correlated with race, and multicolinearity limits the ability of regression analysis to account for it.

Finally, even overlooking all the foregoing problems and putting Baldus's results into a table, Judge Forrester observed:

> The coefficients produced by the 230-variable model on the Charging and Sentencing Study data base produce no statistically significant race of the victim effect either in the prosecutor's decision to seek the death penalty or in the jury sentencing decision. A 200-variable model based on the Procedural Reform data base shows a statistically significant race of the victim effect at work on the prosecutor's decision-making, but that model is totally invalid for it contains no variable for strength of the evidence, a factor which has universally been accepted as one which plays a large part in influencing decisions by prosecutors. Neither model produces a statistically significant race of the defendant effect at the level where the prosecutor is trying to decide if the case should be advanced to a penalty trial. Neither model produces any evidence that race of the victim or race of the defendant has any statistically significant effect on the jury's decision to impose the death penalty. The significance of this table cannot be overlooked. The death penalty cannot be imposed unless the prosecutor asks for a penalty trial and the jury imposes it. *The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either of those decisions in the State of Georgia.*[42]

That is a dense paragraph, so let's unpack it. The most important finding is buried in the middle. Accepting for the sake of argument the death penalty opponents' best known study on its own terms, there is no evidence of discrimination against black defendants, but rather a refutation of any such claim. The primary concern underlying the *Furman* decision[43] has been refuted in the post-*Gregg* era. This is wonderful news and cause for celebration. Yet despite

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[41] *See* Joseph L. Katz, Warren McCleskey v. Ralph Kemp*: Is the Death Penalty in Georgia Racially Biased?*, *in* CAPITAL PUNISHMENT: A BALANCED EXAMINATION 403–06 (Evan J. Mandery ed., 2005); *see also McCleskey*, 580 F. Supp. at 363–64.

[42] *McCleskey*, 580 F. Supp. at 367–68.

[43] *See* Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring); *see also supra* text accompanying note 6.

replication of this result in numerous other studies, some of which are described below, the result remains nearly unknown to the general public. A presidential candidate in 2012 declared in a televised debate that it is "very clear" black defendants "suffer the consequences of the death penalty disproportionately."[44] Nonsense. The opponents' own studies say just the opposite.

Race of victim "effects" are "statistically significant" at one point in the process but not others. This does not mean that racial animus on the part of the decision-maker is the reason for the observed "effect." Another possibility is a legitimate factor, correlated with race but not accounted for in the model. Judge Forrester notes a whopper of a factor: strength of the evidence of guilt. Contrary to the prejudiced image popular in some circles, capital case prosecutors are typically very much concerned with the justice of the case and the possibility, however remote, of executing an innocent person. I know this from a quarter-century of experience working with capital case prosecutors all over the country. Residual doubt of guilt is a powerful and entirely proper reason not to seek the death penalty, even if the crime is especially heinous.

Is there reason to believe that strength of the case is correlated with race of the victim? Regrettably, yes. Building a case depends on the willingness of witnesses to come forward and the credibility of those witnesses. Community trust in the police, social norms against "snitching," fear of reprisal, and the likelihood that a witness has a criminal record of his own are all likely to be correlated with race.

After further discussion of the limitations of regression and other topics, Judge Forrester concluded that McCleskey had failed to make his case. Not only did he fail to prove discrimination in his individual case, the point the Supreme Court would later hold dispositive, Baldus et al. failed to prove (and the State's experts succeeded in rebutting) the basic claims made in the Baldus study.[45] They did not just fail; they failed dismally. The Baldus study lay in shreds when Judge Forrester got through with it.

Yet the Baldus study "has received an undeservedly good press."[46] When Baldus died last year, a story in the New York Times praised his work, calling it "meticulous," never mentioning the thorough, careful judicial finding that it utterly failed to prove what Baldus claimed.[47] The most astonishing misstatement of the status of the Baldus study came from the Supreme Court itself. In his notorious dissent from denial of certiorari in the capital case of *Callins v. Collins*, Justice Harry Blackmun made the jaw-dropping assertions that the Baldus study is "highly

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[44] Kent Scheidegger, *Disproportionate to What?*, CRIME AND CONSEQUENCES BLOG (Jan. 17, 2012, 9:04 AM), http://www.crimeandconsequences.com/crimblog/2012/01/disproportionate-to-what.html.

[45] 580 F. Supp. at 379–80.

[46] *Statistical Evidence of racial discrimination in the death penalty: Statement to the N.C. H. Select Comm. on Capital Punishment*, 2005–2006 Sess. (N.C. 2006) (statement of Elliot Cramer) [hereinafter *Cramer Statement*], *available at* http://ourpaws.info/cramer/death/talk.txt.

[47] Adam Liptak, *David C. Baldus, 75, Dies; Studied Race and the Law*, N.Y. TIMES, June 15, 2011, at B13.

reliable" and "as far as I know, there has been no serious effort to impeach the Baldus study."[48] Did Justice Blackmun not read the district court opinion in a case where he wrote a dissent arguing for reversal of its judgment? It is hard to come to any other conclusion.

B. *The Appeal*

One reason that the Baldus study has "received an undeservedly good press" derives from the unusual way the *McCleskey* case was handled on appeal. The Court of Appeals for the Eleventh Circuit, sitting en banc, commended the district court "for its outstanding endeavor" in analyzing the validity of the Baldus study, and there is little doubt that a review of the factual finding that the study was invalid would have been affirmed under the applicable "clearly erroneous" standard.[49] However, the appellate court decided not to review that aspect of the decision, but instead decided to proceed "by *assuming* the validity of the study and rest[ing their] holding on the decision that the study, even if valid, not only supports the district judge's decision under the clearly erroneous standard of review, but compels it."[50]

Assuming disputed facts in a party's favor is standard practice when the other party seeks a judgment without a trial, such as on a motion for summary judgment.[51] Making such an assumption on appeal following a full trial and determination of those facts is much more rare.

On certiorari, the Supreme Court reviewed only the court of appeals's judgment on this basis. It did not go back and review the district court decision on validity.[52] This is clear enough for those who read the opinion with any degree of care, and the frequent miscitation of the opinion as accepting or endorsing the Baldus study is the fault of those who cite it that way, rather than the opinion itself.[53]

Unfortunately, the Supreme Court opinion, in the course of summarizing Baldus's claimed results, committed a gross error that has contributed to an extreme and erroneous perception ever since. The brief for McCleskey by John Charles Boger misleadingly stated, "Professor Baldus testified that his best statistical model . . . revealed that after taking into account most legitimate reasons

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[48] Callins v. Collins, 510 U.S. 1141, 1153–54 (1994).

[49] *See* McCleskey v. Kemp, 753 F.2d 877, 894–95 (11th Cir. 1985).

[50] *Id.* at 895 (emphasis added).

[51] *See, e.g.*, Saucier v. Katz, 533 U.S. 194, 201 (2001).

[52] *See* McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987).

[53] For example, at a mock trial event in London in March 2010, the prosecutor asked me repeatedly if the Supreme Court had "accepted" the Baldus study and seemed genuinely surprised at my answer it had not. *See* Video: Defending American Justice, testimony of Kent Scheidegger (Criminal Justice Legal Foundation 2010), *available at* http://www.cjlf.org/media/dpontrial/London.htm.

for sentencing distinctions, the *odds* of receiving a death sentence were still more than 4.3 times greater for those whose victims were white than for those whose victims were black."[54] The opinion of the Court says, "defendants charged with killing white victims were 4.3 *times as likely* to receive a death sentence as defendants charged with killing blacks."[55] To one unschooled in statistics, these statements may seem equivalent. They are not. This is literally a textbook example of how to lie with statistics.

Arnold Barnett, a professor at MIT, wanted to illustrate the misuse of statistics in the popular press with the goal "to discourage fellow citizens from taking a strong position or course of action based solely on a press report."[56] The misleading "odds ratio" of *McCleskey* stuck out as a prime example. Quoting the passage above from the opinion and a similar one from the New York Times, Barnett notes, "the Supreme Court, the New York Times, and countless other newspapers and commentators were laboring under a major misconception."[57] He then went through the math to show how an "odds ratio" can wildly exaggerate the degree of disparity. He concludes, "[b]lame for the confusion should presumably be shared by the judges and the journalists who made the mistake and the researchers who did too little to prevent it."[58] He left out the lawyers.

Regrettably, Barnett's exposure of this misleading use of statistics has had no discernible effect. To this day, death penalty opponents seeking to play the race card, including Boger himself, continue to exploit the confusion to inflate their claims of disparity.[59]

The legal holding of the Supreme Court's *McCleskey* decision has been dissected many times by many commentators, so I will not belabor that point here. The decision was a major legal victory for the state, effectively shutting down these kinds of statistical claims in federal courts. Yet the coverage of the decision handed an undeserved public relations victory to the opponents, creating a false public impression that the case of "race of victim bias" had been proved and that the degree of disparity is much greater than the study even claimed it was.

## IV. NEW JERSEY

While the *McCleskey* decision shut down litigation of this type in federal courts, state courts were not necessarily bound to the result. They can interpret their own state's constitution and laws to extend protection to defendants that federal law does not, and the U. S. Supreme Court will not review these decisions

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[54] Brief for Petitioner at 15–16, McCleskey v. Kemp, No. 84-6811 (1986), 1986 U.S. S. Ct. Briefs LEXIS 489 (emphasis added).

[55] 481 U.S. at 287 (emphasis added).

[56] Barnett, *supra* note 26, at 38–39.

[57] *Id.* at 43.

[58] *Id.*

[59] *See Cramer Statement*, *supra* note 46.

based on independent state grounds.[60]

The New Jersey Supreme Court, prior to the repeal of the death penalty in that state, was an exceptionally friendly forum for capital defendants.[61] That court rejected *McCleskey* on independent state grounds.[62] It appointed a special master to examine the matter, curiously choosing none other than David Baldus,[63] an advocate for one side of the debate and the author of the study so severely criticized by the District Court in *McCleskey*. Early analyses were hampered by an inadequate number of cases, however, and the results were inconclusive.[64] After the data base grew with the addition of new cases, the court appointed a new special master, Judge Richard Cohen.[65] "On the statistical evidence before him, Judge Cohen concluded that he did not find 'relentless documentation or even a preponderance in the direction of the existence of any race bias.'"[66] The court was determined to continue reviewing this issue, and it appointed a third special master, Judge David Baime.[67]

Judge Baime remained the special master for several years and produced a series of annual reports. In these reports, the available data were analyzed with three different methods.[68] The result of the analysis was the statistical evidence did not support a claim of bias on either the race of the defendant or the race of the victim.

> The statistical evidence does not support the thesis that the race of the victim affects the likelihood that the defendant will receive the death penalty. We add that the available statistical evidence discloses that African-American defendants who kill White victims are no more likely to receive the death penalty than African-American defendants who kill African-American victims.[69]

In a critically important finding, Judge Baime noted that a disparity had appeared initially, but it turned out that race of the victim was confounded with jurisdiction. Fewer black-victim cases proceed to penalty trial because the

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[60] *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

[61] *See* Kent Scheidegger, *Statement Before the New Jersey Death Penalty Study Commission*, CRIM. JUST. LEGAL FOUND. 1–2 (2006), http://www.cjlf.org/files/NJDPTestimony.pdf.

[62] *See* State v. Marshall, 613 A.2d 1059, 1108–09 (N.J. 1992).

[63] *See id.* at 1063.

[64] *See* State v. Loftin, 724 A.2d 129, 152 (N.J. 1999).

[65] *See id.* at 153–54.

[66] *Id.* at 160.

[67] *See id.* at 232.

[68] DAVID S. BAIME, REPORT TO THE SUPREME COURT SYSTEMIC PROPORTIONALITY REVIEW PROJECT: 2000–2001 TERM 1 (2001).

[69] *Id.* at 61.

counties in which most black people live take fewer of their cases to penalty trial.[70] "New Jersey is a small and densely populated state. It is, nevertheless, a heterogeneous one. It is thus not remarkable that the counties do not march in lockstep in the manner in which death-eligible cases are prosecuted."[71]

Thus, the two studies fully adjudicated in court have come to consistent results. There is no race-of-defendant bias. A connection that initially appears between race of the victim and death sentencing rates disappears when further legitimate factors are considered.

## V. UNADJUDICATED STUDIES

The other studies in this area have not been the subject of completed adjudication. Greater caution is therefore in order when considering their conclusions. As we saw in the *McCleskey* case, the author of a study can claim his study supports a particular conclusion, but upon a challenge and adjudication, the result may be just the opposite.

### A. *Maryland*

"Large Racial Disparity Found Study of Md. Death Penalty," read a front-page headline in the Washington Post in 2003.[72] Given America's obsession with race, there was no shortage of people willing to jump to the conclusion that this study once again confirmed racist discrimination against black people in the administration of criminal justice. A closer look at the study[73] reveals a more nuanced picture.

The study was a large and detailed one, and to the researchers' credit they made a strong attempt to capture and quantify the legitimate factors that go into a prosecutor's decision to seek the death penalty and the jury's decision to impose it.[74] Some factors, however, will always defy quantification. Strength of the evidence, the factor the *McCleskey* court noted was omitted from Baldus's main model,[75] is sought to be quantified with such factors as whether and how many eyewitnesses testify and whether there is physical evidence linking the defendant to the crime. Such "yes or no" or "how many" questions cannot begin to capture this critical variable, though. Physical evidence may be anything from a very weak link (e.g., a hair found at a scene where defendant admits he was for innocent

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[70] *See id.* at 61–62.

[71] *Id.* at 62.

[72] Susan Levine & Lori Montgomery, *Large Racial Disparity Found Study of Md. Death Penalty*, WASH. POST, Jan. 8, 2003, at A1.

[73] R. PATERNOSTER ET AL., AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION (2003).

[74] *See id.* at tbl.9 (listing 123 covariates).

[75] McCleskey v. Zant, 580 F. Supp. 338, 367–68 (N.D. Ga. 1984).

reasons a week earlier) to virtually conclusive (e.g., a DNA match to the victim's blood on the defendant's blood-soaked shirt). Eyewitnesses vary widely in credibility, for a host of reasons. That is why we have safeguards such as the right to confront and cross-examine witnesses and the right to counsel at critical pretrial stages as well as at trial.[76]

The results section of the study begins with a description of race and county patterns without adjusting for case characteristics.[77] These results are utterly irrelevant. We know from past research that crime characteristics that legitimately go into sentencing decisions do correlate with race,[78] so "disparities" in unadjusted data tell us nothing of policy significance.

In the adjusted analysis, the study concluded, "*there is no evidence that the race of the defendant matters at any stage once case characteristics are controlled for.*"[79] That should have been the headline in the next day's newspapers. It is the clearest outcome in the study and the one most salient to the question of whether criminal defendants are being treated unfairly on the basis of race. Instead, this result got little publicity.

Another clear result is that Maryland's locally elected prosecutors seek the death penalty at different rates.[80] Of course they do. That is why we elect them locally in almost all states, to give the people of the community a voice in how vigorously the criminal law will be enforced in their community. If the people of downtown Baltimore City elect a prosecutor who seeks the death penalty relatively rarely while the people of suburban Baltimore County elect one who seeks it more often, that is local democracy working as designed.

When it comes to race of the victim, the picture is more muddled. Recall that in New Jersey the special master found that jurisdiction was confounded with race.[81] It is in Maryland as well. This should not surprise anyone. In the post-*Gregg* era, the Gallup Poll has found that the death penalty has been supported by two-thirds to three-quarters of whites while support among blacks is much lower at two-fifths to a little over half.[82] Naturally, a jurisdiction with a large black population elects a prosecutor who seeks the death penalty more selectively, and those are the jurisdictions where most of the black-victim homicides occur.

Do black-victim cases remain less likely to result in a death sentence after controlling for both case characteristics and jurisdiction? The Paternoster study gives us a mixed result. Using one method, the "effect" remains "statistically

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[76] *See* Perry v. New Hampshire, 132 S. Ct. 716, 728–29 (2012).

[77] PATERNOSTER ET AL., *supra* note 73, at 20.

[78] *See* Katz, *supra* note 41 and accompanying text.

[79] PATERNOSTER ET AL., *supra* note 73, at 31 (emphasis in original).

[80] *See id.* at 28–31.

[81] *See* BAIME, *supra* note 68 and accompanying text.

[82] Lydia Saad, *Racial Disagreement Over Death Penalty Has Varied Historically*, GALLUP (July 30, 2007), http://www.gallup.com/poll/28243/Racial-Disagreement-Over-Death-Penalty-Has-Varied-Historically.aspx.

significant," meaning it passes the traditional rule of thumb for saying we are confident the observed connection is not due to pure chance. Using another method, it is not.[83]

This is hardly compelling evidence that race of the victim *as such* is the reason for observed differences. It may or may not pass the standard statistical criterion for something other than pure chance, depending on which model is used. But on top of pure chance, there are all the other reasons why these kinds of statistical studies may not reflect reality. Among other issues, there are the limited ability of the studies to quantify the case characteristics noted above and the possibility that other factors correlated with race and not considered at all in the study may influence the result. For example, do prosecutors in Maryland consider the wishes of the victim's family in making their decision? That factor is likely correlated with race.[84] The study acknowledges the existence of this factor[85] but does not control for it.[86]

If, with all the effort that went into this study, the best they can do is show an effect on the ragged edge of the most basic criterion, the logical conclusion is that race of the victim is probably *not* a major factor in deciding who is sentenced to death. That decision is primarily the result of legal criteria, the circumstances of the case, and the democratic choice of the people of the local jurisdiction, as it should be. We can say that on the face of the study even without the kind of adversarial testing we had in the *McCleskey* case.

Although the study has not been the subject of an adversary proceeding, it has been challenged in a published article.[87] The lead author is Richard Berk, an expert witness for the *defense* in the *McCleskey* case. This is significant, because many academics who do research on the death penalty reliably produce results that favor one side, raising a suspicion of partisan bias.

The Berk, Li, and Hickman paper is technically dense and difficult for anyone other than a statistician to understand. Suffice it to say that they take the same data analyzed by Paternoster et al., apply different techniques, and get different results. "For both capital charges and death sentences, race either played no role or a small one that is very difficult to specify. In short, it is very difficult to find convincing evidence for racial effects in the Maryland data . . . ."[88] Their point is not to support the death penalty but rather to point out that results from this kind of modeling are "fragile."[89] What "studies show" is not necessarily so. Results are

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[83] PATERNOSTER ET AL., *supra* note 73, at 33.

[84] Saad, *supra* note 82 and accompanying text.

[85] *See* PATERNOSTER ET AL., *supra* note 73, at 14–15.

[86] *See id.*, tbl. 9 (factor not listed).

[87] *See* Richard Berk, Azusa Li & Laura J. Hickman, *Statistical Difficulties in Determining the Role of Race in Capital Cases: A Re-analysis of Data from the State of Maryland*, 21 J. QUANTITATIVE CRIMINOLOGY 365, 367–68 (2005).

[88] *Id.* at 386.

[89] *Id.*

heavily dependent on choices made in the modeling process.

B. *The Federal System*

One more set of studies warrants particular mention because it is an exceptionally egregious example of how the popular perception diverges from the reality. On September 11, 2000, officials at the U.S. Department of Justice were talking to the press about a report to be released the next day.

> In the first comprehensive review of the federal death penalty since it was reinstated in 1988, the Justice Department has found significant racial and geographic disparities, say officials who have seen the report.
>
> In 75 percent of the cases in which a federal prosecutor sought the death penalty in the last five years, the defendant has been a member of a minority group, and in more than half the cases, an African-American, according to the report, which officials said the Justice Department would release on Tuesday.
>
> "It's troubling," said an administration official who has reviewed the data. "The president has expressed concern about the problem, and this backs that up." Another administration official described the report as "disturbing."[90]

This is an extraordinarily odd way for the release of a government report to be handled. Officials making statements about a report before the report is released virtually guarantees that the news coverage will be based on the statements and not on the report itself. That is especially true with inflammatory statements by the officials that border on accusing their own department of racism.

The report actually released the next day,[91] however, was not a "comprehensive review." It was a compilation of raw race statistics without any adjustment for case characteristics. As discussed earlier, such unadjusted data is essentially meaningless. Further, the figures showing large percentages of minorities were presented without the context of the pool of cases subject to federal capital prosecution. Contrary to the press statements of the anonymous officials, the data are not "disturbing" if one is familiar with these facts, and they do not, by themselves, back anything up. Releasing unadjusted data, knowing how it was likely to be misinterpreted and how inflammatory the issue was, was questionable at best. The anonymous commenting campaign the day before was

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[90] Raymond Bonner & Marc Lacey, *Pervasive Disparities Found in the Federal Death Penalty*, N.Y. TIMES, Sept. 12, 2000, at A1.

[91] U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988–2000) (2000).

grossly irresponsible conduct.

The first step toward a responsible assessment was to establish the relevant pool of cases for federal capital prosecution. This task was completed ten months later. Murder, as such, is not a federal offense in most of the country, and federal death penalty cases largely involve killings in the course of drug trafficking operations. "In areas where large-scale, organized drug trafficking is largely carried out by gangs whose membership is drawn from minority groups, the active federal role in investigating and prosecuting these crimes results in a high proportion of minority defendants in federal cases, including a high proportion of minority defendants in potential capital cases arising from the lethal violence associated with the drug trade."[92] The supposedly "disturbing" raw numbers in the initial report reflected the demographic realities of drug trafficking in America in the 1990s and the fact that this segment of homicides represents most of the federal capital cases. Few people familiar with the operations of the U.S. Department of Justice would have needed a study to tell them that.

Of course a comparison of capital cases with the pool of potentially capital cases is only a first step. The next step is to attempt to control for case characteristics, as in the studies previously described. At this point, the National Institute of Justice did something unique. The data base was created in a manner similar to the other studies, but then the data were given to three independent research teams who analyzed it separately with their own methods. Only after their independent analyses were complete did they get together to compare results.[93]

All three teams found the results along the same lines as those found in the *McCleskey* court's assessment of the Baldus study, in the New Jersey special master's report, in Berk and Li's reanalysis of the Maryland data, and at least partially in the Paternoster analysis of the Maryland data. "When we look at the raw data and make no adjustment for case characteristics, we find the large race effects noted previously—namely, a decision to seek the death penalty is more likely to occur when the defendants are white and when the victims are white. However, these disparities disappear when the data coded from the AG's case files are used to adjust for the heinousness of the crime."[94] This result gains considerable credibility by the convergence of three independent teams. "Nevertheless, the three teams agreed that their analytic methods cannot provide definitive answers about race effects in death-penalty cases. Analyses of observational data can support a thesis and may be useful for that purpose, but such analyses can seldom prove or disprove causation."[95]

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[92] U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW para. 4 (2001).

[93] STEPHEN P. KLEIN, RICHARD A. BERK & LAURA J. HICKMAN, RAND, RACE AND THE DECISION TO SEEK THE DEATH PENALTY IN FEDERAL CASES xv–xvi (2006), *available at* http://www.rand.org/content/dam/rand/pubs/technical_reports/2006/RAND_TR389.pdf.

[94] *Id.* at xvii.

[95] *Id.* at xx.

## VI. SO WHAT DOES IT ALL MEAN?

What useful conclusions can we draw from this confusing mix of complex, sometimes flawed, sometimes conflicting studies? First, we must know what we do not know. The caution voiced in the last study quoted above must be taken to heart. These studies will never provide definitive proof.

Second, the most "robust" result, the one that comes up again and again, study after study, jurisdiction after jurisdiction, is the absence of any significant evidence of racial bias against minority defendants. Far and away the most disturbing result, if it occurred, would be an indication that people are on death row who would not be there if they were a different race. The absence of such a result is a remarkable achievement, worthy of celebration. Whether the post-*Furman* reforms worked, the country just changed, or some combination of these or other factors, we can now say that the frequent charge that the death penalty is biased against black defendants is unsupported by the evidence.

What of the claimed "race-of-the-victim bias"? The basis of the claim, as expressed by Justice Brennan, is that "diminished willingness to render [a death] sentence when blacks are victims, reflects a devaluation of the lives of black persons."[96] Obviously, a premise of this argument is that imposing the death penalty constitutes valuing the life of the victim. Good, I'm glad we are agreed on that. If we do have a problem, should we fix it by devaluing the lives of more victims (imposing the death penalty less often or never) or by valuing the lives of more victims (imposing the death penalty more often)?

To the extent that a race-of-the-victim disparity exists, is it due to racial animus of the decision makers? It is difficult to see any model of their thought processes consistent with both this hypothesis and the available data. The same prosecutors make the charging decisions in black-victim cases and black-perpetrator cases. How is it possible that a group of people who refrain from seeking the death penalty in black-victim cases because they value black life less fail to seek it more often in black-perpetrator cases for the same reason? If racial animus were behind the claimed disparities, we should see the effect across the board, yet we do not.

The facts that the death penalty is sought and imposed less often in jurisdictions with high black populations and that the poll data indicate much greater opposition to the death penalty among black Americans point to a very different conclusion. The difference in the numbers is not the result of discrimination against black people but rather the result of empowerment of black people. The days of racial exclusion from voting and jury service are long behind us. In localities with a substantial black population, that population has clout in the election of prosecutors and in the verdicts of juries. The exercise of that clout by the only demographic segment of America with a majority opposed to the death

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[96] McCleskey v. Kemp, 481 U.S. 279, 336 (1987) (Brennan, J., dissenting).

penalty means fewer death sentences.

Is this a good result? In one sense, it is good to see local democracy and jury of the vicinage working as designed. In terms of the justice of the cases and protection of the community, though, this is a bad result. If an effective death penalty saves lives through deterrence, and there is good reason to believe it does,[97] insufficient application of it costs a community dearly in unnecessary loss of life. Aside from deterrence, failure to impose the death penalty in those especially heinous cases where any lesser punishment is inadequate costs society in a less tangible but still real way.

Can anything be done? Building public confidence, especially among black Americans, that the death penalty is, in fact, being administered fairly would help. Lack of confidence is doubtless a large part of the reason why opposition is so much higher among black Americans than any other group. Regrettably, the picture the public has been getting is far different from the reality. Those who seek justice for the very worst crimes will have to devote more attention to educating the public on this important topic.

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[97] *See* Hashem Dezhbakhsh & Paul H. Rubin, *From the 'Econometrics of Capital Punishment' to the 'Capital Punishment' of Econometrics: On the Use and Abuse of Sensitivity Analysis*, 43 APPLIED ECON. 3655 (2011) (answering criticism of their prior paper and showing result is robust); Dale O. Cloninger & Roberto Marchesini, *Reflections on a critique* 16 APPLIED ECON. LETTERS 1709 (2009) (same); Paul R. Zimmerman, *Statistical Variability and the Deterrent Effect of the Death Penalty*, 11 AM. LAW & ECON. REV. 370 (2009) (same).

Exhibit J
Michigan State University College of Law,
*Letter to Committee*

MICHIGAN STATE
UNIVERSITY
COLLEGE OF LAW

March 22, 2021

Committee on Revision of the Penal Code
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Re: Meeting on Capital Punishment in California, March 25-26, 2021

Dear Committee Members:

We write to provide information relevant to your consideration of potential modifications to the capital punishment provisions of the California Penal Code.

We have published two empirical studies of the California capital punishment system using data drawn from over 27,000 murder and manslaughter convictions between 1978 and 2002.[1] The first study, designed by the late Professor David Baldus, examined the breadth of California's capital punishment statute. We found that the death-eligibility rate among California homicide cases was the highest in the nation. Indeed, 95% of all first-degree murder convictions and 59% of all second-degree murder and voluntary manslaughter convictions were death eligible under California's 2008 capital punishment statute.[2] Equally important, only a fraction of those eligible for a death sentence were actually sentenced to death: Only 4.3 percent of the defendants who committed a factually eligible capital murder were sentenced to death.[3]

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In the second study, we examined the racial and ethnic dimensions of California's failure to restrict the application of capital punishment to only the most severe types of murders. We found that individual special circumstances[4] – the factors that are required to impose a death sentence – apply to defendants disparately by race and ethnicity.[5] The racial and ethnic disparities were particularly apparent with respect to two special circumstances – drive-by

[1] Catherine M. Grosso, Jeffrey Fagan, Michael Laurence, David Baldus, George Woodworth, & Richard Newell, *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L. Rev. 1394, 1406 (2019); David Baldus, George Woodworth, Catherine Grosso, Michael Laurence, Jeffrey Fagan, & Richard Newell, *Furman at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility*, 16 J. Emp. Legal Studies 693 (2019).

[2] Baldus, *supra* note 1, at 713 & Table 2; *see also id*. at 722 Figure 1 (comparing California's death-eligibility rate to the rest of the country).

[3] *Id*. at 724 Figure 2.

[4] Cal. Penal Code § 190.2.

[5] Grosso, *supra* note 1, at 1433-40.

shootings and gang membership[6] – which the California Legislature added to the Penal Code despite expressed concerns about the racial effects of the amendments.[7] As a result of our findings, we concluded that the California "statute appears to codify rather than ameliorate the harmful racial stereotypes that are endemic to our criminal justice system."[8]

In light of the Committee's work, we have begun to analyze the data to determine whether racial and ethnic factors affect capital charging and sentencing decisions. Although we have not fully completed our analysis, we believe it is important for the Committee to have the benefit of our initial findings.

Consistent with other studies,[9] we have found significant racial and ethnic disparities in the application in California's capital punishment scheme. First, we found racial and ethnic disparities in prosecutors' decisions to charge a case with special circumstances.[10] Defendants who were accused of killing at least one white victim faced 2.05 times the odds of being charged with one or more special circumstances than those faced by defendants accused of killing non-white victims.[11] Second, we found that this disparity persists when the case proceeds to trial and the jury is asked to impose a death sentence. Defendants accused of killing at least one white victim faced 2.21 times the odds of being sentenced to death than those faced by defendants accused of killing non-white victims.[12]

Finally, the race and ethnicity disparities persisted when examining the race of the defendant in conjunction with the race of the victim. A defendant who is an African American, Latinx, or Native American and who is accused of killing at least one white victim faced 1.9 times the odds of being charged with a special circumstance than those faced by defendants of any race or ethnicity accused of killing non-white victims.[13] Significantly, the disparities are even more stark when sentencing is

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[6] Cal. Penal Code § 190.2(a)(21), (22).

[7] Grosso, *supra* note 1, at 1405-07 (describing the concerns about the racial disparities resulting from adding murders occurring during the commission of a carjacking and drive-by shootings as special circumstances).

[8] *Id*. at 1441.

[9] *See, e.g.*, Steven F. Shatz, Glenn L. Pierce & Michael L. Radelet , *Race, Ethnicity, and the Death Penalty in San Diego County: The Predictable Consequences of Excessive Discretion*, 51 Colum. Hum. Rts. L. Rev. 1070 (2020); Nick Petersen, *Cumulative Racial and Ethnic Inequalities in Potentially Capital Cases: A Multistage Analysis of Pretrial Disparities*, 45 Crim. Justice Rev. 225 (2020); Nick Petersen, *Examining the Sources of Racial Bias in Potentially Capital Cases: A Case Study of Police and Prosecutorial Discretion*, 7 Race & Justice 7 (2016); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 Santa Clara L. Rev. 1 (2005).

[10] All of the disparities presented here are substantial and significant.

[11] When at least one of the murder victims was white, prosecutors charged special circumstances in 38% of the cases (2,108 cases charged with specials/5,539 universe of potential cases), compared to 23% of the cases in which the murder victims were non-white (2,501/10,846).

[12] When at least one of the murder victims was white, the defendant was sentenced to death in 7% of the cases (368 cases resulting in death sentence/5,539 universe of potential cases), compared to 3% of the cases in which the murder victims were non-white (357/10,846).

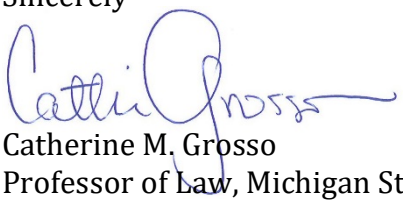
[13] When at least one of the murder victims was white, prosecutors charged special circumstances in 40% of the cases when the defendant was African American, Latinx, or Native American (904 cases charged with specials/2,231 universe of potential cases), compared to 26% of the cases when the defendant of any race or ethnicity was accused of killing non-white victims (3,705/14,154).

examined. Such defendants faced 3.52 times the odds of being sentenced to death than those faced by defendants of any race or ethnicity accused of killing non-white victims.[14]

These findings provide more evidence suggesting that California's overly expansive death penalty statute – which fails to suitably narrow the discretion of prosecutors to seek and juries to impose death sentences – has resulted in significant racial and ethnic disparities in the imposition of capital punishment.

We appreciate that the Committee seeks to complete its work in a timely fashion and hope that we will be able to provide the Committee with our complete findings later this year. In addition, we welcome the opportunity to provide clarification or provide additional information concerning our findings.

Sincerely



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Attorney at Law
Commissioner, California Commission on the Fair Administration of Justice

[14] When at least one of the murder victims was white, the defendants who were African American, Latinx, or Native American were sentenced to death in 11% of the cases (239 cases resulting in death sentence /2,231 universe of potential cases), compared to 3% of the cases when the defendant of any race or ethnicity was accused of killing non-white victims (466/14,154).