**McCleskey v. Kemp**

481 U.S. 279 (1987)

Justice Powell delivered the opinion of the Court.

This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment.

McCleskey, a black man, was convicted of two counts of armed robbery and one count of murder in the Superior Court of Fulton County, Georgia, on October 12, 1978. McCleskey's convictions arose out of the robbery of a furniture store and the killing of a white police officer during the course of the robbery. The evidence at trial indicated that McCleskey and three accomplices planned and carried out the robbery. All four were armed. McCleskey entered the front of the store while the other three entered the rear. McCleskey secured the front of the store by rounding up the customers and forcing them to lie face down on the floor. The other three rounded up the employees in the rear and tied them up with tape. The manager was forced at gunpoint to turn over the store receipts, his watch, and $6. During the course of the robbery, a police officer, answering a silent alarm, entered the store through the front door. As he was walking down the center aisle of the store, two shots were fired. Both struck the officer. One hit him in the face and killed him.

Several weeks later, McCleskey was arrested in connection with an unrelated offense. He confessed that he had participated in the furniture store robbery, but denied that he had shot the police officer. At trial, the State introduced evidence that at least one of the bullets that struck the officer was fired from a .38 caliber Rossi revolver. This description matched the description of the gun that McCleskey had carried during the robbery. The State also introduced the testimony of two witnesses who had heard McCleskey admit to the shooting.

The jury convicted McCleskey of murder. At the penalty hearing, the jury heard arguments as to the appropriate sentence. Under Georgia law, the jury could not consider imposing the death penalty unless it found beyond a reasonable doubt that the murder was accompanied by one of the statutory aggravating circumstances. Ga.Code Ann. § 17-10-30(c) (1982). The jury in this case found two aggravating circumstances to exist beyond a reasonable doubt: the murder was committed during the course of an armed robbery, § 17-10-30(b)(2); and the murder was committed upon a peace officer engaged in the performance of his duties, § 17-10-30(b)(8). In making its decision whether to impose the death sentence, the jury considered the mitigating and aggravating circumstances of McCleskey's conduct. § 17-10-2(c). McCleskey offered no mitigating evidence. The jury recommended that he be sentenced to death on the murder charge, and to consecutive life sentences on the armed robbery charges. The court followed the jury's recommendation and sentenced McCleskey to death.

On appeal, the Supreme Court of Georgia affirmed the convictions and the sentences…

McCleskey next filed a petition for a writ of habeas corpus in the Federal District Court for the Northern District of Georgia. His petition raised 18 claims, one of which was that the Georgia capital sentencing process is administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution. In support of his claim, McCleskey proffered a statistical study performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth (the Baldus study) that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970's. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants.

Baldus also divided the cases according to the combination of the race of the defendant and the race of the victim. He found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims. Similarly, Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.

Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.

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McCleskey's first claim is that the Georgia capital punishment statute violates the Equal Protection Clause of the Fourteenth Amendment. He argues that race has infected the administration of Georgia's statute in two ways: persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers. As a black defendant who killed a white victim, McCleskey claims that the Baldus study demonstrates that he was discriminated against because of his race and because of the race of his victim. In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application. We agree with the Court of Appeals, and every other court that has considered such a challenge, that this claim must fail.

Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." Whitus v. Georgia, 385 U.S. 545, 550 (1967). A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. Wayte v. United States, 470 U.S. 598, 608 (1985). Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in his case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study. McCleskey argues that the Baldus study compels an inference that his sentence rests on purposeful discrimination. McCleskey's claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black.

The Court has accepted statistics as proof of intent to discriminate in certain limited contexts. First, this Court has accepted statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district…Second, this Court has accepted statistics in the form of multiple-regression analysis to prove statutory violations under Title VII of the Civil Rights Act of 1964.

But the nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire selection or Title VII cases. Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense…Thus, the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case. In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.

Another important difference between the cases in which we have accepted statistics as proof of discriminatory intent and this case is that, in the venire-selection and Title VII contexts, the decisionmaker has an opportunity to explain the statistical disparity…[A] legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.

Finally, McCleskey's statistical proffer must be viewed in the context of his challenge. McCleskey challenges decisions at the heart of the State's criminal justice system.

[O]ne of society's most basic tasks is that of protecting the lives of its citizens, and one of the most basic ways in which it achieves the task is through criminal laws against murder…Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.

[The following are excerpts from Justice Powell’s analysis of McCleskey’s claim that his death sentence violated the 8th Amendment’s protection against of cruel and unusual punishment because punishments based on race are arbitrary.]

To evaluate McCleskey's challenge, we must examine exactly what the Baldus study may show. Even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions, or that race was a factor in McCleskey's particular case. Statistics, at most, may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. The question "is at what point that risk becomes constitutionally unacceptable," Turner v. Murray, 476 U.S. 28, 36, n. 8 (1986). McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.

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McCleskey's argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system. Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense. Whereas decisions against a defendant's interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable. Similarly, the capacity of prosecutorial discretion to provide individualized justice is "only entrenched in American law." 2 W. LaFave & J. Israel, Criminal Procedure § 13.2(a), p. 160 (1984). As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. Of course, "the power to be lenient [also] is the power to discriminate," K. Davis, Discretionary Justice 170 (1973), but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice." Gregg v. Georgia, 428 U.S. at 200, n. 50.

At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system…Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.

Two additional concerns inform our decision in this case. First, McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system…Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender…Also, there is no logical reason that such a claim need be limited to racial or sexual bias…[S]uch a claim could -- at least in theory -- be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decision making. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey…

Second, McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility -- or indeed even the right -- of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." Furman v. Georgia, 408 U.S. at 383 (Burger, C.J., dissenting). Legislatures also are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts, Capital punishment is now the law in more than two-thirds of our States. It is the ultimate duty of courts to determine on a case-by-case basis whether these laws are applied consistently with the Constitution. Despite McCleskey's wide-ranging arguments that basically challenge the validity of capital punishment in our multiracial society, the only question before us is whether in his case the law of Georgia was properly applied. We agree with the District Court and the Court of Appeals for the Eleventh Circuit that this was carefully and correctly done in this case.

Accordingly, we affirm the judgment of the Court of Appeals for the Eleventh Circuit.

It is so ordered.

Justice Blackmun (joined by Justices Brennan, Marshall, and Stevens), dissenting.

A criminal defendant alleging an equal protection violation must prove the existence of purposeful discrimination. Washington v. Davis, 426 U. S. 229, 426 U. S. 239-240 (1976); Whitus v. Georgia, 385 U.S. at 385 U. S. 550. He may establish a prima facie case [of purposeful discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson v. Kentucky, 476 U.S. at 476 U. S. 94. Once the defendant establishes a prima facie case, the burden shifts to the prosecution to rebut that case.

"The State cannot meet this burden on mere general assertions that its officials did not discriminate, or that they properly performed their official duties."

The State must demonstrate that the challenged effect was due to "permissible racially neutral selection criteria.'" Ibid., quoting Alexander v. Louisiana, 405 U. S. 625, 405 U. S. 632 (1972).

Under Batson v. Kentucky and the framework established in Castaneda v. Partida, McCleskey must meet a three-factor standard. First, he must establish that he is a member of a group "that is a recognizable, distinct class, singled out for different treatment." Second, he must make a showing of a substantial degree of differential treatment.Third, he must establish that the allegedly discriminatory procedure is susceptible to abuse or is not racially neutral.

There can be no dispute that McCleskey has made the requisite showing under the first prong of the standard. The Baldus study demonstrates that black persons are a distinct group that are singled out for different treatment in the Georgia capital sentencing system. The Court acknowledges, as it must, that the raw statistics included in the Baldus study and presented by petitioner indicate that it is much less likely that a death sentence will result from a murder of a black person than from a murder of a white person. White-victim cases are nearly 11 times more likely to yield a death sentence than are black-victim cases.The raw figures also indicate that, even within the group of defendants who are convicted of killing white persons and are thereby more likely to receive a death sentence, black defendants are more likely than white defendants to be sentenced to death.

With respect to the second prong, McCleskey must prove that there is a substantial likelihood that his death sentence is due to racial factors. The Court of Appeals assumed the validity of the Baldus study, and found that it

"showed that systemic and substantial disparities existed in the penalties imposed upon homicide defendants in Georgia based on race of the homicide victim, that the disparities existed at a less substantial rate in death sentencing based on race of defendants, and that the factors of race of the victim and defendant were at work in Fulton County."

753 F.2d 877, 895 (CA11 1985).

The question remaining, therefore, is at what point does that disparity become constitutionally unacceptable. Recognizing that additional factors can enter into the decisionmaking process that yields a death sentence, the authors of the Baldus study collected data concerning the presence of other relevant factors in homicide cases in Georgia during the time period relevant to McCleskey's case. They then analyzed the data in a manner that would permit them to ascertain the independent effect of the racial factors.

McCleskey demonstrated the degree to which his death sentence was affected by racial factors by introducing multiple regression analyses that explain how much of the statistical distribution of the cases analyzed is attributable to the racial factors. McCleskey established that, because he was charged with killing a white person, he was 4.3 times as likely to be sentenced to death as he would have been had he been charged with killing a black person. McCleskey also demonstrated that it was more likely than not that the fact that the victim he was charged with killing was white determined that he received a sentence of death -- 20 out of every 34 defendants in McCleskey's mid-range category would not have been sentenced to be executed if their victims had been black. The most persuasive evidence of the constitutionally significant effect of racial factors in the Georgia capital sentencing system is McCleskey's proof that the race of the victim is more important in explaining the imposition of a death sentence than is the factor whether the defendant was a prime mover in the homicide. Similarly, the race-of-victim factor is nearly as crucial as the statutory aggravating circumstance whether the defendant had a prior record of a conviction for a capital crime.

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As to the final element of the prima facie case, McCleskey showed that the process by which the State decided to seek a death penalty in his case and to pursue that sentence throughout the prosecution was susceptible to abuse. Petitioner submitted the deposition of Lewis R. Slaton, who, as of the date of the deposition, had been the District Attorney for 18 years in the county in which McCleskey was tried and sentenced. As Mr. Slaton explained, the duties and responsibilities of that office are the prosecution of felony charges within the Atlanta Judicial Circuit that comprises Fulton County. He testified that, during his years in the office, there were no guidelines informing the Assistant District Attorneys who handled the cases how they should proceed at any particular stage of the prosecution. There were no guidelines as to when they should seek an indictment for murder, as opposed to lesser charges, when they should recommend acceptance of a guilty plea to murder, acceptance of a guilty plea to a lesser charge, reduction of charges, or dismissal of charges at the postindictment-preconviction stage, or when they should seek the death penalty. Slaton testified that these decisions were left to the discretion of the individual attorneys, who then informed Slaton of their decisions as they saw fit.

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The above-described evidence…gives rise to an inference of discriminatory purpose…McCleskey's showing is of sufficient magnitude that, absent evidence to the contrary, one must conclude that racial factors entered into the decisionmaking process that yielded McCleskey's death sentence. The burden, therefore, shifts to the State to explain the racial selections. It must demonstrate that legitimate racially neutral criteria and procedures yielded this racially skewed result.

In rebuttal, the State's expert suggested that, if the Baldus thesis was correct, then the aggravation level in black-victim cases where a life sentence was imposed would be higher than in white-victim cases. The expert analyzed aggravating and mitigating circumstances "one by one, demonstrating that, in life sentence cases, to the extent that any aggravating circumstance is more prevalent in one group than the other, there are more aggravating features in the group of white-victim cases than in the group of black-victim cases. Conversely, there were more mitigating circumstances in which black-victim cases had a higher proportion of that circumstance than in white-victim cases."

The State did not test its hypothesis to determine if white-victim and black-victim cases at the same level of aggravating circumstances were similarly treated. McCleskey's experts, however, performed this test on their data. They demonstrated that the racial disparities in the system were not the result of the differences in the average aggravation levels between white-victim and black-victim cases. The State's meager and unsophisticated evidence cannot withstand the extensive scrutiny given the Baldus evidence.

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One of the final concerns discussed by the Court may be the most disturbing aspect of its opinion. Granting relief to McCleskey in this case, it is said, could lead to further constitutional challenges. That, of course, is no reason to deny McCleskey his rights under the Equal Protection Clause. If a grant of relief to him were to lead to a closer examination of the effects of racial considerations throughout the criminal justice system, the system, and hence society, might benefit. Where no such factors come into play, the integrity of the system is enhanced. Where such considerations are shown to be significant, efforts can be made to eradicate their impermissible influence and to ensure an evenhanded application of criminal sanctions.

[Justice Brennan, joined by Marshall, Blackmun and Stevens, wrote a dissenting opinion on 8th Amendment grounds.]