Capital Defense Journal

Volume 5 | Issue 2 Article 11

Spring 3-1-1993

JENKINS v. COMMONWEALTH 244 Va. 445 423 S.E.2d 360 (1992)

habeas claim. Such an argument would have to persuade the court that where a defendant has **never** had an opportunity to present a claim of constitutional error to a federal court, a more expansive view of the "miscarriage of justice" exception should be adopted.

Summary and analysis by:
Lesley Meredith James

JENKINS v. COMMONWEALTH

244 Va. 445 423 S.E.2d 360 (1992)
Supreme Court of Virginia

FACTS

On October 12, 1990, after Arthur Ray Jenkins III and a companion had become intoxicated at a restaurant and engaged in a fight with a restaurant patron, family members took Jenkins and his companion from the scene to his aunt's home where he had been living, along with his uncle, Floyd Jenkins, age 69, and Lee H. Brinklow, age 72. After Brinklow attempted to prevent Arthur Jenkins from entering the house, an argument ensued, and a grisly series of events commenced. Jenkins shot Brinklow in the face with a .22 rifle, shot his uncle in the head leaving him on the floor "gagging," and after a short interval outside with Brinklow, returned to the house, shot his uncle in the head again, and then, using a butcher knife, stabbed him repeatedly until his "guts came out." Though Brinklow pled for mercy, Jenkins shot him in the head.[1] He then robbed his two victims of their personal items, stole cash and other valuables from his aunt's bedroom, and left the premises carrying his two victim's bodies in the back of Brinklow's truck. Jenkins and his companion abandoned the truck, and after an attempt to clean up the murder scene, fled the area. Jenkins was apprehended later near Abingdon.

Jenkins was charged in a multiple count indictment which included: the capital murder of more than one person as part of the same transaction,[2] two counts of capital murder for the killings of Brinklow and Jenkins in the commission of robbery,[3] two counts of robbery, and two counts of illegal use of a firearm.[4] At trial Jenkins pled guilty to the illegal use of a firearm in the commission of Brinklow's murder, and the jury found Jenkins guilty on the remaining charges, including three charges of capital murder. Jenkins was sentenced to life imprisonment for each of the robbery convictions and two years imprisonment for the weapons charge. At the sentencing phase for the capital offenses, the jury sentenced Jenkins to death for the two remaining capital charges,[5] basing their decision on both the vileness and future dangerousness aggravating factors.[6]

On appeal to the Virginia Supreme Court, Jenkins presented a number of arguments centering around the trial court's failure to properly take into consideration that Jenkins had been sexually abused as a child. Jenkins argued that some victims of child abuse suffer from a psychological disorder, "child abuse accommodation syndrome," which, if triggered by the appropriate provocation, followed by a sufficient "heating-up period," can result in uncontrollable rage. Jenkins alleged that a suggestive remark made by his uncle caused just such a reaction, and therefore he should have been charged with manslaughter rather than capital murder.

In order to support this theory, defense counsel was prepared to offer the testimony of Dr. Faye Sultan, a North Carolina psychologist, who had examined Jenkins eight days before trial, and the testimony of Ronald Mabry, a social worker familiar with Jenkins' case. The trial court refused to allow Mabry's testimony because the court deemed his testimony to be part of an improper attempt by defense counsel to offer a diminished capacity defense in a case where defendant did not claim to be mentally incompetent. In addition the court held that such an attempt violated the "*Stamper* principle,"[7] which holds evidence of the state of mind of the defendant to be irrelevant unless an insanity defense is mounted. On appeal to the Virginia Supreme Court, defense counsel argued that in barring Mabry's testimony, the court was stripping the defendant of the right "to mount a manslaughter defense."

Unlike Mr. Mabry, Dr. Sultan voluntarily decided not to testify. Her decision was based on a motion filed by the prosecutor during the penalty phase, five days into the trial, suggesting that Dr. Sultan could not properly testify in Virginia because she was not licensed here. The prosecutor went so far as to allege that should Dr. Sultan testify, she might be violating Virginia licensing statutes, a criminal violation. Though the trial court overruled the prosecutor's motion, Dr. Sultan, after consulting with independent counsel, decided not to risk possible legal and ethical sanctions by testifying. Defense counsel objected to the prosecutor's tactic as improper, and suggested that it interfered with the defendant's constitutional right to present favorable evidence during the penalty phase of the trial.

Finally, defense counsel alleged that there may have been juror misconduct. Published accounts after the trial revealed that the foreman had made a plea for a capital sentence by arguing that if his fellow jurors failed to impose the death penalty, Jenkins might be released on parole in as few as ten years. Because this statement is clearly inaccurate, and

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[1] Medical examination of the victims indicated Brinklow had received four gunshot wounds to the head, and the uncle had received two gunshot wounds in addition to seven stab wounds to the abdomen which penetrated the body up to eight inches.

[2] *See* Va. Code Ann. § 18.2-31(7) (1990).

[3] *See* Va. Code Ann. § 18.2-31(4) (1990).

[4] Jenkins was also charged in the original indictment with the murder of Brinklow under Va. Code Ann. §18.2-32, but the prosecutor subsequently made a motion to nolle prosequi that count.

[5] Although the defendant was also convicted of capital murder for the killing of Floyd Jenkins in the commission of robbery, that charge was dismissed during the penalty phase upon the Commonwealth's motion.

[6] *See* Va. Code Ann. § 19.2-264.2; § 19.2-264.4(C) (1990).

[7] *See Stamper v. Commonwealth*, 228 Va. 707, 717, 324 S.E.2d 682, 688 (1985).

parole is not a subject properly considered by a jury in Virginia, defense counsel argued that the jury's flawed deliberations amounted to reversible error.[8]

HOLDING

The Virginia Supreme Court upheld Jenkins' conviction and sentence.[9] The court declined to decide whether Jenkins was indeed offering a diminished capacity defense or whether the proffered defense had violated the *Stamper* principle. Rather the court held that "the defendant was not entitled, under the evidence, to mount a manslaughter defense."[10] The court refused to recognize the "child sexual abuse accommodation syndrome" defense because the "uncontradicted evidence" showed that the murder had not been committed upon sudden provocation, but was committed with malice and deliberation.[11] The court found no impropriety in the prosecutor's conduct toward Dr. Sultan, holding that the maneuver did not violate Jenkins' due process right to call witnesses in his behalf.[12] Finally, the court failed to find reversible error in the comments made by the jury foreman which suggested that the jury had improperly considered parole eligibility.[13] The court reiterated the general rule that jury deliberations are only properly considered if there is evidence of improper **external** influences.[14]

SUMMARY/ANALYSIS IN VIRGINIA

I. Child Abuse Accommodation Syndrome

After the defendant, Arthur Jenkins, had been examined by Dr. Sultan, defense counsel attempted during the trial phase to mount a novel defense similar to that of "battered woman's syndrome." Jenkins' defense centered around the influence of his childhood experiences of being sexually abused. He argued that these traumatic experiences impacted his state of mind at the time of the offense. Normally, under Virginia case law, state of mind is only relevant if a defendant employs an insanity defense.[15] However, the defense here wanted to downgrade the capital murder charges to manslaughter on the basis that although the murders seemingly were committed with malice aforethought, they were actually committed instead after what might be described as delayed sudden provocation.

Dr. Sultan would have testified that Jenkins suffered from "child abuse accommodation syndrome," a mental illness suffered by victims of child abuse. After being reminded in some way of an abusive experience in the past, a "heating up period" will begin. This period may last an indeterminate amount of time (usually a day or two) and may culminate in a fit of rage by the child abuse victim. In this case, Jenkins claimed that a proposition by his uncle a day or two before the incident triggered his heating up period.

Clearly, the Virginia Supreme Court was not prepared to accept this novel defense, especially in light of the facts of this case.[16] The murders were simply too brutal and deliberate for the court to accept that his actions could be analogized to actions in the heat of passion. In the absence of an insanity claim, the court stated that it would not normally consider such a diminished capacity defense.[17] The court stressed that "'malice and heat of passion are mutually exclusive; malice excludes passion, and passion presupposes the absence of malice.'"[18] To accept "child abuse accommodation syndrome," the court would have had to make an exception to the requirement of "sudden provocation" in manslaughter cases.[19]

Despite the court's refusal to allow it in at the guilt phase, "child abuse accommodation syndrome" may turn out to be an effective tool as mitigating evidence. The United States Supreme Court held in *Penry v. Lynaugh*[20] that mental retardation and a history of child abuse are valid mitigating factors. Furthermore, *Eddings v. Oklahoma*[21] forbids limitations which prohibit the sentencer from considering and giving weight to mitigating evidence through the operation of statutes and evidentiary rules.[22] Defense counsel may be able to fit this disorder within one of the expressly recognized factors in mitigation enumerated in the Virginia Code,[23] but, in any case, could offer it under the Eighth Amendment right to introduce any evidence in mitigation, whether or not statutorily enumerated.[24] The manner in which this evidence would be presented to the court would be virtually identical to the way one would present evidence at trial when attempting to reduce murder to manslaughter.[25]

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[8] Jenkins assigned a number of other errors. Some of these the court dealt with in a conclusory fashion, while others did not involve death penalty law or are unlikely to arise often because they revolved around facts peculiar to the case. These issues will not be discussed in this summary. Jenkins argued that: (1) the Virginia death penalty statute is unconstitutional because it is vague, overbroad, and applied in a racially discriminatory fashion; (2) incriminating statements he made after being arrested were not admissible because he did not knowingly and voluntarily waive his right to counsel and his privilege against self-incrimination; (3) the trial court erred in refusing to admit his instructions on intoxication and second degree murder; (4) the jury should be able to consider evidence of parole eligibility in the event of a life sentence; and (5) the sentences were the product of passion or prejudice and are disproportionate to the culpability of the defendant and the nature of the crimes.

[9] *Jenkins v. Commonwealth*, 244 Va. 445, 462 423 S.E.2d 360, 371 (1992).

[10] *Id.* at 457, 423 S.E.2d at 368.

[11] *Id.*

[12] *Id.* at 459, 423 S.E.2d at 369. *See Webb v. Texas*, 409 U.S. 95 (1972) (holding that a fundamental element of due process is a defendant's right to present witnesses to establish a defense).

[13] *Jenkins*, 244 Va. at 460, 423 S.E.2d at 370.

[14] *Id.*

[15] *See Stamper v. Commonwealth*, 228 Va. 707, 717, 324 S.E.2d 682, 688 (1985).

[16] There was some suggestion by witnesses for the prosecution that the uncle had never sexually abused Jenkins, and that defense counsel had manufactured this defense out of whole cloth. The court assumed for the sake of argument, however, that defendant's claims were true. Furthermore, Jenkins' deliberation in carrying out these attacks, as well as his attempts to clean up the premises certainly worked against him.

[17] *See Jenkins*, 244 Va. at 456, 423 S.E.2d at 367 (citing *Stamper v. Commonwealth*, 228 Va. 707, 717, 324 S.E.2d 682, 688 (1985)).

[18] *Jenkins*, 244 Va. at 457 423 S.E.2d at 368 (quoting *Barrett v. Commonwealth*, 231 Va. 102, 106, 341 S.E.2d 190, 192 (1986)).

[19] The definition of manslaughter in Virginia is "the unlawful killing of another without malice. To reduce homicide from murder to voluntary manslaughter, the killing must have been done in the heat of passion and upon reasonable provocation." *Barrett v. Commonwealth*, 231 Va. 102, 105-06, 341 S.E.2d 190, 192 (1986).

[20] 492 U.S. 302 (1989).

[21] 455 U.S. 104 (1982).

[22] "Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the state refuse to consider, as a matter of law, any relevant mitigating factor." *Id.* at 114.

[23] Va. Code Ann. §§ 19.2-264.4(B)(ii), (iv) (1990): "[T]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" or "at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired."

[24] *See Lockett v. Ohio*, 438 U.S. 586 (1978).

[25] *See* Hansen, *Mitigation: An Outline of Law, Method, and Strategy*, Capital Defense Digest, Vol. 4, No. 2, p. 29 (1992).

Before employing the "child abuse accommodation" defense, defense counsel should inquire into this disorder when discussing mental mitigation with defendant's psychiatric experts. As with many theories of mitigation, this strategy may work against the defendant if the jury perceives it as too contrived. However, if presented properly, it could be an effective argument for the defendant. The most important task for defense counsel is to explain to the jury the difference between proof at the trial stage and proof at the penalty phase. Evidence used to prove a mitigating factor may be misconstrued by the jury as trying to offer a legal excuse if the jury is not clear on why a bifurcated proceeding is used in capital trials.

II. Coercion of Defense Witnesses by Prosecutor

Jenkins alleged that by warning the defendant's primary expert witness that she might be criminally prosecuted if she testified, the prosecutor violated the defendant's due process right to call witnesses in his defense. The leading case in this area is *Webb v. Texas*,[26] in which the United States Supreme Court held that a trial judge's vigorous warnings to a defense witness about the dangers of perjury amounted to a violation of the defendant's right to present his own witnesses to establish a defense, because the witness no longer felt that she could testify freely. Similarly, in *United States v. MacCloskey*,[27] the Fourth Circuit held that a warning by the prosecutor that the witness "would be well advised to remember the Fifth Amendment" amounted to improper behavior, and a violation of the defendant's right to due process.

The Virginia Supreme Court answered Jenkins' argument by first contending that Dr. Sultan's decision not to testify was a voluntary, informed decision on her part. However, the fact that Dr. Sultan ultimately declined to testify seems to be no more "voluntary" than the decision of a defense witness to invoke the Fifth Amendment after suggestions from the prosecutor that she may be subject to prosecution should she testify, which has been held to be a violation of a defendant's right to due process.[28]

Secondly, the court responded that defense counsel should have moved for a continuance. Though such a move would certainly have been prudent, the court's response seems inadequate in response to the questionable maneuvers on the prosecutor's part at a late stage of the proceedings regarding a crucial witness.

Furthermore, the prosecutor's questionable conduct occurred at a critical stage for the defendant. Not only were the defendant's due process rights at stake at this stage, but also his Sixth Amendment right to effective assistance of counsel and Eighth Amendment right to present mitigating evidence. Dr. Sultan's decision not to testify effectively denied Jenkins the opportunity to present mitigating evidence in violation of *Lockett v. Ohio*.[29] Moreover, because the prosecutor chose to employ his tactic at the eleventh hour, his actions amounted to a constructive denial of Jenkins' right to put on competent psychiatric testimony. As the Court stated in *Ake v. Oklahoma*:[30] "Without a psychiatrist's assistance [at the sentencing stage], the defendant cannot offer a well-informed expert's opposing view and thereby loses a significant opportunity to raise in the juror's minds questions about the State's proof of an aggravating factor."[31] The Virginia Supreme Court's endorsement of the prosecutor's approach as "an acceptable trial tactic,"[32] sets a dangerous precedent which might lead to a substantial chilling effect on defendants' ability to present evidence from expert witnesses. Few professionals will risk criminal prosecution even if the threat of such prosecution is only suggested through innuendo.

In light of the court's position in *Jenkins*, defense counsel must prepare themselves to combat last minute prosecutorial attempts to discourage testimony by defense witnesses through collateral means. First of all, should such an issue arise, attorneys should request a continuance. Considering the court's comment in *Jenkins* that defense counsel failed to avail himself of a clear opportunity for a continuance, Virginia courts facing a similar situation in the future should be amenable to granting such a request.

Second, defense counsel should employ the various constitutional arguments available under *Webb*, *Lockett*, and *Ake*. Expert witnesses who are non-lawyers have no more ability to evaluate the gravity of possible criminal liability than an ordinary defense witness (who employs his Fifth Amendment right out of fear that he may be charged with complicity, for example). Such a strategy should not be considered an acceptable trial tactic, but rather a denial of due process rights under *Webb*. Justice Marshall's opinion in *Ake* can be used effectively by pointing out the vital role experts play in marshalling a defense. To make affirmative attempts to remove a vital actor in the defense team denies the defendant the right to effective assistance of counsel. Finally, it should be argued that to use collateral methods to deter a defense witness from testifying at a critical stage of the proceedings does little to serve the ends of justice, and therefore are improper.[33]

III. Improper Consideration of Parole Evidence by Jury

The Virginia courts have been steadfast in their refusal to allow juries to consider evidence of parole eligibility or ineligibility during the penalty phase of a capital trial.[34] The Court in *Jenkins* again "declined defendant's invitation to change [its] position on this issue." However, *Jenkins* presented the court with an interesting dilemma, because published reports after the trial indicated that the jurors **had** considered parole as a factor. The court determined that the comments made by the foreman of the jury about parole eligibility fell within the internal matters of the juryroom into which courts should not inquire.[35]

The scope of *Jenkins*' holding must be assessed in light of the Virginia Court of Appeals' holding in *Harris v. Commonwealth*.[36] In *Harris, t*he court held that a jury's consideration of parole as a factor in its deliberations was prejudicial to the accused, and overturned the sentence arrived at by the jury. The *Harris* court stated: "'The reception of any evidence by the jury . . . in addition to that produced at trial is ground for setting aside the verdict whenever there is sufficient ground

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26 409 U.S. 95 (1972).

27 682 F.2d 468 (4th Cir. 1982).

28 *See United States v. Morrison*, 535 F.2d 223 (3rd Cir. 1976).

29 438 U.S. 586 (1978).

30 470 U.S. 68 (1985).

31 *Id.* at 85.

32 *Jenkins*, 244 Va. at 459, 423 S.E.2d at 369.

33 *See* American Bar Association Standards for Criminal Justice Standard 3-1.1(c) (2nd ed. 1982): "The duty of the prosecutor is to seek justice, not merely to convict."

34 *See, e.g., King v. Commonwealth*, 243 Va. 353, 416 S.E.2d 669 (1992), and case summary of *King*, Capital Defense Digest, Vol. 5, No. 1, p. 37 (1992); *Watkins v. Commonwealth*, 238 Va. 341, 351, 385 S.E.2d 50, 56, *cert. denied*, 494 U.S. 1074 (1989), and case summary of *Watkins*, Capital Defense Digest, Vol. 2, No. 1, p. 15 (1989); *Hinton v. Commonwealth*, 219 Va. 492, 495, 247 S.E.2d 704, 706 (1978).

But see Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978). In *Smith*, the Virginia Supreme Court mentioned the fact that the defendant "would be in his sixties before he would even be eligible for parole," as one of a number of mitigating factors argued by the defense, without remarking on the propriety or impropriety of introducing such testimony. 219 Va. at 481, 248 S.E.2d at 151.

35 *Jenkins*, 244 Va. at 460, 423 S.E.2d at 367.

36 13 Va. App. 47, 408 S.E.2d 599 (1991).

to believe that . . . an accused . . . has been prejudiced by receipt of the information.'"[37] *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.'"[38]

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.[39] 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 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.[40]

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."[41] 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

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[37] *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)).

[38] *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)).

[39] *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 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).

[40] 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).

[41] *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.[1] 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.[2]

Despite the Court's ruling, the unfortunate phenomenon of race discrimination continues to exist in capital sentencing.[3] 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."

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[1] 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.

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

[3] 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).