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## LITIGATING THE DEATH PENALTY AND RACE DISCRIMINATION IN A POST-McCLESKEY WORLD

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to believe that . . . an accused . . . has been prejudiced by receipt of the information."<sup>37</sup> *Harris* can be construed as holding that even matters traditionally considered to be internal may be examined by the court in cases where prejudice to the defendant can be shown. In fact, *Harris* holds that courts have an "affirmative duty" to investigate the charges and to ascertain whether . . . as a matter of fact, the jury was guilty of such misconduct."<sup>38</sup>

Even after *Jenkins*, the *Harris* holding may allow inquiry into jury discussion of parole in certain cases. The court in *Harris* noted that that case involved a specific factual assertion by a juror based on particular personal knowledge, and that it was not a mere assertion of opinion. Therefore the jury foreman's statement in *Jenkins*, "Okay in ten years, do you want your child to run into [the defendant] on the street?" may not qualify as more than a mere assertion of opinion under *Harris*.

In light of *Harris*, defense counsel should continue to assail Virginia's prohibition on evidence of parole eligibility at the sentencing phase. *Jenkins* offers an opportunity for defense counsel to point out the hypocrisy of the rule: although juries are told that they may not take parole eligibility into consideration, case after case, like *Jenkins*, demonstrates that there is clear evidence that juries do exactly that.<sup>39</sup> Furthermore, defense counsel should take advantage of *Harris* and consider having jurors questioned during voir dire about their knowledge of the parole system, and post-trial to determine whether parole eligibility

<sup>37</sup> *Id.* at 51, 408 S.E.2d at 601 (quoting *Commercial Union Insurance Co. v. Moorefield*, 231 Va. 260, 265, 343 S.E.2d 329, 333 (1986)).

<sup>38</sup> *Harris*, 13 Va. App. at 52, 408 S.E.2d at 601 (quoting *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 209, 361 S.E.2d 436, 448 (1987)).

<sup>39</sup> See Hood, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605, 1624 (1989) (citing National Legal Research Group, Inc., Jury Research and

entered into their deliberations. It seems unlikely that the Virginia courts will be able to maintain their bar on parole eligibility evidence if the defense bar is diligent in pointing out the disparities between the theoretical foundations upon which the courts depend and the realities of juror deliberations.<sup>40</sup>

#### IV. Page Limits on Briefs Submitted to Virginia Supreme Court

In his appeal to the Virginia Supreme Court, *Jenkins*' counsel, in order to stay within the fifty page limit for briefs submitted to that court, merely referred to the trial transcript, rather than incorporating that material verbatim into his brief. The court admonished counsel reminding him that "[a] cross-reference to argument made at trial is insufficient."<sup>41</sup> While page limits on appellate briefs clearly serve a useful purpose, the effectiveness of a defendant's appeal, especially in a capital trial, should not rest on his counsel's ability to include all arguments within fifty pages. If defense counsel harbor any doubts about their ability to stay within the fifty page limit and still effectively make all arguments, counsel should apply to the court for permission to submit a lengthier brief. Should the court deny the request, counsel should object on the constitutional grounds of denial of due process, thereby preserving a viable federal claim for further appeal.

Summary and Analysis by:  
Paul M. O'Grady

Trial Simulation Services, *Report on Jurors' Attitudes Concerning the Death Penalty* (Dec. 6, 1988)). See also Paduano and Stafford Smith, *Deathly Errors: Juror Misconceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211, 221-22 & nn. 30-34 (1987).

<sup>40</sup> For a more extensive discussion of parole eligibility evidence, see Straube, *The Capital Defendant and Parole Eligibility*, Capital Defense Digest, Vol.5, No.1, p.45 (1992).

<sup>41</sup> *Jenkins*, 244 Va. at 461, 423 S.E.2d at 370.

## LITIGATING THE DEATH PENALTY AND RACE DISCRIMINATION IN A POST-McCLESKEY WORLD

BY: G. DOUGLAS KILDAY

### I. INTRODUCTION

In 1978, an African-American man named Warren McCleskey was convicted of armed robbery and murder for killing a white police officer during the robbery of a furniture store.<sup>1</sup> McCleskey received a life sentence for the armed robbery and a death sentence for the murder.

In appealing his convictions and death sentence, McCleskey raised a fundamental challenge to the Georgia capital sentencing scheme. McCleskey claimed that the Georgia death penalty was applied in a racially discriminatory manner in violation of the Fourteenth and Eighth Amendments. McCleskey relied upon an elaborate statistical study by Professors David C. Baldus, Charles Pulaski, and George Woodworth (the "Baldus study") which demonstrated a disparity in the application of the death penalty based upon the race of the victim. The Baldus study

isolated and then accounted for thirty-nine variables which could have explained the disparities on non-race grounds. The study concluded that defendants charged with killing a white victim are 4.3 times more likely to be sentenced to death than those charged with killing a black victim.

McCleskey's challenge ultimately was unsuccessful. In a five to four decision, the United States Supreme Court ruled that the study proffered by McCleskey was insufficient to show either a Fourteenth Amendment or an Eighth Amendment violation.<sup>2</sup>

Despite the Court's ruling, the unfortunate phenomenon of race discrimination continues to exist in capital sentencing.<sup>3</sup> This article will provide an analysis of the *McCleskey* decision under both the Fourteenth and Eighth Amendments and then suggest ways that the capital defense attorney can argue race discrimination in a "post-*McCleskey* world."

<sup>1</sup> McCleskey admitted his role in the robbery, but denied that he was the one who killed the victim. McCleskey was one of four people who took part in the robbery.

<sup>2</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>3</sup> Indeed, the Court assumed the validity of the Baldus study and stated that it "demonstrate[d] a risk that the factor of race entered into

some capital sentencing decisions" 481 U.S. at 291, n. 7 (emphasis in original). Further statistical studies have reached the same conclusion as the Baldus study. See Gen. Gov't Div., U.S. Gen. Accounting Office Rep. GGD-9, *Death Penalty Sentencing: Research Indicates a Pattern of Racial Disparities* (Feb. 26, 1990) (describing the results of twenty-eight empirical studies).

## II. McCLESKEY v. KEMP

### A. The Equal Protection Claim

McCleskey's first argument was that the Georgia capital punishment statute violated his right to "the Equal Protection of the laws" under the Fourteenth Amendment. He claimed that racial considerations played a part in the Georgia capital penalty system in two ways: (1) those who murder white victims are more likely to receive the death penalty than those who murder blacks, and (2) black defendants are more likely to receive the death penalty than white defendants.

The majority opinion, written by Justice Powell, began by stating the requirements for a claim under the Equal Protection Clause:

[A] defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in his case acted with discriminatory purpose.<sup>4</sup>

Noting that McCleskey's only proof in support of his equal protection claim was the Baldus study, the majority then discussed and distinguished the "limited contexts" of jury selection<sup>5</sup> and Title VII cases<sup>6</sup> in which statistics have been accepted as proof of intent to discriminate.<sup>7</sup> First, the decision to impose the death penalty is made by a jury which meets only for the occasion of making that one decision. In

<sup>4</sup> *McCleskey*, 481 U.S. at 292 (citations omitted) (emphasis in original).

<sup>5</sup> *Id.* at 293-94. The Court noted that the statistical proof necessary to prove an equal protection violation in the jury selection process is less than the "stark" pattern necessary in other contexts. *Id.* (citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)).

<sup>6</sup> *Id.* at 294 (citing *Bazemore v. Friday*, 478 U.S. 385, 400-401 (1986) (opinion of Brennan, J., concurring in part)).

<sup>7</sup> *Id.* at 293.

<sup>8</sup> *Id.* at 295, n. 15.

<sup>9</sup> *Id.* at 295, n. 14 (relying on *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)). The Court's argument rested on the rule requiring that the sentencer in a capital case cannot be "precluded from considering, as a mitigating factor, any aspect of [the] 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." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original). However, this rule is not applied as broadly as the *McCleskey* Court indicated. As Justice Powell's opinion itself acknowledged, the *Lockett/Eddings* rule requires that the proffered mitigating evidence be "relevant to the defendant's background, character [or] the offense." *McCleskey*, 481 U.S. at 295, n. 14 (emphasis added). As a result, capital defendants have not been entitled to introduce literally "any" evidence in mitigation without limits. *See, e.g.*, Straube, *The Capital Defendant and Parole Eligibility*, Capital Defense Digest, Vol. 5, No. 1, p. 45 (1992) (noting that Virginia courts, with the approval of the Fourth Circuit Court of Appeals, have refused to permit capital defendants to inform juries of the true meaning of a life sentence as a reason to impose a sentence less than death).

The *McCleskey* Court also overstated the "limits" on what may be considered in venire-selection and Title VII cases. Justice Powell quoted two statutes which supposedly "limit" such considerations in the venire-selection context more than the "relevance" limitation in the capital penalty context. The first statute stated that "[a] grand juror must be a

contrast, the Court noted that "[t]he decisions of a jury commission or of an employer over time are fairly attributable to the commission or the employer. Therefore, an unexplained statistical discrepancy can be said to indicate a consistent policy of the decisionmaker."<sup>8</sup> Second, the Court noted that the factors which may be considered in venire-selection and Title VII cases are "limited," while the factors which a capital jury may consider are more all-encompassing.<sup>9</sup> Finally, the Court pointed out that in venire-selection and Title VII cases, "the decisionmaker has an opportunity to explain the statistical disparity."<sup>10</sup> In capital cases, on the other hand, policy considerations require that "jurors cannot be called to testify to the motives and influences that led to their verdict,"<sup>11</sup> and prosecutors have "wide discretion" and should not be forced to defend their decisions to seek death penalties.<sup>12</sup>

The Court considered all of these factors against the backdrop of its express concern that McCleskey's challenge was directed at "decisions at the heart of the State's criminal justice system."<sup>13</sup> Consequently, the majority held that "[b]ecause discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."<sup>14</sup> According to five justices of the United States Supreme Court, the Baldus study was "clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose."<sup>15</sup>

The Court addressed one final argument under the Equal Protection Clause. McCleskey argued that the State as a whole, presumably through its legislature, acted with discriminatory purpose by allowing the death penalty to be administered in a discriminatory fashion. However, the Court found no evidence that Georgia's legislature had maintained its death penalty "because of . . . its adverse effects upon

citizen of Texas and of the county, be a qualified voter in the county, be 'of sound mind and good moral character,' be literate, have no prior felony conviction, and be under no pending indictment 'or other legal accusation for theft or of any felony.'" *See McCleskey*, 481 U.S. at 295, n. 14 (quoting *Casteneda v. Partida*, 430 U.S. 482, 485 (1977)) (emphasis added). The second statute provided that "jury commissioners may exclude any [juror who is] not 'upright' and 'intelligent' from grand jury service." *McCleskey*, 481 U.S. at 295, n. 14 (quoting *Turner v. Fouche*, 396 U.S. 346, 354 (1970)) (emphasis added). Both of these statutes can reasonably be read at least as broadly as the Court's *Lockett/Eddings* rule for capital defendants. As long as a factor is "relevant" to soundness of mind, character, uprightness, or intelligence, it can be considered in venire-selection cases. This mirrors the Court's capital case standard that mitigating evidence must be "relevant" to the offense or the defendant's background or character in order for the Eighth Amendment to require its admission into evidence.

Similarly, the Court noted that employment decisions under Title VII "may involve a number of relevant variables" which must all have a "reasonable relationship to the employee's qualifications to perform the particular job at issue." *McCleskey*, 481 U.S. at 295, n. 14 (emphasis added). This "reasonable relationship" limitation bears no apparent difference to the "relevance" requirement in the capital penalty context.

<sup>10</sup> *McCleskey*, 481 U.S. at 296.

<sup>11</sup> *Id.* (quoting *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U.S. 585, 593 (1907)). *But see* Fed R. Evid. 606(b): "[A] juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." For an analysis of the issues pertaining to the admissibility of juror testimony, *see infra* notes 84-108 and accompanying text.

<sup>12</sup> *McCleskey*, 481 U.S. at 296 (citations omitted).

<sup>13</sup> *Id.* at 297.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

an identifiable group."<sup>16</sup> As a result, the Court rejected McCleskey's equal protection claims.<sup>17</sup>

### B. The Eighth Amendment Claim

McCleskey also argued that the Baldus study showed that Georgia's capital sentencing scheme violated the Eighth Amendment's proscription of "cruel and unusual punishments."<sup>18</sup> The *McCleskey* majority turned its attention to the Baldus study itself. The Court began by noting that statistics "at most may show only a likelihood that a particular factor entered into some decisions" and said "[t]he question 'is at what point that risk becomes constitutionally unacceptable.'"<sup>19</sup> The Court ruled that the Baldus study did not demonstrate a sufficient likelihood of racial bias to render his death sentence constitutionally unsound.<sup>20</sup>

Justice Powell characterized the Baldus study as indicating "a discrepancy that appears to correlate with race"<sup>21</sup> but concluded that the discrepancy alone was insufficient to demonstrate a violation of the Eighth Amendment:

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.<sup>22</sup>

Thus, while reiterating its "unceasing efforts" to eradicate racial prejudice from our criminal justice system,<sup>23</sup> the Court also cautioned that these efforts were "guided" by the privilege of trial by jury, necessitating the hands-off approach which courts have taken with respect to jury decisions. The Court firmly rooted its Eighth Amendment ruling in the discretion which a jury necessarily must have.<sup>24</sup>

The Court concluded its Eighth Amendment analysis by stating two additional "concerns." First, the Court noted that a finding in

favor of McCleskey would have opened the floodgates for claims of racial bias in all areas of criminal law.<sup>25</sup> Secondly, the Court feared that statistical studies might also demonstrate disparities based on the race, sex, facial characteristics or physical attractiveness of the defendant, victim, judge or attorney.<sup>26</sup> The Court was unwilling to open those floodgates and suggested that McCleskey's arguments could best be addressed by legislatures.<sup>27</sup>

### III. ARGUING RACE DISCRIMINATION AFTER *McCLESKEY*

Despite unusually loud criticism,<sup>28</sup> the Supreme Court is unlikely to retreat from the principles enunciated in *McCleskey*. As disappointing as the decision may be, however, *McCleskey* did not rule that the issue of race discrimination was irrelevant in capital sentencing; rather, the Court found that the petitioner failed to present a cognizable claim on the facts he alleged. There are several avenues which *McCleskey* left open for a challenge to a death sentence based on racial discrimination, under both the Fourteenth and Eighth Amendments. The most important strategy in arguing racial prejudice is to explain why a particular defendant's argument differs from the situation addressed in *McCleskey*.

#### A. Stronger Statistics

In rejecting McCleskey's Fourteenth Amendment claim, the Court found the Baldus study to be "insufficient"<sup>29</sup> and implicitly acknowledged that statistics can be used as circumstantial evidence of an intent to discriminate.<sup>30</sup> Similarly, in rejecting McCleskey's Eighth Amendment claim, the Court stated that the Baldus study did not present a "constitutionally significant risk of racial bias."<sup>31</sup> The Court thus left the door open for a statistical challenge which demonstrated a greater disparity than the Baldus study.<sup>32</sup> Realistically, however, it is unlikely that any empirical study could show a significantly greater disparity along racial lines than the Baldus study. Thus, although the Court has not necessarily set out to create an absolute barrier to claims based solely on statistical evidence, the practical effect of *McCleskey* is, in all likelihood, to do just that.

<sup>16</sup> *Id.* at 298.

<sup>17</sup> *Id.* at 299.

<sup>18</sup> The Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660, 667 (1962).

<sup>19</sup> *Id.* at 308-309 (quoting *Turner v. Murray*, 476 U.S. 28, 36, n. 6 (1986)).

<sup>20</sup> *Id.* at 309.

<sup>21</sup> *Id.* at 312.

<sup>22</sup> *Id.* at 313.

<sup>23</sup> *Id.* at 309 (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)).

<sup>24</sup> *McCleskey*, 481 U.S. at 311-312. The Court noted that such discretion necessarily empowers a jury to discriminate, but concluded that depriving a jury of discretion would be "totally alien to . . . notions of criminal justice." *Id.* at 312 (citations omitted).

<sup>25</sup> It is questionable whether this assertion is indeed true. While the majority is correct in stating that "[t]he Eighth Amendment . . . applies to all penalties," *id.* at 315, the heightened reliability requirement of the Eighth Amendment has been fashioned in capital cases only. *See, e.g. Godfrey v. Georgia*, 446 U.S. 420 (1980).

<sup>26</sup> *McCleskey*, 481 U.S. at 317-318. As Justice Brennan's dissenting opinion observes, this seems to express "a fear of too much justice." *Id.* at 339 (Brennan, J., dissenting).

<sup>27</sup> *Id.* at 319.

<sup>28</sup> *See Kennedy, McCleskey v. Kemp: Race, Capital Punish-*

*ment, and the Supreme Court*, 101 Harv. L. Rev. 1388 (1988); Gronhoyd, Note, *Social Science Statistics in the Courtroom: The Debate Resurfaces in McCleskey v. Kemp*, 62 Notre Dame L. Rev. 688 (1987); *The Supreme Court, 1986 Term — Leading Cases*, 101 Harv. L. Rev. 119, 158 (1987); Bienen, *Of Race, Crime and Punishment*, N.Y. Times, June 21, 1987, at A22; Tubak, *New Deals Ratify Unfair Death Penalty*, Legal Times, May 4, 1987, at 18; Bedau, *Someday McCleskey Will be Death Penalty's Dred Scott*, L.A. Times, May 1, 1987, § 2, at 5; Lewis, *Bowing to Racism*, N.Y. Times, Apr. 28, 1987, at A31; *Discrimination in Death? Yes, 5-4*, N.Y. Times, Apr. 24, 1987, at A30; *Killers of Whites, Killers of Blacks*, N.Y. Times, Oct. 16, 1986, at A38. *But see Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion*, 15 W. State U. L. Rev. 95, 121-25 (1987).

<sup>29</sup> *McCleskey*, 481 U.S. at 297.

<sup>30</sup> *See id.* at 291, n. 7.

<sup>31</sup> *Id.* at 313.

<sup>32</sup> *See, e.g., People v. Stewart*, 520 N.E.2d 348, 358-59 (Ill.) (Simon, J., dissenting) (arguing that *McCleskey* "did not foreclose entirely the possibility that equal protection violations could be proven in an individual case through the use of statistical evidence"), *cert. denied*, 488 U.S. 900 (1988). *See also State v. Mallett*, 732 S.W.2d 527, 538 (Mo.) (characterizing the *McCleskey* decision as "seldom" permitting statistics alone to give rise to an equal protection claim), *cert. denied*, 484 U.S. 933 (1987).

## B. Statistics Pertaining to a More Narrow Class of Decisionmakers

In arguing that McCleskey's statistics did not prove discrimination, the Court relied in part on the large number of decisionmakers in the administration of a state's death penalty. The Court also relied upon the uniqueness of each jury, stating that no state-wide statistical disparity can fairly be attributed to the unique jury which meets for one isolated occasion in any particular trial. These comments seem to suggest a preference by the Court for studies which are more focused on the particular area where the sentencing decisions are being made. Even more ideally, an empirical study might be directed at the charging decisions of an individual prosecutor's office. The Court left this possibility open, characterizing as "questionable" whether such a claim could be maintained.<sup>33</sup> Such an allegation would make the claim of racial bias much more analogous to "decisions of a jury commission or of an employer" which are "fairly attributable" to the decisionmaker over time.<sup>34</sup>

Several courts have been presented with more localized claims of racial bias than McCleskey presented in his case. Those claims have been unsuccessful, but the arguments warrant discussion. In some cases, the claims were flawed from the outset based on the way in which the issues were framed.

An empirical study which differs from the Baldus study only in that the size of the surveyed area is more focused is unlikely, standing alone, to lead to success in court. Such a study still fails to account for the uniqueness of each jury and the difficulty of attributing decisions over time directly to anyone.<sup>35</sup> This is exactly how courts have responded to statistical claims of racial bias in a particular county or city. For example, in *People v. Williams*,<sup>36</sup> the defendant challenged his sentence based on a county-specific empirical study.<sup>37</sup> The Court summarily dismissed the claim, relying on *McCleskey*.<sup>38</sup> Similarly, the defendant in *State v. Byrd*<sup>39</sup> attempted to show racial bias in Hamilton County, Ohio. The Court denied relief because Byrd failed to demonstrate "evidence that improper racial considerations prompted the jury's recommendation of death in this case."<sup>40</sup>

<sup>33</sup> *McCleskey*, 481 U.S. at 295, n. 15.

<sup>34</sup> *Id.* See also *Fuller v. Georgia State Bd. of Pardons and Paroles*, 851 F.2d 1307 (11th Cir. 1988). In *Fuller*, a black inmate brought a civil rights action against the Georgia State Board of Pardons and Paroles, alleging that parole decisions were made in a racially discriminatory manner. Fuller presented empirical evidence which demonstrated that white inmates had been paroled at a higher frequency than black inmates. The Eleventh Circuit rejected Fuller's claim, but acknowledged that his challenge was "more specific than *McCleskey*'s because it focuses on the decisions of a single entity, the Georgia Parole Board, rather than the decisions of many unique juries." *Id.* at 1310. The court also noted that under *McCleskey*, "an unexplained statistical showing of disparate racial treatment by a single entity over a period of time could raise the inference of an equal protection violation." *Id.*

<sup>35</sup> See *supra* note 8 and accompanying text. In addition, a local study will ordinarily attempt to draw broad conclusions about race discrimination in an area based on a relatively small sample of cases. The *McCleskey* Court anticipated this problem. 481 U.S. at 296, n. 15.

<sup>36</sup> 588 N.E.2d 983, 1022 (Ill. 1991), *cert. denied*, 113 S. Ct. 218 (1992).

<sup>37</sup> See *Murphy, Application of the Death Penalty in Cook County*, 73 Ill. B. J. 90 (1984).

<sup>38</sup> *Williams*, 588 N.E.2d at 1022.

<sup>39</sup> 512 N.E.2d 611, 619 (Ohio 1987), *cert. denied*, 484 U.S. 1037 (1988).

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., *Van Cleave v. State*, 517 N.E.2d 356 (Ind. 1987), *cert.*

A potentially more successful strategy is to focus on an individual decisionmaker to whom decisions can fairly be attributed over time, such as the prosecuting attorney's office.<sup>41</sup> In pursuing this strategy, a county-specific empirical study can be useful in convincing a court to allow further inquiry into the local charging policies and practices of the prosecutor's office.<sup>42</sup>

This is the approach which the defendant took in *People v. McPeters*.<sup>43</sup> McPeters relied on statistical disparities in the administration of the death penalty in Fresno County, California and sought discovery relating to local charging practices. The California Supreme Court affirmed the denial of the request, relying partly on *McCleskey*'s recognition of the necessity for prosecutorial discretion and partly on flaws in the supporting statistical study itself.<sup>44</sup> If an appropriate foundation can be laid with an unflawed empirical study, however, it seems that such a request should be granted. Indeed, the *McCleskey* Court itself, while emphasizing the importance of prosecutorial discretion, stated unequivocally that such discretion "cannot be exercised on the basis of race."<sup>45</sup>

If a prosecutor appears to have followed a pattern of pursuing the death penalty in a way that correlates with race, defense attorneys should first seek further information. If a non-racial reason for the pattern is not apparent, then two claims are available under *McCleskey*. First, attorneys should claim that the unexplained pattern is sufficient by itself to demonstrate a violation of the Fourteenth Amendment. This claim would analogize the statistical disparity to venire-selection and Title VII cases discussed by the *McCleskey* majority, where statistics can create an inference of purposeful discrimination.<sup>46</sup> When making this claim, it should be noted that the *McCleskey* Court itself specifically left open the possibility that statistics could be used to challenge a specific prosecutor's charging policies.<sup>47</sup> Secondly, defense attorneys may argue that the unexplained pattern gives rise to a constitutionally significant risk of racial bias in violation of the Eighth Amendment. It should be emphasized that the unexplained pattern of racial discrimination is attributable to an on-going identifiable entity, the prosecutor's office, unlike the more general pattern alleged by *McCleskey*.

*denied*, 488 U.S. 1019 (1988). In *Van Cleave*, the defendant claimed that the prosecutor in his county had engaged in a pattern of racial discrimination in pursuing the death penalty. Despite the fact that discovery had provided Van Cleave with detailed information of all death penalty cases filed by the prosecutor, Van Cleave failed to supplement his claim of race discrimination with any supporting evidence. By dismissing Van Cleave's claim based on the insufficiency of the evidence, the court implicitly acknowledged that a properly substantiated claim could give rise to a cognizable constitutional challenge. *Id.* at 372.

<sup>42</sup> A useful analogy can be drawn to *Batson v. Kentucky*, 476 U.S. 79 (1986). Under *Batson*, if a prosecuting attorney uses peremptory challenges in a way that demonstrates a pattern correlating with race, the burden is on the attorney to explain those challenges. Similarly, if a *prima facie* case of race discrimination can be shown in a local office's charging policies, a court might be persuaded to permit broader discovery pertaining to those policies.

<sup>43</sup> 832 P.2d 146 (Cal. 1992).

<sup>44</sup> *Id.* at 155.

<sup>45</sup> *McCleskey*, 481 U.S. at 309, n. 30 (citing *Wayte v. United States*, 470 U.S. 598, 608 (1985); *United States v. Batchelder*, 442 U.S. 114 (1979); and *Oyler v. Boles*, 368 U.S. 448 (1962)). See also *U.S. v. Bernal-Rojas*, 933 F.2d 97 (1st Cir. 1991) ("Although prosecutorial discretion is shielded from intense judicial review, it cannot be wielded in a manner which discriminates against a constitutionally protected class.") (citations omitted).

<sup>46</sup> See *McCleskey*, 481 U.S. at 294-95; n. 14; n. 15.

<sup>47</sup> *Id.* at 295, n. 15.

It is extremely important that attorneys distinguish the claims being made from those presented in *McCleskey*. If a court fails to see the subtle differences between a pattern premised on a prosecutor's charging practices and a pattern premised on results only, the claim almost certainly will fail. A prime example is *State v. Irick*.<sup>48</sup> In *Irick*, the defendant attempted to call the Knox County District Attorney General as a witness to demonstrate that he had never requested the death penalty in a case where the victim was black. Irick's victim was white, and he claimed that the Knox County District Attorney improperly discriminated against him on that basis. In support of his request, Irick presented statistical data on all reported homicide cases in Knox County from 1978 to 1986, through the testimony of a state-paid investigator. Irick's request was denied, and the Tennessee Supreme Court affirmed his subsequent death sentence.<sup>49</sup> The court relied on *McCleskey* and ruled that Irick had "utterly failed" to prove that "the decision makers in his case acted with discriminatory purpose."<sup>50</sup> The court saw the statistics and quickly retreated to *McCleskey*. What the court failed to see was that Irick was making an allegation of discrimination in his case and sought discovery to support that claim. Attorneys making such a claim must be prepared to convince the court that an easy retreat to *McCleskey* is not available where the proffered statistical showing goes to a specific on-going actor like the prosecutor's office.

### C. Case-Specific Indicia of Racial Prejudice

The one avenue for challenge which *McCleskey* most clearly left open is a case-specific claim of racial discrimination based upon facts in the defendant's own case. Such a showing is difficult to make.<sup>51</sup> The problem is determining what facts would suffice to show purposeful discrimination in an individual case.<sup>52</sup> An even greater problem is that such evidence rarely manifests itself in tangible forms. Few modern juries, judges or prosecutors would admit to purposefully treating defendants differently because of their race or the victim's race. However, as it is said, "[d]enial ain't just a river in Egypt."<sup>53</sup> Defense attorneys bear the burden of digging deeper to discover if racial prejudice has infected the decisionmaking process in an unconstitutional manner.

A racial prejudice claim of this nature is necessarily fact-specific. No boilerplate pre-trial motion or supporting memorandum can adequately present and preserve this argument.<sup>54</sup> The facts which might demonstrate an intent to discriminate on the basis of race are as varied as one's imagination. Attorneys must be attentive and creative in supporting a claim of racial bias with specific facts. An analysis of the cases where such claims have been made will provide insight into the various contexts in which racial prejudice can rear its ugly head in the capital sentencing process. And, although many of these claims

<sup>48</sup> 762 S.W.2d 121 (Tenn. 1988), cert. denied, 489 U.S. 1072 (1989).

<sup>49</sup> *Id.* at 135.

<sup>50</sup> *Id.*

<sup>51</sup> See generally Herbrand, Annotation, *What Constitutes Such Discriminatory Prosecution or Enforcement of Laws as to Provide Valid Defense in State Criminal Proceedings*, 95 A.L.R.3d 280 (1979); Herbrand, Annotation, *What Constitutes Such Discriminatory Prosecution or Enforcement of Laws as to Provide Valid Defense in Federal Criminal Proceedings*, 45 A.L.R. Fed. 732 (1979); 13 Am. Jur. Proof of Facts 2d 609, *Discriminatory Enforcement of Criminal Law* (1977).

<sup>52</sup> See, e.g., *Daniels v. State*, 528 N.E.2d 775 (Ind. 1988), vacated, 491 U.S. 902 (1989). In *Daniels*, the defendant sought funds for an expert to determine whether Indiana administered its death penalty in a discriminatory fashion. The defendant acknowledged that this, standing alone, would not demonstrate a constitutional violation. However,

ultimately failed, some have convinced a court, or at least one judge, that the *McCleskey* threshold requirement was satisfied.

#### 1. *Robinson v. State*

In *Robinson v. State*,<sup>55</sup> the Florida Supreme Court found sufficient indicia of racial prejudice to warrant reversal of the death sentence.<sup>56</sup> At trial, the prosecuting attorney conducted the following cross-examination of a defense expert witness:

Mr. Alexander (prosecutor): Would you say, Doctor, that it's a fair statement that the Defendant, Mr. Robinson, is prejudiced toward white people, specifically, women?

Doctor Krop: I don't know if he's prejudiced against them in the way we typically think of prejudice in terms of feeling like whites are worse than blacks or blacks are worse than whites. I think he has probably a lot of hostility built up. I don't know enough about his history in terms of whether there were racial prejudices which occurred substantially in his own background which would back that up, but I think he just has a lot of difficulty with women in general and I really can't say whether it's necessarily a racial hostility.

Mr. Alexander: In regard to one of the answers you gave Mr. Pearl, you noted the Defendant had told you about several victims in the past in regard to sexual encounters. Are you familiar with the gender and race of those particular victims?

Doctor Krop: I believe that Mr. Pearl indicated that they were white.

Mr. Alexander: Do you know if they were male or female?

Doctor Krop: I probably don't know for sure. I presume they were white females.

Mr. Alexander: And you know the victim in this case also was a white female, do you not?

Doctor Krop: Yes, I do.<sup>57</sup>

At this point, defense counsel finally objected and moved for a mistrial. Counsel argued that this examination was an attempt to make an improper racial appeal. The defendant was black, the victim was white, and the jury was all white. The trial court denied the request for

*Daniels* claimed that the expert would have testified to "other" evidence in support of his claim. The court rejected *Daniels*' argument, holding that he must assert what "other" evidence would be presented. *Id.* at 783.

<sup>53</sup> See Senator Al Gore, Remarks at the University of Texas at Austin (Aug. 27, 1992) (quoting from a song by Dire Straits). See also Al Franken, *I'm Good Enough, I'm Smart Enough, and Doggone it, People Like Me—Daily Affirmations* by Stuart Smalley at Dec. 1 (Dell Paper-back 1992).

<sup>54</sup> But see Comment Note, Annotation, *Preconviction Procedure for Raising Contention that Enforcement of Penal Statute is Unconstitutionally Discriminatory*, 4 A.L.R.3d 404 (1965).

<sup>55</sup> 520 So.2d 1 (Fla. 1988).

<sup>56</sup> Although the court also found that the State impermissibly argued a nonstatutory aggravating factor, the court found the claim of racial prejudice to be "even more damaging." *Id.* at 6.

<sup>57</sup> See *id.* at 6 (emphasis added).

a mistrial and refused to give a cautionary instruction to the jury.

The Florida Supreme Court reversed, holding that "the prosecutor's examination of this witness was a deliberate attempt to insinuate that appellant had a habit of preying on white women and thus constituted an impermissible appeal to bias and prejudice."<sup>58</sup> The court noted the absence of a cautionary instruction but also stated in *dicta* that "improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection below or even in the presence of a rebuke by the trial judge."<sup>59</sup>

## 2. *Ex Parte Brandley*

Perhaps the most extensive claim of race discrimination ever made in a capital case was in *Ex Parte Brandley*.<sup>60</sup> Brandley was a black male charged with the rape homicide of a white female. After a hung jury resulted in a mistrial, Brandley was retried, convicted of capital murder, and appealed. The Texas Court of Criminal Appeals affirmed his conviction.<sup>61</sup>

On state habeas, the Texas Court of Criminal Appeals ordered an evidentiary hearing pursuant to three of Brandley's seven claims. One claim was that the factor of race had impermissibly entered his trial in violation of the Eighth and Fourteenth Amendments. The hearing judge entered findings of fact on all three of Brandley's claims, and the case returned to the Texas Court of Criminal Appeals. Because the court reversed Brandley's conviction on the grounds that the investigative procedures followed by the State had violated Brandley's due process rights,<sup>62</sup> the majority's ruling contains no discussion of the race discrimination issue. An examination of the hearing judge's findings on the race discrimination claim, however, is informative.<sup>63</sup>

The hearing judge began by noting that Brandley was a black male convicted of raping and killing a sixteen year old white female. A professor from the University of Texas testified, based on an elaborate statistical study, that a black defendant who is convicted for a rape/homicide of a white victim is five times more likely to receive the death penalty than a white defendant with a black victim. The hearing judge observed that the professor's methodology was "consistent" with the Baldus study which the Supreme Court assumed to be valid in *McCleskey*.<sup>64</sup>

Both of Brandley's juries were all white, and in both trials the State had used peremptory challenges to strike all qualified blacks.<sup>65</sup> Trial

<sup>58</sup> *Id.* See also *State v. Houston*, 534 A.2d 1293 (Me. 1987). In *Houston*, the defendant was charged with assaulting a female victim. The sentencing judge in a bench trial stated that he usually gave a jail sentence "when men are convicted of beating women or hitting women" because he held "a very dim view of men hitting women." *Id.* at 1296 (emphasis in original). He then sentenced Houston to "two to three days" of jail time so that Houston would know that he 'can't go around hitting women.'" *Id.* Noting that the statute was gender-neutral, the Maine Supreme Court vacated Houston's sentence, finding an impermissible gender-based classification in the trial judge's statements. *Id.* at 1297.

<sup>59</sup> *Robinson*, 520 So.2d at 7. See also *Blair v. Armontrout*, 916 F.2d 1310, 1351-52 (8th Cir. 1990) (Heaney, J., concurring in part and dissenting in part), *cert. denied*, 112 S. Ct. 89 (1991). At Blair's trial, the prosecutor speculated during closing arguments on "the victim's fear at seeing 'this black man' with a gun." See *id.* There was no objection, and the issue was not raised in state courts or in the Eighth Circuit, which denied relief. See *id.* at 1351, n. 21. However, Judge Heaney dissented, finding ineffective assistance of counsel and both cause and prejudice for the default. *Id.* at 1351, n. 21, and 1335, n. 3. Judge Heaney found that "[a]ny invitation to racial prejudice in the criminal process is . . . prohibited by the [F]ourteenth [A]mendment."

manuals used by the prosecuting attorneys during both trials recommended that black persons not be permitted to serve on any criminal jury. The hearing judge found that if any prosecutor deviated from this practice, that attorney would be required to "explain why he departed [from] standard practice by allowing a black person to serve on a criminal jury."<sup>66</sup>

In Brandley's first trial, only one juror held out and refused to convict the defendant. During deliberations, the other jurors repeatedly called him "Nigger lover."<sup>67</sup> After the trial, the holdout juror received thousands of harassing phone calls where the caller would say, "Nigger lover" and hang up.<sup>68</sup> The hearing judge also found that the holdout juror had difficulty obtaining employment years later as a result of his "not guilty" vote.

The circumstances of Brandley's arrest and pre-trial detention also reflected possible racial animus. Shortly after the victim's body was discovered, a white police officer was asked who committed the murder. Referring to Brandley, the officer stated, "the nigger was elected."<sup>69</sup> Bond was set at \$30,000. When Brandley's attorneys attempted to make the bond, the sheriff refused, stating, "[t]he little Nigger doesn't belong on the ground."<sup>70</sup> The district attorney concurred with these sentiments and went to the trial judge, without notice to Brandley's attorney. The judge immediately signed an ex parte order increasing the bond to \$70,000.

Many members of the public, black and white, attended Brandley's trial. However, whenever a black spectator exited the courtroom, a sheriff's deputy would follow that person and keep him or her under observation. An elderly white spectator in the audience repeatedly stated, "[k]ill the nigger, kill the nigger . . ." <sup>71</sup> In chambers, the district attorney stated that if any announcements to the audience were necessary, he would make the announcement to the white people, while Brandley's attorneys could make the announcement to the black people.

Because the Texas Court of Criminal Appeals granted Brandley a new trial based on a separate due process violation,<sup>72</sup> these incredible facts were not the basis for the court's reversal. However, Judge Campbell addressed the race discrimination issue in dissent. His opinion is instructive on the types of arguments which defense counsel should anticipate in response to such a claim.

The dissent conceded that Brandley's claim went "much farther than that of the defendant in *McCleskey*" because he introduced "evidence suggesting the presence of racial discrimination in his particular case."<sup>73</sup> But Judge Campbell then examined each finding individually

*Id.* at 1351.

<sup>60</sup> 781 S.W.2d 886 (Tex. Crim. App. 1989).

<sup>61</sup> *Brandley v. State*, 691 S.W.2d 699 (Tex. Crim. App. 1985).

<sup>62</sup> *Ex Parte Brandley*, 781 S.W.2d at 894-95.

<sup>63</sup> A dissenting judge argued that all of Brandley's claims, including the claim of racial bias, were without merit. Judge Campbell's dissenting opinion examined the findings of fact at length. Contrary to the hearing judge's conclusion, Judge Campbell determined that the findings of fact were insufficient to satisfy *McCleskey*. *Brandley*, 781 S.W.2d at 913-33 (Campbell, J., dissenting).

<sup>64</sup> See *Brandley*, 781 S.W.2d at 926 (Campbell, J., dissenting).

<sup>65</sup> Brandley's conviction became final before the United States Supreme Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court has since held that *Batson* should not be given retroactive effect to cases on collateral review. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

<sup>66</sup> See *Brandley*, 781 S.W.2d at 926 (Campbell, J., dissenting).

<sup>67</sup> See *id.*

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See *id.* at 927.

<sup>71</sup> See *id.*

<sup>72</sup> *Id.* at 894 (majority opinion).

<sup>73</sup> *Id.* at 928, n. 14 (Campbell, J., dissenting).

and found that a new trial was not warranted.

First, Judge Campbell found that the statistical study was insufficient, but accepted the study as "circumstantial evidence" of racial bias, relying on *McCleskey*.<sup>74</sup> Then the dissent dismissed suggestions of racial bias in the selection of the first jury because its deliberations had not produced the challenged conviction and sentence. Although he agreed with Brandley that the prosecutor's trial manual, the testimony of district attorneys, and the pattern of racially motivated peremptory challenges supported "an inference of discriminatory intent" as to the second trial,<sup>75</sup> Judge Campbell found that the evidence did not meet the "greater burden of proof set out in *Swain v. Alabama*,"<sup>76</sup> requiring a showing of "purposeful discrimination" in the use of peremptory challenges.<sup>77</sup>

The dissenting judge then dismissed allegations of racial slurs directed at the holdout juror from the first trial, stating that such statements provided only a speculative inference as to popular opinion at the time of Brandley's second trial.<sup>78</sup> Although Judge Campbell found the statement, "the nigger was elected" to be indicative of "the grossest of racial insensitivity,"<sup>79</sup> he concluded that the context of the statement revealed that Brandley was "elected" not because of his race, but because of his physical size.<sup>80</sup> Judge Campbell also dismissed Brandley's claim pertaining to the racial motivation for the denial of his attempt to post bond as moot, since Brandley had thereafter been convicted.<sup>81</sup> Finally, the dissent refused to give any weight to the evidence of the racially charged nature of the trial, stating that the evidence failed to "establish that the jury was aware" of the racist comments by the white spectator or

<sup>74</sup> *Id.* at 929.

<sup>75</sup> *Id.* at 931 (emphasis in original).

<sup>76</sup> 380 U.S. 202 (1965).

<sup>77</sup> *Brandley*, 781 S.W.2d at 930 (Campbell, J., dissenting).

Brandley was precluded from relying on *Batson v. Kentucky*, 476 U.S. 79 (1986), because the Supreme Court decided *Batson* after Brandley's conviction became final. See *supra* note 65 and accompanying text. As Judge Campbell indicated, the case law available to Brandley required a "greater burden" than *Batson*.

<sup>78</sup> *Brandley*, 781 S.W.2d at 930 (Campbell, J., dissenting).

<sup>79</sup> *Id.* at 932.

<sup>80</sup> *Id.* The witness who testified to this statement said that he heard the officer state, "the nigger was tall enough and strong enough and he was elected." See *id.*

<sup>81</sup> *Id.* The weaknesses in this argument are particularly striking. If the investigators were initially motivated by racial animus, but not justice, then the subsequent conviction is called into question. Remarkably, the dissent uses that very conviction to vitiate the evidence of its impropriety.

<sup>82</sup> *Id.* at 933.

<sup>83</sup> *Id.*

<sup>84</sup> 720 F. Supp. 1566 (N.D. Ga. 1989).

<sup>85</sup> For instance, two jurors admitted using the word "nigger" on occasion, and two jurors expressed a general fear of blacks. See *id.* at 1576.

<sup>86</sup> Dobbs' trial attorney stated that blacks are less educated and less intelligent than whites. He referred to the black community of Chattanooga, Tennessee as "black boy jungle" and admitted to using the word "nigger" jokingly. See *id.*

<sup>87</sup> See *id.* at 1578. See also *Coleman v. Risley*, 839 F.2d 434 (9th Cir. 1988) (Reinhardt, J., dissenting). In *Coleman*, a habeas petitioner made a claim of racial discrimination based on the trial judge's reference to him as "black boy" and on the fact that the prosecutor allowed petitioner's white co-defendant to plead guilty and avoid the death penalty while refusing to make similar allowances for petitioner. A Ninth Circuit panel affirmed the district court's refusal to grant *Coleman* an evidentiary hearing on these allegations. *Id.* at 450-51. However, Judge Reinhardt dissented, finding that *Coleman* presented "more than enough of a showing of unequal and arbitrary treatment to

of the sheriff's practice of following black spectators who exited the courtroom.<sup>82</sup> Judge Campbell concluded his dissent by stating that "[t]he record in this case simply does not establish 'exceptionally clear proof' of applicant's claim as required by *McCleskey*. Applicant should be denied relief under this claim."<sup>83</sup>

### 3. *Dobbs v. Zant*

In *Dobbs v. Zant*,<sup>84</sup> the petitioner in a federal habeas corpus action claimed that he had been discriminated against on the basis of his race and the race of his victim. Dobbs introduced depositions of the jurors who had decided his sentence. These depositions indicated varying degrees of racial insensitivity and general bias.<sup>85</sup> The petitioner also introduced evidence of the trial judge's prior career as a segregationist legislator and statements by his own trial attorney indicating general racial prejudice.<sup>86</sup> Finally, Dobbs introduced evidence that the judge and defense attorney referred to the defendant at trial as "colored" and "colored boy."<sup>87</sup>

The District Court for the Northern District of Georgia denied Dobbs' habeas petition,<sup>88</sup> and the Eleventh Circuit Court of Appeals affirmed.<sup>89</sup> However, the district court's discussion of the admissibility of juror testimony illustrates the intricacies of Federal Rule of Evidence 606(b).<sup>90</sup> This rule, which holds most juror testimony inadmissible, provides a potential opportunity to introduce such evidence in federal court<sup>91</sup> when racial bias has played a part in the decision making process during the state trial.<sup>92</sup>

be entitled to a hearing before the United States District Court." *Id.* at 468 (Reinhardt, J., dissenting). The Ninth Circuit, en banc, subsequently withdrew the panel's opinion and reversed *Coleman*'s death sentence based on a separate due process violation. *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir.) (en banc), cert. denied, 493 U.S. 944 (1989).

<sup>88</sup> *Dobbs*, 720 F. Supp. at 1581.

<sup>89</sup> *Dobbs v. Zant*, 963 F.2d 1403, 1412 (11th Cir. 1991), rev'd on other grounds, 113 S. Ct. 835 (1993). The United States Supreme Court determined that *Dobbs* was entitled to have a trial transcript admitted as part of the record on habeas in order to support his claim of ineffective assistance of counsel. See case summary of *Dobbs*, Capital Defense Digest, this issue.

<sup>90</sup> Fed. R. Evid. 606(b) provides:

**Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or judgment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

See also *supra* note 11 and accompanying text.

<sup>91</sup> Such evidence is also arguably admissible in Virginia courts. See *infra* note 106.

<sup>92</sup> Indeed, the Advisory Committee's Notes to Rule 606(b) acknowledged the "substantial authority" which "refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside." However, the committee noted that "the door of the jury room is not necessarily a satisfactory dividing point." Fed. R. Evid. 606(b) advisory committee's note.



The district court in *Dobbs* noted that a juror's statements "about his mental processes in reaching [a] decision may not be used as evidence in a subsequent challenge to the decision."<sup>93</sup> However, the court quoted the United States Supreme Court for the proposition that "a juror can testify concerning 'any mental bias in matters unrelated to the specific issues that the juror was called upon to decide and whether extraneous prejudicial information was improperly brought to the juror's attention.'"<sup>94</sup> The *Dobbs* court found that "[r]acial prejudice is a 'mental bias . . . unrelated to the specific issues that the juror was called upon to decide.'"<sup>95</sup> As a result, a habeas petitioner may inquire into mental biases of the jurors who imposed the sentence at trial in order to show either an Eighth Amendment or a Fourteenth Amendment<sup>96</sup> *McCleskey* claim.<sup>97</sup>

The *Dobbs* court then pointed out a glaring conflict: while Rule 606(b) excludes juror testimony concerning the sentencer's "mental processes," *McCleskey* required that one who challenges a death sentence bears the burden to show "actual bias in the sentencing decision."<sup>98</sup> The court considered this conflict in light of *Tanner v. United States*.<sup>99</sup> In *Tanner*, a juror stated after trial that several jurors had used alcohol, marijuana, and cocaine during the trial. The Court found the evidence inadmissible under Rule 606(b) because it determined that juror intoxication is not an outside influence on the deliberations.<sup>100</sup> However, the *Tanner* Court took the additional step of determining whether that ruling violated the defendant's Sixth Amendment right to a fair trial before an impartial jury. In resolving this conflict, the Supreme Court reasoned that the defendant's Sixth Amendment rights were sufficiently protected by *voir dire*, a juror's obligation to report misconduct, and the defendant's ability to show juror misconduct post-trial through the testimony of non-jurors.<sup>101</sup> Important to the Court's reasoning was the fact that intoxication is an observable characteristic.<sup>102</sup>

<sup>93</sup> *Dobbs*, 720 F. Supp. at 1572 (citation omitted).

<sup>94</sup> *Id.* at 1573 (quoting *Rushen v. Spain*, 464 U.S. 114, 121, n. 5 (1984)) (emphasis in original). It is significant that the *Rushen* Court went beyond the express language of Rule 606(b) in permitting evidence of a juror's "mental bias."

<sup>95</sup> *Dobbs*, 720 F. Supp. at 1573 (emphasis added).

<sup>96</sup> The *Dobbs* court addressed only the Eighth Amendment aspect of the *Rushen* language, but not the Fourteenth Amendment aspect. *Id.* Certainly one who seeks to introduce evidence of "mental bias" alone will have difficulty proving purposeful discrimination. However, where the evidence of juror bias is so strong that it appears that a juror voted against the defendant because of racial considerations, a Fourteenth Amendment claim can be presented within the rubric of *Rushen*'s "mental bias" language. Furthermore, as the *Dobbs* court observed, an Eighth Amendment *McCleskey* claim, purporting to show an impermissible risk of racial discrimination, can clearly be made with evidence of a juror's "mental bias." The *Rushen* language thus loosens the restrictions of Fed. R. Evid. 606(b) for both Fourteenth and Eighth Amendment claims.

<sup>97</sup> *Dobbs*, 720 F. Supp. at 1573. The court noted that its analysis, to some extent, permitted a habeas petitioner to "bypass the *voir dire* process and investigate the racial prejudices of the jurors after the verdict has been received" and that the State had not raised an argument challenging its ruling on that basis. *Id.* at 1573, n. 7. However, the court also found that an attempt to demonstrate that the jury's decision was based on race, which *McCleskey* required in order to establish an equal protection violation, could not have been made during *voir dire* for the obvious reason that the decision had not yet been rendered at that time. *Id.*

<sup>98</sup> *Id.* at 1573.

<sup>99</sup> 483 U.S. 107 (1987).

<sup>100</sup> *Id.* at 125. The Court relied on specific legislative history stating that under Rule 606(b), a juror could not "'testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations.'" *Id.* at 123 (quoting H. R. Rep.

The *Dobbs* court noted the crucial distinction between Tanner's claim of juror intoxication and a claim of juror discrimination on the basis of race: "[R]acial bias is not as observable as intoxication."<sup>103</sup> The court noted the availability of other methods of proving race discrimination and concluded that "[r]ule 606(b)'s prohibition ordinarily would not impair a defendant's ability to show an Equal Protection or Eighth Amendment violation" through those methods.<sup>104</sup> Despite this observation, the court concluded:

In a given case, however, testimony of racial bias based on a juror's conduct or statements during the deliberations may become admissible notwithstanding Rule 606(b) if the admissible evidence of a juror's racial prejudice is so strong that the death penalty appears to have been imposed on the basis of the defendant's race. In the face of strong evidence that the defendant's constitutional rights, under the standards articulated in *McCleskey*, may have been violated, the statutory Rule 606(b) privilege would have to yield. In such a case, the balance between the defendant's rights and the society's interest in protecting the jury system would not be met by enforcing Rule 606(b).<sup>105</sup>

Despite the fact that the *Dobbs* court ruled against the petitioner on the merits of his race discrimination claim, it is important to note that the court admitted the crucial juror testimony into evidence. Attorneys should consider interviewing or deposing jurors in any collateral challenge to a death sentence where racial bias is a potential issue.<sup>106</sup> In framing arguments on admissibility of juror testimony, several difficult issues must be confronted. First, attorneys should cite the *Rushen*

No. 93-650, pp. 9-10 (1973) (emphasis supplied by the Court)).

<sup>101</sup> *Id.* at 127.

<sup>102</sup> *See id.* at 125-26.

<sup>103</sup> *Dobbs v. Zant*, 720 F. Supp. at 1574.

<sup>104</sup> *Id.* The Court pointed out that evidence of racial bias can be admitted in "several ways: during *voir dire*, by juror testimony about another juror's statements or conduct prior to the verdict, and by post-verdict evidence of a juror's bias." *Id.* (emphasis in original).

<sup>105</sup> *Id.*

<sup>106</sup> This avenue for relief need not be reserved exclusively for federal habeas corpus. Although Rule 606(b) applies only in federal court, post-verdict statements by jurors are also arguably admissible in the race discrimination context under Virginia law. In Virginia courts, the extent of permissible post-verdict inquiries into a jury's deliberations and biases is determined by common law: "We have adhered strictly to the general rule that the testimony of jurors should not be received to impeach their verdict, especially on the ground of their own misconduct." *Caterpillar Tractor Co. v. Hulvey*, 233 Va. 77, 82, 353 S.E.2d 747, 750 (1987). However, "there may be exceptional cases where juror testimony might be admissible to impeach their verdict to prevent a miscarriage of justice." *Id.* *See also* Friend, *The Law of Evidence in Virginia* § 59(c) (3d ed. 1988) ("This rule is not a complete prohibition of [juror testimony to impeach the jury's verdict], but it is clear that the policy of the courts is to receive such testimony only in exceptional circumstances.")

For an example of an application of the "miscarriage of justice," or "exceptional circumstance" exception, *see Harris v. Commonwealth*, 13 Va. App. 47, 53, 408 S.E.2d 599, 602 (1991) (holding that the trial court abused its discretion in declining to inquire into the extent to which extraneous information about the defendant's future eligibility for parole entered into the decision making process). Attorneys should argue, both on direct appeal and on state habeas, that a miscarriage of justice would result from the refusal to admit juror testimony which would show an impermissible risk of purposeful discrimination based on race.

language as support for admissibility of juror testimony demonstrating a "mental bias" on the part of one or more jurors. This language is available in support of both Eighth and Fourteenth Amendment claims.<sup>107</sup> Second, if the evidence is excluded under Rule 606(b), attorneys should address the dichotomy between Rule 606(b)'s exclusions and *McCleskey*'s requirements for proving a race discrimination claim. In this situation, attorneys should distinguish *Tanner* and refer to the analysis of the district court in *Dobbs*. Attorneys should argue that a juror can testify to statements and deliberations at trial, notwithstanding Rule 606(b), if the "evidence of a juror's racial prejudice is so strong that the death penalty appears to have been imposed on the basis of the defendant's race."<sup>108</sup>

#### D. Argue for a More Stringent Standard Under the Virginia Constitution

Several state courts have considered imposing higher obligations under their own constitutions than the United States Supreme Court has required when contemplating statistical claims of racial discrimination in capital cases.<sup>109</sup> Article I, Section 11 of the Virginia Constitution provides that "the right to be free from any governmental discrimination upon the basis of . . . race . . . shall not be abridged."<sup>110</sup> Although this clause has been held to be no broader than the Equal Protection Clause

<sup>107</sup> See *supra* note 96 and accompanying text.

<sup>108</sup> *Dobbs*, 720 F. Supp. at 1574.

<sup>109</sup> See, e.g., *State v. Mallett*, 732 S.W.2d 527 (Mo.) (Blackmar, J., dissenting) (advocating that the Missouri Supreme Court should "be mindful of appearances" and reduce a death sentence to life imprisonment without probation or parole pursuant to a state statute, notwithstanding *McCleskey*), *cert. denied*, 484 U.S. 933 (1987); *State v. Koedatich*, 548 A.2d 939 (N.J. 1988) (Handler, J., dissenting) (stating that, despite *McCleskey*, "[t]he course of federal jurisprudence should not distract state courts from an independent evaluation of the issue," and concluding that the New Jersey constitution forbids administration of the death penalty in a racially discriminatory manner), *cert. denied*, 488 U.S. 1017 (1989); *State v. Green*, 406 S.E.2d 852 (N.C. 1991) (rejecting a state and federal constitutional claim of racial discrimination premised on statistical evidence, but leaving the door open on the state claim, rejecting it on the basis that "the statistical studies offered by the defendant do not relate specifically to North Carolina or to the district in which the defendant was tried"); *People v. Adcox*, 763 P.2d 906 (Cal. 1988) (Mosk,

of the Fourteenth Amendment of the United States Constitution,<sup>111</sup> Virginia attorneys should make race discrimination challenges under both the Virginia and federal constitutions, if for no other reason than to draw attention to the problems of race discrimination which continue to plague the death penalty in Virginia.<sup>112</sup> Moreover, such a comprehensive challenge acts as a safeguard against potential arguments of procedural default, arguments which courts have so frequently embraced as a means of precluding post-conviction review.

#### IV. CONCLUSION

Although the United States Supreme Court has severely limited the opportunities to challenge a death sentence based on racial discrimination, the opportunities have not been completely eviscerated. This article has provided several avenues through which such a claim might be presented to a court. Attorneys should be prepared to assign racially discriminatory patterns more specifically to individuals who can be held accountable for the entire pattern. Attorneys must also be alert to any case-specific evidence which might show that racial bias has played a part in their clients' trials. Finally, statistical evidence of state-wide disparities in the administration of Virginia's death penalty should be assigned as error under the Virginia Constitution.

J., dissenting) (arguing that, where a defendant has shown that similarly situated individuals have received lesser sentences, the defendant's death sentence is unconstitutionally disproportionate, under either the United States Constitution or the California Constitution).

<sup>110</sup> Va. Const. Art. I, § 11.

<sup>111</sup> See, e.g., *Archer v. Mayes*, 213 Va. 633, 194 S.E.2d 707 (1973).

<sup>112</sup> See *Turner v. Commonwealth*, 234 Va. 543, 555, 364 S.E.2d 483, 490, *cert. denied*, 486 U.S. 1017 (1988). In *Turner*, the defendant proffered a statistical study relating to the discriminatory impact of the death penalty in Virginia. After *Turner* originally made his claim, the United States Supreme Court decided *McCleskey*. *Turner* admitted that *McCleskey* prevented a defendant from relying on statistics alone to prove a statute invalid, but nevertheless asked the Supreme Court of Virginia "to hold to the contrary." *Turner*, 234 Va. at 555, 364 S.E.2d at 483. The court stated simply: "We decline this request." *Id.* It is unclear whether *Turner*'s request was premised on the United States Constitution or Article I, Section 11 of the Virginia Constitution.

### ANYTHING SOMEONE ELSE SAYS CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW: THE USE OF UNADJUDICATED ACTS IN CAPITAL SENTENCING\*

BY: LAURA J. FENN

*Picture yourself; you are tired, exhausted, after so many days sitting with the same eleven people in that jury box. It is a strange place to be. You didn't expect the courtroom would look so much like a church. All week long you have been listening, your mind alternately concentrating and wandering. You have heard testimony, testimony from experts, from witnesses, from family members, even from the defendant himself. You have seen evidence, compelling and personal physical evidence from the crime scene, about the victim, who is dead now. You have heard enough testimony and seen enough evidence to convince you and the eleven others that this man was guilty of committing a horrible, brutal crime. This man is a murderer.*

*You have unanimously decided to convict the defendant of capital murder and now you must decide whether he should be sentenced to life imprisonment or be sentenced to die.*

*You hear more evidence. You hear psychiatrists discussing the mental state of the defendant. You hear a sibling telling you about the background of the defendant. The stories of child abuse and the testimony about the defendant's mental disturbance begin to give you a glimpse into his background, a hint of how someone might have such a troubled upbringing that his behavior would culminate in such a horrible act. . . not that it would excuse what was done, but that it becomes slightly more understandable; understandable enough that you begin to change your mind, to think that perhaps death is not the best punishment.*

*But then you hear a jail cell mate relating stories about other things the defendant has done. He tells you that the defendant boasted about another murder he committed. Maybe he tells you that the defendant bragged about "taking" a girl and forcing her*