THE ABYSS OF RACISM

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> *It is important to recall what motivated Members of this Court at the genesis of our modern capital punishment case law.* Furman v. Georgia *was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty—particularly in Southern States.*[1]

I. THE BARRIER TO EXAMINING SYSTEMIC RACISM IN THE IMPOSITION OF CAPITAL PUNISHMENT

Fifteen years after *Furman v. Georgia*,[2] Justice Powell, writing for the majority in *McCleskey v. Kemp*,[3] expressly

*Professor of Law, William H. Bowen School of Law, University of Arkansas at Little Rock; Founding Editor, The Journal of Appellate Practice and Process. This essay is the third in a series devoted to the continuing problem of racial discrimination in the administration of the death penalty. *See* J. Thomas Sullivan, *Lethal Discrimination*, 26 Harv. J. Racial & Ethnic Just. 69 (2010); J. Thomas Sullivan, *Lethal Discrimination 2: Repairing the Remedies for Racial Discrimination in Capital Sentencing*, 26 Harv. J. Racial & Ethnic Just. 113 (2010). It reflects a perspective shaped by my representation of capital defendants sentenced to death in trial, appellate, and post-conviction proceedings in Texas, New Mexico, and Arkansas. The essay is not intended to be comprehensive, the number of important capital decisions and the published commentary being virtually overwhelming; instead, it offers one view of the death penalty. Its title is drawn from Justice Murphy's dissenting opinion in *Korematsu v. U.S.*, 323 U.S. 214 (1944), the decision upholding the internment of individuals of Japanese descent, including American citizens, after the start of World War II.

1. *Graham v. Collins*, 506 U.S. 461, 479 (1993) (Thomas, J., concurring).

2. 408 U.S. 238 (1972).

3. 481 U.S. 279 (1987). Georgia death row inmate Warren McCleskey had the rather amazing distinction of seeing two cases involving his claim reviewed on the merits by the United States Supreme Court. *See McCleskey v. Zant*, 499 U.S. 467 (1991). He was executed in 1991 after the Court held that his second federal habeas petition demonstrated an "abuse of the writ." *Id.* at 470; *see* Death Penalty Information Center, *Searchable Execution Database*, http://www.deathpenaltyinfo.org/views-executions (enter "Warren McCleskey" in "name" box and click enter to see execution details) (accessed Oct. 11, 2012; copy on file with Journal of Appellate Practice and Process).

rejected the equal protection argument that had persuaded Justice Douglas to vote against the death penalty in *Furman*.[4] Despite empirical evidence demonstrating that death sentences were more frequently imposed on African-Americans than on white defendants, particularly when they were convicted of murdering white victims, Justice Powell concluded for the majority that the empirical data demonstrated only a "*risk*" that black defendants were subject to racial discrimination in the imposition of the death penalty.[5] Under *McCleskey*, showing a statistical disparity in imposition of the death penalty by race is not sufficient to establish a claim of racial discrimination. Instead, the *McCleskey* Court held that "to prevail under the Equal Protection Clause, McCleskey *must prove that the decisionmakers in his case acted with discriminatory purpose*."[6]

The significance of Justice Powell's opinion in *McCleskey* cannot be overstated.[7] The *McCleskey* majority concluded that the apparent disparities shown in McCleskey's statistical evidence reflected neither an arbitrary nor a racially discriminatory application of the penalty, the death sentences imposed being based upon evidence developed in support of aggravating circumstances in each case.[8] Consequently, attacks on capital sentences as improperly influenced by racial bias have consistently failed when based on statistical evidence demonstrating greater use of the death penalty either against

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4. In joining the plurality striking down existing state capital sentencing statutes in *Furman*, Justice Douglas categorically rejected death penalty statutes that provided for discretionary sentencing by juries or judges because of the inherent risk that death sentences would be imposed in a discriminatory fashion:

> [W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

Furman, 408 U.S. at 255 (Douglas, J., concurring).

5. 481 U.S. at 291 n. 7 (emphasis in original); *see generally id.* at 291–92.

6. *Id.* at 292 (some emphasis added).

7. The decision remains problematic and deeply troubling for litigants, their lawyers, and members of the public concerned about the influence of racial bias in capital sentencing. *See e.g.* McCleskey v. Kemp *25 Years Later*, http://mccleskyvkemp.com (collecting and reflecting discussion throughout twenty-five-year history of decision) (accessed July 13, 2012; copy of main page on file with Journal of Appellate Practice and Process).

8. 481 U.S. at 286–91.

black defendants or in cross-racial cases involving white victims.[9] Thus, *McCleskey* has effectively discouraged or undermined attempts to use statistical evidence to demonstrate systemic, constitutional flaws in the system of capital prosecution and sentencing.[10]

After leaving the Court, Justice Powell reportedly reversed his thinking on the death penalty and stated that he regretted his vote in *McCleskey*.[11] Yet the decision remains an almost insurmountable hurdle for litigants challenging capital sentencing on disparate-imposition grounds even though the statistical evidence can be taken to suggest that death sentences are discriminatorily imposed whether the focus is the race of the defendant (most often black) or the race of the victim (most often white).

Whether the statistical evidence actually supports a conclusion that the death penalty is applied discriminatorily remains subject to debate.[12] What is evident, however, is that the

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9. 481 U.S. at 286–87.

10. *See e.g. Andrews v. Shulsen*, 802 F.2d 1256, 1269 (10th Cir. 1986) (attacking Utah's capital sentencing scheme based upon disproportionate number of African Americans on death row and the fact that all victims in the small number of cases in which death had been imposed were white). In *Andrews*, the petitioner pointed out that at the time all black defendants eligible for capital punishment had killed Caucasian victims and all had been sentenced to death. The court found the population—seven individuals on death row, four of whom were black—statistically insignificant, despite the disproportionally smaller percentage of the state's total population who were black, and also concluded that the petitioner's evidence failed to demonstrate that the individuals sentenced to death were, in fact, subjected to any systematic policy of racial discrimination. *Id.* Significantly, the *Andrews* court did affirm, however, that evidence of racial discrepancies in imposition of the death penalty could afford a basis for relief, observing that "a pattern of discriminatory or otherwise arbitrary sentencing decisions in capital cases can violate the Constitution regardless of intent," and that "[u]nlike the Fourteenth Amendment's guarantee of 'equal laws, not equal results,' . . . the Eighth Amendment protects against unacceptably inconsistent outcomes." *Id.* at 1267 (citation omitted). But the *Andrews* court also found that the petitioner had not made a sufficient showing of discriminatory impact in imposition of capital sentences in Utah at the time. *Id.* at 1269.

11. *See* John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 451 (Charles Scribner's Sons 1994); Mark A. Graber, *Judicial Recantation*, 45 Syracuse L. Rev. 807, 807 (1994) ("Had Justice Powell seen the light while on the bench, the Supreme Court would have dealt a crippling blow to the death penalty in *McCleskey*."). Justice Powell's repudiation of the death penalty in retirement, of course, had no impact upon the precedential value of his opinion for the Court in *McCleskey*.

12. Statistics kept by the Death Penalty Information Center show that fifty-six percent of the defendants executed since 1976 have been white, thirty-four percent black, and eight percent Hispanic. Death Penalty Information Center, *Facts about the Death Penalty*, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (May 30, 2012). However, the

demographic breakdown in the use of the death penalty is sufficient to warrant inquiry. What is also evident is that the Court's decision in *McCleskey* precludes capital defendants' raising the death penalty's relative use as a basis for federal constitutional challenges. And this has been the case for a long time: Justice Blackmun, discussing *McCleskey* after seven years of seeing the case invoked to prevent capital defendants from presenting evidence of systemic bias,[13] observed that

> [d]espite . . . staggering evidence of racial prejudice infecting Georgia's capital sentencing scheme, the majority turned its back on McCleskey's claims, apparently troubled by the fact that Georgia had instituted more procedural and substantive safeguards than most other States since *Furman*, but was still unable to stamp out the virus of racism.[14]

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disparity between black and white defendants sentenced to death reflects a more troubling reality. Statistics compiled by the Department of Justice, for instance, show that in 2005, the national homicide offender rate for blacks was seven times higher than for whites and that blacks were victims of homicides at six times the rate for whites. Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the U.S.: Trends by Race*, http://bjs.ojp.usdoj.gov/content/homicide/race.cfm (June 21, 2012). Thus, the apparent disproportionality of capital sentencing between blacks and whites might simply reflect the disparity in offender rates. If so, the apparent disproportional imposition of capital sentences is explained as a function of relatively higher offender rates for blacks, rebutting claims that statistical analysis serves to prove discriminatory use of death sentences. Even if so, it raises perhaps a far more difficult question in terms of explaining why blacks dominate whites in the population of homicide offenders by a ratio of seven to one.

Another troubling statistic involves cross-racial homicides, one perhaps explaining why death penalty opponents look to the race of the victim in asserting equal protection claims. *Id.* When race or ethnicity of the victim is considered, the statistics show that seventy-six percent of victims are identified as white, fifteen percent as black, and six percent as Hispanic. These percentages may roughly reflect the breakdown of these groups in the national population. *See* Dept. of Commerce, U.S. Census Bureau, *The 2012 Statistical Abstract*, http://www.census.gov/compendia/statab/2012/tables/12s0010.pdf (Tbl. 10: *Resident Population by Race, Hispanic Origin, and Age: 2000 and 2009*) (indicating that in 2009, 244,298,000 residents of the U.S. were counted as "White Alone," 39,641,000 were counted as "Black Alone," and 48,419,000 were counted as being of "Hispanic Origin," and noting in addition that "Hispanics may be any race").

13. *Callins v. Collins*, 510 U.S. 1141 (1994). *Callins* is the case in which Justice Blackmun finally came to reject the use of the death penalty, announcing that he felt "morally and intellectually obligated simply to concede that the death penalty experiment ha[d] failed." *Id.* at 1145.

14. *Id.* at 1153. The Court has been aware of possibility of racism in the imposition of the death penalty since at least as early as *Aldridge v. U.S.*, 283 U.S. 308 (1931), in which the Court recognized the potential for racial prejudice to improperly influence the capital sentencing decision in a prosecution of a "negro" defendant charged with the murder of a

In fact, evidence of "the virus of racism" in the system existed long before *McCleskey* was decided. In *Swain v. Alabama*,[15] for example, the Court rejected a challenge based on evidence that no black had been seated as a juror in the county in which Swain was convicted during the preceding twenty-five years.[16]

The *Swain* majority, confronted by evidence of this apparent disparity in treatment of blacks in the jury-selection process,[17] still declined to conclude that such evidence of longstanding exclusion was sufficient to prove an equal protection violation. Because peremptory challenges were not exclusively under the control of prosecutors, but were also a tactical tool used by counsel for the accused, defense counsel's exclusion of some minority jurors essentially clouded the evidence and prevented the Court from concluding that exclusion of blacks from petit jury service could be exclusively

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white police officer. *Id.* at 309. Defense counsel noted that in a prior trial, a "Southern" venireperson had indicated that she might be influenced by the fact that a black defendant was charged with the murder of a white person, and requested the trial court inquire into possible racial prejudice on the part of prospective jurors. The trial court refused. *Id.* at 310.

The *Aldridge* Court reversed, *id.* at 315, citing a series of decisions rendered by Southern courts authorizing inquiry into juror bias in cases involving minority defendants. It also noted that the inquiry "as to the existence of a disqualifying state of mind has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character." *Id.* at 313. Moreover, the Court recognized the significance of racial prejudice in capital cases, explaining: "Despite the privileges accorded to the negro, we do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry. *And this risk becomes most grave when the issue is of life or death.*" *Id.* at 314 (emphasis added).

15. 380 U.S. 202 (1965), *overruled in part*, *Batson v. Ky.*, 476 U.S. 79 (1986) (overruling *Swain* only to the extent that its reasoning limited proof of discriminatory use of peremptories to establishing a pattern and practice of discrimination over time).

16. *Id.* at 222–23.

17. *Id.* at 224. The majority conceded the theory underlying the equal protection claim:

> If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.

Id.

attributed to state actors.[18] *Swain* held, then, that demonstrating discrimination in the exclusion of blacks from petit jury service required proof of not only a pattern of prosecutorial peremptory challenges excluding minorities, but also proof that prosecutors accused of using peremptories to discriminate on the basis of race were actually engaged in a pattern and practice of using peremptories for the purpose of racial exclusion.[19]

Over time, the *Swain* remedy for prosecutorial racism proved unworkable, which finally led to the Court's recognition of an arguably more usable remedy in *Batson v. Kentucky*.[20] *Batson* permits the party opposing the use of a peremptory challenge to object and establish a prima facie claim by showing that the strike was used to remove a prospective juror who is a member of a cognizable racial or ethnic group. The proponent of the strike must respond by offering a race-neutral explanation for the strike. The trial court then determines whether to accept it.[21]

Had the *McCleskey* Court recognized the compelling statistical evidence of disparity in the charging decisions of prosecutors with respect to the death penalty—decisions reflecting discretion exercised by prosecutors alone and so not subject to an analysis that includes defense counsel's use of the same strategies[22]—would have necessarily resulted in a capital defendant's submission of similar statistical evidence being deemed sufficient to make out a prima facie case of racially

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18. The majority concluded by acknowledging that

> there has not been a Negro on a jury in Talladega County since about 1950. But the responsibility of the prosecutor is not illuminated in this record. There is no allegation or explanation, and hence no opportunity for the State to rebut, as to when, why and under what circumstances in cases previous to this one the prosecutor used his strikes to remove Negroes. In short, petitioner has not laid the proper predicate for attacking the peremptory strikes as they were used in this case. Petitioner has the burden of proof and he has failed to carry it.

Id. at 226.

19. *Id.* at 227–28.

20. 476 U.S. 79 (1986).

21. *Id.* at 96–98. The *Batson* remedy was later extended to permit the prosecution—or, in fact, any litigant in any jury trial—to challenge a peremptory apparently exercised on the basis of race. *See e.g. Ga. v. McCollum*, 505 U.S. 42 (1992) (extending *Batson* to prohibit criminal defendant's exclusion of prospective jurors based on race or ethnicity); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (extending *Batson* to exclusion of minority jurors in civil cases).

22. *See* pp. 95–96, *supra* (discussing *Swain*).

discriminatory use of capital sentencing. Instead, the *McCleskey* Court offered no solution to the problem posed in that case—a problem that logically leads to the conclusion that state actors routinely exercise their discretion in capital sentencing to discriminate on the basis of the race or ethnicity of the accused or the victim.

As it did in *Batson* by addressing the inherent problem of demonstrating prejudice in *Swain*, the Court, if genuinely interested in addressing discriminatory application of the death penalty based on racial or ethnic factors, would have long ago realized the error of *McCleskey*. It would have moved to fashion a new remedy allowing statistical evidence to be used in establishing prima facie claims of discrimination in the charging process and imposition of the death penalty. Yet the Court has not been forthcoming, even though the use of comparative statistical analysis would afford a workable way of addressing the problems suggested—one might even say demonstrated—by the obvious racial disparity in actual use of the penalty.

The Court's inaction means that the *McCleskey* barrier continues to frustrate generalized challenges to racially discriminatory use of the death penalty, demanding instead that proof of discrimination be directly related to the prosecution of the individual defendant. However, proving discrimination in the individual case is virtually impossible unless the prosecutor is prepared to admit bias in seeking the death sentence, so *McCleskey* remains virtually an absolute bar to claims of racial discrimination in the administration of the death penalty.

A. Considering the McCleskey *Effect:* Williams

The problem posed by *McCleskey*, a problem that would be dramatically impacted by the Eighth Amendment analysis advanced by Justice Douglas in *Furman*, is demonstrated by the Arkansas capital prosecution of Frank Williams. The state supreme court ordered a new sentencing proceeding for Williams[23] because the jury failed to find that mitigating-

23. 2011 Ark. 534. The conviction and death sentence had been upheld on direct appeal. *Williams v. State*, 902 S.W.2d 767 (Ark. 1995). Appellate counsel on the direct appeal had been fined for failure to timely file the appellate brief. *Williams v. State*, 885 S.W.2d 679 (Ark. 1994) (imposing fine). It bears noting that in contrast to the issue of

circumstances evidence had been presented at trial despite the defense presentation of expert evidence about Williams's troubled childhood and low IQ, and the fact that he had likely been under the influence of alcohol and marijuana at the time of the offense.[24] This grant of relief followed lengthy post-conviction litigation[25] and a well-argued and thoroughly

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discriminatory exercise of peremptory challenges to exclude minority venirepersons involved in *Swain*, which implicated the rights of those individuals to participate in jury service in addition to compromising the accused's right to a fairly selected petit jury, the issue presented in *Williams* is not complicated by defense counsel's contribution to the disparity in treatment. The power to make discriminatory charging decisions lies exclusively with the prosecution (with, in some jurisdictions, involvement of a grand jury). Defense counsel is not involved. The ability to charge on a discriminatory basis thus lies "wholly in the hands of state officers," in the language of the *Swain* majority. 300 U.S. at 227.

24. *Williams v. State*, 2011 Ark. 534. The court found that

> [t]he Williams jury erroneously marked subsection D, despite the fact that Williams had offered unrebutted evidence in mitigation through Mary Pat Carlson, a licensed professional counselor, regarding the fact that he grew up in a dysfunctional family with substance abuse as a primary area of dysfunction and that he came from a violent background where his parents would get into physical altercations with one another under the influence. Additionally, evidence was presented that he was functioning with a low I.Q., understanding things in society about as well as a nine or ten year old. Carlson opined that Williams was alcohol dependent, abused cannabis, and had an antisocial behavior problem. Carlson further opined Williams was under the influence of both alcohol and marijuana on the night of the murder. It was her testimony that, physiologically, he was not able to appreciate the criminality of his conduct and conform it to the requirement of the law.

Id. at *5–*6 (footnote omitted).

25. Williams's post-conviction counsel (different from direct-appeal counsel, who was also sanctioned, *see supra* n. 24) was ordered to show cause for his failure to timely file the appellate brief from denial of relief by the trial court and was fined $250.00 for that failure. *Williams v. State*, 25 S.W.3d 429, 429–30 (Ark. 2000). The court later denied all claims on the merits. *Williams v. State*, 56 S.W.3d 360 (Ark. 2001). Although post-conviction counsel raised constitutional challenges to the Arkansas capital sentencing scheme, these were rejected as procedurally defaulted, not having been raised on direct appeal, but also on the merits as being repetitious of claims previously decided adversely by the court. However, it was necessary for these constitutional claims to be presented in the state process in order for them to be heard in federal habeas, assuming that they were not procedurally barred under Arkansas law. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

Williams's attempt to litigate constitutional claims in the federal habeas process proved unsuccessful when, following denial of relief on his initial petition, his counsel sought leave to amend his petition to raise additional issues, including a claim that his execution was barred under *Atkins v. Va.*, 536 U.S. 304 (2006). The federal courts concluded that the attempt to assert this new claim was procedurally barred as an improper attempt to litigate a successive petition. *Williams v. Norris*, 461 F.3d. 999, 1000–01 (8th Cir. 2006). Despite the constitutional prohibition against the execution of the mentally retarded recognized in *Atkins*, the court refused on procedural grounds to consider the

documented clemency petition that gained a favorable recommendation from the state parole board,[26] and occurred only when the Arkansas Supreme Court recognized its own error in failing to find error in its review of the death sentence.[27]

Evidence developed by Williams's federal defenders shows why reliance on statistical evidence focusing on capital prosecutions in a single judicial district should be sufficient to support a claim of disparity in use of the death penalty.[28] Williams relied on localized evidence that the death sentence has been imposed in a racially discriminatory fashion in the Arkansas judicial district in which he was sentenced[29] because

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merits of the claim—further evidence of the flawed system in which substantial constitutional rights are sacrificed, not through knowing relinquishment by defendants, but through the procedural failures of their lawyers. The Supreme Court eventually denied certiorari once again. *Williams v. Norris*, ___ U.S. ___, 128 S. Ct. 81 (2007).

26. In his application for executive clemency, Williams, now represented by federal defenders, pointed out that while the federal habeas court refused to consider the *Atkins* claim, treating it as procedurally barred, it did order his lawyer to repay half of his $10,000.00 fee. The district court also stated on the record that the attorney should no longer be considered for court appointments. *See* Application for Exec. Clemency of Frank Williams, Jr. at 31 (Ark. Dept. Correct. July 1, 2008) [hereinafter Williams Clemency Petition] (copy on file with author).

27. *Williams*, 2011 Ark. 534 at *4 (characterizing its own failure to recognize the jury's action in ignoring mitigating-circumstances evidence as, "[u]nfortunately, . . . an erroneous finding by this court"); *see also* Ark. R. App. Practice—Criminal 10.

28. This disparate-treatment claim, along with an *Atkins*-based mental-impairment claim, was presented in the Williams Clemency Petition. *See* Death Penalty Information Center, *News and Developments–Clemency, Upcoming Arkansas Execution in Doubt because of Lethal Injection Problems and Clemency Recommendation*, http://www.deathpenaltyinfo.org/node/2423 (accessed July 14, 2012; copy on file with Journal of Appellate Practice and Process). The Williams Clemency Petition was preceded by a favorable vote from the Arkansas Board of Pardons and Parole. *Id.* (noting that "[t]he Board had received petitions for clemency from 13 state, national, and international organizations and developmental disabilities experts which concluded that Mr. Williams suffers from mental retardation based on his sub-average adaptive functioning and the diagnosis of psychological experts."). The execution in his case was stayed pending a civil suit brought by death-row inmates challenging the Arkansas execution protocol; that action proved successful, *Hobbs v. Jones*, 2012 Ark. 293 (holding that legislation delegating authority to establish protocol for executions violated separation of powers), after the Arkansas Supreme Court had already ordered a new sentencing proceeding in Williams's case. *See Hobbs v. Jones*, 2012 Ark. 293 at *3, *29 n. 1.

29. The Williams Clemency Petition relied on research completed by the late David Baldus and his associates, George Woodworth and Neil Allen Weiner. *See* David C. Baldus, Neil A. Weiner & George Woodworth, *Evidence of Racial Discrimination in the Administration of the Death Penalty: Arkansas Judicial Circuits 8 & 8S, 1990–2005* (2008) (unpublished mss.; copy on file with author) [hereinafter *Discrimination in Arkansas*]. Professor Baldus's similar research in Georgia provided the statistical support for the

the five death sentences imposed in the Eighth and Eighth South Judicial Districts from 1990 through 2005 were all imposed in cases involving black defendants and white victims.[30] The research also showed that during this period blacks were charged in more than twice the number of cases eligible for treatment as capital cases as were white defendants.[31] Further, in nine of ten cases in which black defendants were charged with murdering white victims, capital murder charges were filed, while capital charges were filed only forty percent of the time in other cases eligible for capital treatment.[32]

No white capital defendant was subjected to a capital sentencing hearing over the eighteen-year period covered by the fifteen-year study and the three post-study years, while black defendants faced the death penalty in one of every four cases. And those black defendants were eleven times more likely to face the death penalty when the victim was white than when the victim was black.[33] Moreover, two-thirds of black defendants charged with killing white victims during the period faced the death penalty, while only three of fifty-four defendants in other cases faced a potential capital sentence. And, in five of nine cases in which black defendants faced the death penalty, they were sentenced to death while no other death-penalty-eligible defendant received the death penalty.[34] These results led the report's authors to conclude that this ratio of death sentences to death-sentence-eligible cases would occur by chance less than once in 10,000 instances.[35]

Williams also presented evidence to rebut the suggestion that his crime, which involved a single aggravating circumstance (an alleged assault with a knife on a law enforcement officer who was himself subsequently convicted of two federal felony offenses after being indicted for filing false statements, fraud,

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petitioner's arguments in *McCleskey*. *See McCleskey*, 481 U.S. at 284, n. 2 (citing David Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & C. 661, 674 n. 56 (1983)).

30. Williams Clemency Petition, *supra* n. 26, at 38–39.

31. *Id.* at 39–40.

32. *Id.* at 40.

33. *Id.*

34. *Id.*

35. *Id.* (citing *Discrimination in Arkansas*, *supra* n. 29, at 8).

conspiracy, and money laundering),[36] was more heinous than the offenses committed by four death-penalty-eligible white capital defendants who were not sentenced to death in the Eighth and Eighth South Districts during the research period.[37] None of these white defendants responsible for killing multiple victims suffered the death penalty, while Williams was sentenced to death upon his conviction for the murder of his employer, a farmer who terminated his employment for "breaking a tractor."[38] In fact, the only multiple-victim case during the research period in which the death penalty was imposed involved a black defendant.[39]

The research also showed that in four of the six most aggravated cases studied, black defendants received the death penalty for killing white victims, while no death sentence was imposed on a defendant of any race when the victim was black.[40] In fact, *Williams* was among the least aggravated cases to appear in the research data, and his federal defenders argued that the district-wide statistics compiled by the researchers indicated that Williams would not have faced the death penalty had his victim not been white.[41] Nevertheless, the compelling statistical evidence of discriminatory charging could not have satisfied the *McCleskey* requirement for proof that his capital charge and resulting death sentence were the result of discriminatory intent on the part of the prosecuting attorney.

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36. *Id.* at 36 n. 10.

37. These were defendants who had

- committed at least three murders and had other violent felony convictions;
- doused three people with gasoline—killing two of them—after an argument over $20.00;
- fatally shot an acquaintance and killed a witness, both in their early twenties; and
- killed his wife and fifteen-year-old son for no apparent reason.

Id. at 42.

38. *Williams*, 902 S.W.2d at 768.

39. Williams Clemency Petition, *supra* n. 26, at 42.

40. *Id.* at 42.

41. *Id.* at 43.

B. Comparative Analysis after Batson*:* Miller-El *and* Snyder

The Court diluted *Batson*'s power to combat racial discrimination through the use of peremptory challenges in *Purkett v. Elam*,[42] upholding, *per curiam*, a finding that the prosecutor's stated basis for exercising peremptory strikes against black prospective jurors—that the length of their hair and facial hair made them look "suspicious"—was an acceptable "race-neutral" explanation for their exclusion. This prompted Justice Stevens, joined by Justice Brennan, to complain:

> Today, without argument, the Court replaces the *Batson* standard with the surprising announcement that any neutral explanation, no matter how "implausible or fantastic," even if it is "silly or superstitious," is sufficient to rebut a prima facie case of discrimination.[43]

Nevertheless, comparative analysis has proved useful in assessing the reliability of trial court decisions accepting prosecutors' explanations for peremptory challenges that exclude minority jurors from capital juries, even in the wake of the Court's retreat in *Purkett*. In both *Miller-El v. Dretke*[44] and *Snyder v. Louisiana*,[45] the Court ultimately resolved the question of prosecutorial intent in the defendant's favor by engaging in a comparative analysis of otherwise similarly situated majority and minority venirepersons, including focusing on the actual questions propounded to the prospective jurors by prosecutors during the voir dire process.[46] In these cases, objective review of

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42. 514 U.S. 765 (1995).

43. 514 U.S. at 771, 775 (Stevens & Brennan, JJ., dissenting) (internal citations omitted).

44. 545 U.S. 231 (2005).

45. 552 U.S. 472 (2008).

46. *Miller-El*, 545 U.S. at 241 (characterizing the prosecution's use of peremptories to exclude ninety-one percent of prospective minority jurors as "remarkable," noting that "[h]appenstance is unlikely to produce this disparity," and concluding that "if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination"); *Snyder*, 552 U.S. at 483–84 (comparing the similar situations of a white member of the jury pool and a black member of the jury pool who each expressed a desire to fulfill commitments outside the courtroom instead of serving on the *Snyder* jury, assessing prosecutors' asserted reasons for challenging the latter but not the former, and concluding that "it is hard to see why the prosecution would not have had at

the disparate impact of state action resulted in a resolution that takes account of the "race bias in the administration of the death penalty" recognized by Justice Thomas in *Graham*.[47] It is as a result "hard to see why"[48] comparative analysis is apparently acceptable in assessing prosecutorial decisions about using peremptories to strike prospective jurors but apparently unacceptable in assessing prosecutors' decisions about charging defendants with capital offenses and seeking the penalty of death.[49]

Miller-El and *Snyder*, in which the defendants both relied on *Batson*,[50] demonstrate that without comparative analysis, the Court has been unable to prevent racial discrimination in the selection of capital jurors. The Court's commitment to reliance on state court fact-finding—typically conducted by the trial judge who presided over the capital conviction and sentencing in the first instance—compromises the efficacy of the *Batson* remedy for racial discrimination in the jury-selection process.[51] Trial courts willing to tolerate apparent discrimination against minority jurors in the prosecution's use of peremptory challenges can hardly be expected to order relief when acceptance of an arguably "race-neutral"[52] explanation for a strike typically ends their inquiry and is then entitled to deference in subsequent review of their decisions. The decisions in *Miller-El* and *Snyder* remain powerful reminders that deference to state trial court fact-finding may serve to insulate

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least as much concern regarding" the prospective juror who was white as it expressed about the prospective juror who was black).

47. *See* p. 91, *supra*.

48. *Snyder*, 552 U.S. at 484.

49. *See* pp. 99–101, *supra* (discussing the comparative analysis advanced in *Williams* and showing that evidence of this type should be sufficient to provide reviewing courts with an objective basis for assessing the conduct of prosecutors, acting independently, in disparate charging decisions that result in statistically significant differences in the use of the death penalty based on racial or ethnic factors).

50. *See* 476 U.S. at 92–93 (recognizing need for revision of remedy for alleged discriminatory use of peremptory challenges by not requiring proof of systematic discrimination in multiple trials, overruling *Swain v. Ala.*, 380 U.S. 202 (1965)).

51. *Id.* at 97 ("We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.").

52. *See Purkett*, 514 U.S. at 772 (Stevens & Brennan, JJ., dissenting).

racial bias in the selection of capital trial juries and the prosecution of capital cases from review.

II. UNDUE DEFERENCE TO STATE JUDGES AND JURIES, AND TO TRIAL COUNSEL, IN FEDERAL HABEAS CASES

A. Deference to State Trial Courts

As the preceding discussion indicates, comparative analysis is seldom used in the trial courts, and those courts' reluctance to employ it, combined with appellate courts' deference to both the rulings of trial courts and the strategic decisions made by trial counsel, often leaves death-sentenced defendants with no viable means of challenging their sentences on grounds of racial bias in the capital-trial process.

Unfortunately, federal habeas law not only permits these limitations, but requires deference to procedural regularity even though that deference can prevent merits consideration of even the most critical constitutional claims in the habeas process.[53] Moreover, even failure by defense counsel to preserve error in state proceedings bars consideration of a defaulted constitutional claim, unless the defendant can show that counsel failed to render the effective assistance guaranteed by the Sixth Amendment.[54] Consequently, even when counsel's actions result

53. *E.g. Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (procedural default in state proceedings, such as failure to timely appeal from adverse decision by post-conviction court that results in state appellate court's refusal to consider federal constitutional claim on the merits, bars federal habeas review); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (failure to make timely objection resulting in procedural default of claim under state law bars merits review of claim in federal habeas action unless petitioner can establish cause for default and prejudice resulting from default).

54. Under *Strickland v. Wash.*, 466 U.S. 668, 688, 694 (1984), an ineffective-assistance claim requires a showing that counsel's performance was defective and not the result of an objectively reasonable strategy and also a showing that there is a reasonable probability that but for counsel's defective performance, the outcome of the proceeding would have been different. In *Murray v. Carrier*, 477 U.S. 478 (1986), the Court held that counsel's failure to preserve error will not satisfy the cause requirement under *Wainwright v. Sykes*, and will not enable a reviewing court to avoid deference to state court procedural default absent manifest injustice, like actual innocence, concluding that "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington* . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Id.* at 488. In *Smith v. Murray*, 477 U.S. 527, 534 (1986) the Court also concluded that a tactical decision

in default of a claim that the death sentence was imposed as a result of racial discrimination—a claim touching the very heart of the requirement that a capital sentence not be the product of bias or prejudice—that procedural default insulates the claim from federal habeas review.

The dual policies of deference to counsel's judgment in exercising trial strategy and deference to the decisions of state court judges (who are often elected and then subject to re-election, retention election, or recall) essentially commit the ultimate decision on a significant constitutional claim to a judge who is perhaps less likely to find a violation warranting relief than is a Presidentially appointed, Senate-vetted federal judge serving for life. Even if not predisposed toward racial bias, state trial judges may be more likely to favor prosecutors and defense counsel appearing regularly before them and less likely to set aside convictions or death sentences imposed by jurors (who are often voters in the judges' own communities), particularly in cases involving the heinous crimes that are typically prosecuted as capital offenses, and that can later be sensationalized in campaign advertisements directed against sitting judges. The system of deference firmly in place seems virtually designed to ensure that death sentences will only be set aside with great difficulty.

Moreover, the federal habeas statute makes it extremely difficult to set aside a state death sentence because it can only be set aside if the state court has rendered a decision "contrary to" or reflecting an "unreasonable application of" Supreme Court precedent, or if the state court decision was unreasonable in light of the factual record.[55] Thus, a state court decision may be

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made by counsel resulting in procedural default of a claim in state proceedings, such as the decision not to press a claim of error on appeal, does not establish "cause" for application of a state rule of procedural default under *Wainwright v. Sykes*.

55. 28 U.S.C. § 2254(d) (Westlaw 2012). The statute prohibits the grant of relief on a federal constitutional claim that was adjudicated on the merits in the state courts unless the state court decision:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id.; *see also e.g. Brown v. Payton*, 544 U.S. 133, 147 (2005) (holding that federal habeas statute precluded relief based on an alleged infirmity in California capital sentencing

incorrect, but still must be upheld on federal habeas.[56] And a state court's reasonable application of a state rule of procedural default to preclude consideration of a federal constitutional claim on the merits will serve to bar its consideration in the federal habeas process.[57] This requirement of deference to a state court's application of a procedural default can only be avoided in the extreme circumstance noted by the Court in *House v. Bell*:[58]

> Out of respect for the finality of state-court judgments federal habeas courts, as a general rule, are closed to claims that state courts would consider defaulted. In certain exceptional cases involving a compelling claim of actual innocence, however, the state procedural default rule is not a bar to a federal habeas corpus petition.[59]

The Court's posture of deference to state courts ignores the historical truth revealed in Justice Thomas's observation in *Graham v. Collins* with which this essay began. Racial discrimination in the administration of capital punishment prompted the *Furman* Court's intervention in the state death-penalty process,[60] and the Court's continuing policy of undue respect for state-court judgments rests on the illusion that it has been effectively addressed.

The Court's deference to state courts' fact-finding and application of state procedural-default rules serves the twin goals of comity and finality, but at the expense of ensuring that capital sentences are imposed without taint of racial discrimination. For example, this deference explains why the

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instructions because state court decision did not reflect incorrect or unreasonable application of Supreme Court precedent).

56. *Wiggins v. Smith*, 539 U.S. 510, 520–21 (2003) ("In order for a federal court to find a state court's application of our precedent 'unreasonable,' the state court's decision must have been *more than incorrect or erroneous*. The state court's application must have been 'objectively unreasonable.'") (citations omitted; emphasis added).

57. *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (citing *Coleman*, 501 U.S. 722).

58. 547 U.S. 518 (2006).

59. *Id.* at 522.

60. The death penalty remains most prominently used in Southern states and any suggestion that racial discrimination has been completely addressed in those states is simply false. But this is not to suggest that racial discrimination in the criminal justice system is limited to the South. *See e.g.* Samuel R. Gross, *Race, Peremptories and Capital Jury Deliberations*, 3 U. Pa. J. Const. L. 283, 292–93 (2001) (describing racially discriminatory use of peremptory challenges in Philadelphia).

federal courts refused to entertain the claim by now-executed inmate Curtis Osborne[61] that his own attorney—who reportedly referred to Osborne by saying "[t]hat little nigger deserves the death penalty" in a conversation with another client—was racially biased.[62] Osborne claimed that the obvious racial bias underlying this statement led his attorney to conceal the prosecution's offer of a life sentence in return for his guilty plea, while his lawyer responded that he had disclosed the offer to Osborne, who rejected it. Despite Osborne's supporting affidavit, neither the state nor federal habeas court ever considered whether defense counsel had in fact made the statement because the claim was raised in a successor petition for post-conviction relief.[63] The state court accepted counsel's explanation that he had disclosed the offer and its holding barred reconsideration of that finding as a matter of res judicata.[64]

It is possible, of course, that Osborne's claim of racism might have proved false had the supporting affidavit been tested at an evidentiary hearing. It is also possible that, even if counsel's racial slur was reported accurately, he might have conveyed the plea offer to Osborne.[65] Nevertheless, deference to the state trial court's initial ruling insulated Osborne's death sentence from review in the federal habeas process.

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61. *Osborne v. Terry*, 466 F.3d 1298 (11th Cir. 2006).

62. *Id.* at 1316.

63. *Id.* at 1316–18.

64. *Id.* at 1318. The Eleventh Circuit explained the district court's deference to the state court's fact-finding on this point:

> The district court also found that the affidavit is not sufficient to rebut the State court's factual finding based on Mostiler's clear testimony that he told Osborne about the plea offer, that Osborne rejected the offer, and that Osborne never wavered from that position. Accordingly, the district court denied Osborne relief on these claims.

Id. at 1318.

65. *Id.* ("Even if the affidavit correctly recounts Mostiler's statements to Huey, it does not establish that Mostiler failed to convey the plea offer to Osborne. Moreover, Osborne presents no other evidence to support his claim that Mostiler's alleged racial animosity affected his representation."). While it is true that Osborne's lawyer might have performed effectively in actually conveying the plea offer to his client, the fact remains that use of such language may give rise to a credible inference that his alleged inaction could be attributed to racial animus, a claim never fully tested by evidentiary hearing in the case. *Cf. Wisc. v. Mitchell*, 508 U.S. 476, 482–86 (1993) (discussing the possibility that evidence of use of racial slurs may in other situations be sufficient to warrant enhancement of a sentence pursuant to a statute imposing greater punishment for "hate crimes").

B. Deference to Trial Counsel's Decisions

Deference to trial counsel's explanations for decisions made in preparation for trial or at trial may also insulate claims of racial taint in the death sentence from federal habeas review. For instance, executed Texas inmate Gary Sterling was sentenced by an all-white jury that included a juror who admitted in a post-trial interview and in testimony at the post-trial hearing that he referred to African-Americans as "niggers."[66] Sterling argued that trial counsel was ineffective in not questioning prospective jurors about racial bias, despite his right to do so.[67]

Sterling's trial counsel explained that he found such inquiry fruitless because jurors seldom responded honestly, but that he assumed the juror in question, whom he described as a "middle of the road" juror in the rural county where Sterling was tried, probably held racist sentiments. Nevertheless, he thought the juror would be favorable to the defense because he had previously represented the juror on another matter. The federal habeas court explained the thinking of trial attorneys Dunn and Anderson:

> At the habeas hearing, Dunn opined that [Juror W] "probably is a racially prejudiced individual, but he is a fair man" and "probably a middle-of-the-road juror for Navarro County," where "there is a large sector of the public . . ., both black and white, that are racially prejudice[d]." Dunn made a strategic decision that [Juror W] would be a favorable juror because of their prior attorney-client relationship. Anderson also thought they were very pleased to have [Juror W] on the jury because Dunn had represented him in the past and knew him well. She testified at the habeas hearing that, although a few years

66. *Sterling v. Cockrell*, 100 Fed. Appx. 239, 242–43 (5th Cir. 2004).

67. *See Turner v. Murray*, 476 U.S. 28 (1986). The *Turner* Court held that in cross-racial murders prosecuted as capital crimes, the potential for racial bias might taint a death sentence imposed upon an African-American defendant, observing that "[f]ear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty." *Id.* at 35; *accord Ham v. S.C.*, 409 U.S. 524, 526 (1973) (characterizing the questioning of prospective jurors about racial bias as required by "the essential demands of fairness" ensured by the Due Process Clause).

> had elapsed since trial, she was sure it was "a conscious trial tactic" that they wanted him as a juror.[68]

Whether or not trial counsel reasonably believed that Juror W would have been a favorable juror, counsel's failure to question prospective jurors about potential bias effectively conceded the existence of racial prejudice among the jurors. That prejudice should never have been permitted to influence Sterling's all-white jury when it made the sentencing decision in a case involving an African-American defendant charged with murder of a white victim.[69]

Moreover, while the state and federal courts accepted counsel's explanation of the decision not to voir dire prospective jurors about racism as an objectively reasonable strategy—the test for avoiding a finding of ineffectiveness[70]—deference to counsel's judgment should also have forced the court's consideration of counsel's more general observation about jurors living in the county where Sterling was convicted and sentenced. In characterizing Juror W as a "middle of the road juror" for Navarro County, counsel necessarily implied that any jury panel drawn from its citizens would be likely to include racially biased jurors. The question not addressed by the courts' deference to counsel's judgment about the level of racial prejudice in the

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68. *Sterling v. Cockrell*, 2003 WL 21488632, *36 (N.D. Tex.) (internal citations omitted).

69. In federal capital prosecutions, jurors are instructed that they may not consider the race of the defendant or any victim as a factor in the sentencing decision. The controlling statute provides:

> (f) Special precaution to ensure against discrimination.—In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

18 U.S.C. § 3593 (available at http://uscode.house.gov). No comparable instruction was given at Sterling's capital trial.

70. *See Strickland*, 466 U.S. at 688.

community in which Sterling was tried is whether any death sentence imposed there in a case involving a black defendant, particularly one charged with the death of a white victim, could ever be free from the taint of that community's commonplace racial prejudice. But until state courts abandon—or are directed to abandon—such undue deference, this question will never be answered.[71]

III. SUBORDINATION OF SUBSTANTIVE RACIAL-DISCRIMINATION CLAIMS TO PROCEDURAL CONCERNS: *BUCK* AND *SALDANO*

The exclusion of minority jurors from capital trials does not describe the full extent of continuing questions concerning the influence of racial bias in use of the death penalty. In other contexts, evidence or suggestion of racial bias is often disregarded or discounted by courts' reliance on procedural default rules, typically those relating to trial counsel's failure to properly preserve error. For instance, in *Buck v. Thaler*,[72] the Court denied certiorari on a claim that Buck's sentence was

71. Recently, a North Carolina case made headlines when a state trial judge reduced a death sentence to life imprisonment, finding that the eighteen-year-old case was infected with racism in the selection of the trial jury. *See* Campbell Robertson, *Bias Law Used to Move a Man Off Death Row*, 161 N.Y. Times A1 (April 21, 2012). The judge acknowledged that the evidence of the defendant's guilt was unquestionable, but invoked the relevant provision of North Carolina's Racial Justice Act, N.C. Gen. Stat. Ann. § 15A-2011 (Westlaw 2009), to reduce the sentence from death to life without parole upon finding extensive evidence of intentional discrimination. Unfortunately, that Act has recently been amended by the North Carolina legislature to remove the provisions used in that case. *See* Sarah Preston, *North Carolina's Historic Racial Justice Act Gutted*, http://www.aclu.org/blog/capital-punishment-racial-justice/north-carolinas-historic-racial-justice-act-gutted (July 3, 2012) (indicating that the North Carolina legislature overcame the governor's veto of new legislation "repealing the provision that allowed defendants to file claims showing statewide discrimination in sentencing and jury selection," and so removed the state's short-lived legislative support for the use of statistical evidence to demonstrate system-wide racism) (copy on file with Journal of Appellate Practice and Process).

Legislative events subsequent to the decision in this case demonstrate the folly of the Supreme Court's reliance on state actors—whether prosecutors, judges, or legislators—to properly carry out federal constitutional commands. That approach presupposes the good faith of every state prosecutor, trial judge, and state legislator, all working inside a death-penalty system that has been compromised by the taint of racism since before *Furman* was decided.

72. ___ U.S. ___, 132 S. Ct. 32 (2011); ___ U.S. ___, 132 S. Ct. 69 (2011) (denying application for stay of execution and petition for writ of certiorari); ___ U.S. ___, 130 S. Ct. 2096 (2010) (denying petition for writ of certiorari to the Fifth Circuit).

influenced by the prosecution's psychologist, who testified in the sentencing phase that Buck's race—African-American—rendered him more likely to commit acts of criminal violence in the future, which is the heart of the capital sentencing question in Texas trials.[73] Buck relied on *Saldano v. Texas*,[74] in which similar race-based dangerousness analysis offered through the same expert had led to relief, based on the concession by the Texas Attorney General that the conclusions of this expert witness violated equal protection and due process.[75] Although other minority defendants had obtained relief from their death

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73. Tex. Code Crim. Proc. Ann. Art. 37.071(1) (Westlaw 2011) (requiring capital trial jurors to make findings in response to interrogatories propounded during the sentencing proceeding, at which the prosecution's case in seeking the death penalty requires proof of the convicted defendant's "future dangerousness"). The statute provides, in pertinent part, that "[o]n conclusion of the presentation of the evidence, the court shall submit the following issues to the jury: (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann. Art. 37.071(1)(b); *see also Buck*, 132 S. Ct. at 35 (Sotomayor & Kagan, JJ., dissenting from denial of certiorari) (noting that "future dangerousness" was "a fact that the jury was required to find in order to sentence Buck to death.").

74. 530 U.S. 1212 (2000). On remand in *Saldano*, the Texas Court of Criminal Appeals explained the unique circumstances of the case:

> After we affirmed his conviction on September 15, 1999, the appellant petitioned the Supreme Court for a writ of certiorari. The question for review was, "Whether a defendant's race or ethnic background may ever be used as an aggravating circumstance in the punishment phase of a capital murder trial in which the State seeks the death penalty." The Attorney General of Texas filed a response to the petition, in which he confessed that the prosecution's introduction of race as a factor for determining "future dangerousness" constituted a violation of the appellant's rights to equal protection and due process.

Saldano v. State, 70 S.W.3d 873, 875–76 (Tex. Crim. App. 2002).

The state court initially addressed the authority of the Texas Attorney General to make this concession. Because it held that the claim of constitutional error—the admission of Dr. Quijano's opinion on the relationship between race and ethnicity and the propensity of minority offenders to commit acts of criminal violence in the future—had not been preserved at trial and had consequently been forfeited, 70 S.W.3d at 891, it found the state's confession of error in the United States Supreme Court to be ineffective because it was contrary to Texas law requiring preservation of error. Saldano obtained relief in federal habeas corpus, however, because the Texas Attorney General declined to rely on the defense of procedural default and the habeas court proceeded to find that admission of the psychologist's testimony constituted constitutional error requiring relief. *Saldano v. Cockrell*, 267 F. Supp. 2d 635, 642–43 (E.D. Tex. 2003).

75. *Saldano*, 70 S.W.3d at 875. After the grant of federal habeas relief, Saldano was again sentenced to death. That sentence was upheld on appeal. *Saldano v. State*, 232 S.W.3d 77, 82 (Tex. Crim. App. 2007); *Ex parte Saldano*, 2008 WL 4727540 (Tex. Crim. App. 2008) (denying post-conviction relief).

sentences because of the same psychologist's race-determinative conclusions, Buck was denied relief because his own trial counsel had initiated discussion of Buck's race before the jury.[76]

Justice Alito, joined by Justices Scalia and Breyer, explained in a statement respecting the denial of certiorari that the claim of racial discrimination could properly be subordinated to state procedural default rules and concerns about counsel's failure to properly preserve error.[77] He pointed out that the difference between the procedural context for the admission of the psychological testimony in *Buck* and other cases involving the same type of testimony lay in the fact that in the other cases prosecutors had elicited the expert opinion based on the race factor in their cases-in-chief during the sentencing proceeding:

> Buck was tried for capital murder, and a jury convicted. He was sentenced to death based on the jury's finding that the State had proved Buck's future dangerousness to society.
>
> The petition in this case concerns bizarre and objectionable testimony given by a "defense expert" at the penalty phase of Buck's capital trial. The witness, Dr. Walter Quijano, testified that petitioner, if given a noncapital sentence, would not present a danger to society. But Dr. Quijano added that members of petitioner's race (he is African–American) are statistically more likely than the average person to engage in crime.
>
> *Dr. Quijano's testimony would provide a basis for reversal of petitioner's sentence if the prosecution were responsible for presenting that testimony to the jury.* But Dr. Quijano was a defense witness, and it was petitioner's

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76. Justice Alito explained the difference in the disposition for Buck and those for the other defendants who had obtained relief on the basis of the objectionable expert testimony:

> [T]he fact remains that the present case *is* different from all the rest. In four of the six other cases, *see, e.g., Saldano v. Texas*, 530 U.S. 1212, 120 S. Ct. 2214, 147 L.Ed.2d 246 (2000), the prosecution called Dr. Quijano and elicited the objectionable testimony on direct examination. In the remaining two cases, *see Alba v. Johnson*, 232 F.3d 208 (C.A.5 2000) (Table); *Blue v. Johnson*, Civ. Action No. 99–0350 (SD Tex., Sept. 29, 2000), while the defense called Dr. Quijano, the objectionable testimony was not elicited until the prosecution questioned Dr. Quijano on cross-examination.

Buck, ___ U.S. ___, 132 S. Ct. at 34 (statement of Alito, Scalia & Breyer, JJ., respecting denial of certiorari) (emphasis in original).

77. *Id.* at 34–35 (statement of Alito, Scalia & Breyer, JJ., respecting denial of certiorari).

> attorney, not the prosecutor, who first elicited Dr. Quijano's view regarding the correlation between race and future dangerousness.[78]

Buck's death sentence was thus insulated from constitutional challenge because of the trial strategy chosen by his lawyers.

The *Saldano-Buck* litigation sequence reflects direct use of race as a capital-sentencing factor, a constitutional infraction recognized even by the former Texas Attorney General in *Saldano*, but also demonstrates the barriers imposed by federal habeas practice and state preservation rules that often serve to insulate claims of racial discrimination from relief. In *Buck*, seven members of the Court voted to deny certiorari despite Buck's claim that the admission of race-based conclusions as to his propensity to commit acts of criminal violence in the future impermissibly tainted his death sentence—a claim consistent with the position taken by the Texas legislature in excluding evidence of race in the capital sentencing determination.[79]

A majority of the Court was essentially willing in *Buck* to subordinate the constitutional claim of racial bias in the administration of the death penalty to procedural considerations of deference to both state court reliance on procedural default and trial counsel's strategy.[80] The same had been true below. In rejecting habeas relief, the Fifth Circuit had explained:

> Indeed, in the punishment phase of the trial, it was Buck's defense counsel who argued for the admission of Dr. Quijano's expert report into evidence, despite language in the report suggesting that Buck's race is one factor that might argue in favor of a finding of future dangerousness. *Buck and his counsel presumably made this strategic determination* because they believed that the potential

78. *Id.* at 33 (emphasis supplied).

79. Tex. Code Crim. P. Art. 37.071(2)(a)(2) (Westlaw 2012) ("[E]vidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct.").

80. Justices Sotomayor and Kagan dissented from the denial of certiorari and, while not prepared to order relief on the record before the Court, would have remanded for the Fifth Circuit to reconsider asserted misrepresentations by Texas in resisting Buck's habeas petition. *Buck*, 132 S. Ct. at 35 (Sotomayor & Kagan, JJ., dissenting from denial of certiorari). Their remand position, however, reflected concern for procedural fairness in the disposition of Buck's claim, not an objection to the substantive question: whether a death sentence tainted by racially discriminatory expert testimony can be legitimized by procedural default.

> benefit of Dr. Quijano's ultimate conclusion—that Buck was not likely to pose any future danger to society if he were incarcerated—outweighed any risk of exposing the jury to Dr. Quijano's less favorable opinions.[81]

The Fifth Circuit's characterization of counsel's strategy as presumably shared by Buck is particularly interesting because it necessarily suggests that Buck either initiated or acquiesced in counsel's approach.[82] By presuming that Buck had been involved in the development of strategy in eliciting the damning testimony of Dr. Quijano, the Fifth Circuit seemingly attempted to absolve itself of any responsibility for permitting Buck's execution to proceed despite the taint of racial bias in the sentencing proceeding.[83]

Even assuming that the Fifth Circuit's presumption that trial counsel and Buck jointly, or trial counsel at Buck's instigation, deliberately offered Dr. Quijano's testimony, the question of the legitimacy of a death sentence admittedly

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81. *Buck v. Thaler*, 345 Fed. Appx. 923, 930 (5th Cir. 2009) (finding that Buck's claim would fail on the merits because defense counsel, not the prosecutor, had introduced the issue of race in the proceedings) (emphasis supplied).

82. Imputing counsel's decisions to the accused is not uncommon in the resolution of claims based on default, even though one might normally assume that it is counsel's obligation to exercise strategically sound discretion in representing a criminal defendant, including preservation of claims of constitutional error. *See e.g. State v. Fudge*, 206 S.W.3d 850, 858 (Ark. 2005) (alleging ineffective assistance in capital counsel's "failure to include federal grounds in his motion for directed verdict, thereby foreclosing Fudge's opportunity to present the claim in a federal habeas corpus proceeding"). But the presumption indulged by the Fifth Circuit hardly reflects the type of knowing and intelligent waiver on the record warranting a finding that Buck waived his constitutional right to be free from racial bias in imposition of his death sentence. Instead of presuming a valid waiver, the Supreme Court's position since *Johnson v. Zerbst*, 304 U.S. 458 (1938), has been that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights" and "'do not presume acquiescence in the loss of fundamental rights." *Id.* at 464–65 (internal quotation marks omitted). Waiver being the "intentional abandonment of a known right," *Wood v. Milyard*, ___ U.S. ___, 132 S. Ct. 1826, 1835 (2012); *U.S. v. Olano*, 507 U.S. 725, 733 (1993), the presumed waiver of objection to Quijano's inflammatory testimony should never have been permitted to trump the merits unless the record clearly demonstrated that Buck understood the consequences of presenting Quijano's testimony and acquiesced in counsel's development of that testimony during the sentencing phase of the trial.

83. It is not clear, of course, that jurors actually relied on Dr. Quijano's opinion in finding that there was a probability that Buck would engage in acts of criminal violence in the future if he was sentenced to life in prison rather than death. Nor, in light of the disposition in *Saldano*, is it unreasonable to assume that had Buck been granted federal habeas relief, a new sentencing proceeding might have resulted in another death sentence. *See* n. 74, *supra* (relating history of *Saldano* litigation).

influenced by racial discrimination remains untouched by the disposition in *Buck*. This elevation of process over substance compromises the Court's commitment to the administration of a racially fair death penalty. Justice Alito described Buck's petition as one involving "bizarre and objectionable testimony," yet a majority of the Court refused to order further review in the case.

IV. CONCLUSION: *FURMAN*'S SAD LEGACY

State policies of deference to state rules of procedural default and to trial counsel's explanations for failure to aggressively protect the rights of their clients serve to preclude federal habeas courts from actively exercising jurisdiction to address questions of racial discrimination that influence imposition of a death sentence in individual cases. The Court's expression of concern that death sentences not be tainted by racial bias is, consequently, undermined by these policies, which elevate process over substance with respect to this most serious constitutional issue. And yet, it appears that individual Justices are aware of the conflict.

Much as Justices Powell and Blackmun concluded after years of experience that the administration of capital punishment is often compromised by racial discrimination, Justices O'Connor and Stevens have similarly expressed reservations about the integrity of the capital-sentencing process. Justice O'Connor's concern was particularly prompted by the number of death-sentenced inmates eventually exonerated and the uneven quality of capital counsel.[84] However, she resigned from

84. *See e.g.* David Von Drehle, *Death Penalty Walking*, Time, http://www.time.com/time/magazine/article/0,9171,1699855-1,00.html (Jan. 14, 2008) (noting that Justice O'Connor " told a group of Minnesotans not long ago that they should 'breathe a big sigh of relief every day' that their state doesn't have the death penalty," while also pointing out that Justice Powell "told a biographer that the vote he most regretted was the one he cast in 1987 to save capital punishment," and that Justice Stevens, "who as a new Justice in 1976 voted to restore capital punishment, now speaks of the 'serious flaws' in the system he helped devise") (accessed Sept. 5, 2012; copy on file with Journal of Appellate Practice and Process); *see also e.g.* Editorial, *Justice O'Connor on Executions*, 150 N.Y. Times A16 (July 5, 2001); Alan Berlow, *Supreme Court Shocker*, Salon.com, http://archive.salon.com/news/feature/2001/07/04/oconnor/index.html (July 4, 2001).

Justice O'Connor's long-held and consistent support for the capital sentencing process also drew sharp criticism. *See e.g.* Edward Lazarus, *Justice O'Connor's Death*

the Court without acting directly on these concerns. But Justice Stevens made his concerns public in his concurring opinion upholding the execution protocol under attack in *Baze v. Rees*.[85] Among other points he raised in criticizing continued reliance on capital sentencing as a punishment option—the most important being the execution of an innocent defendant[86]—he noted that

> [a] third significant concern is *the risk of discriminatory application of the death penalty. While that risk has been dramatically reduced, the Court has allowed it to continue to play an unacceptable role in capital cases*. Thus, in *McCleskey v. Kemp*, . . . the Court upheld a death sentence despite the "strong probability that [the defendant's] sentencing jury . . . was influenced by the fact that [he was] black and his victim was white."[87]

Justice Stevens's *Baze* opinion also cited *Evans v. State*,[88] in which the Court let stand a decision by the Supreme Court of Maryland "affirming a death sentence 'despite the existence of a study showing that the death penalty is statistically more likely to be pursued against a black person who murders a white victim than against a defendant in any other racial combination.'"[89] Nevertheless, he concurred in the *Baze* Court's judgment rather than rejecting capital sentencing as a matter of Eighth or Fourteenth Amendment dictate, as Justices Brennan, Marshall, Douglas, Blackmun, and Powell all did.

While the experiences of past Justices argue for reconsideration of the death sentence because of its potential misuse as an element of racial oppression—misuse nearly impossible to quantify or detect in any individual case—their conclusions rejecting capital punishment, whether as a matter of constitutional interpretation or public-policy analysis, are not shared by any sitting Justice. The current Court's unanimous acquiescence in the constitutional acceptance of capital sentencing reflects a continued failure to recognize the damage

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Penalty Regrets—and Responsibility, http://writ.news.findlaw.com/lazarus/20010710.html (July 10, 2001).

85. 553 U.S. 35 (2008).

86. *Id.* at 85–86 (Stevens, J., concurring in judgment).

87. *Id.* at 85 (emphasis added).

88. 914 A.2d 25 (Md. 2006), *cert. denied*, 552 U.S. 835 (2007).

89. *Baze*, 553 U.S. at 85 (Stevens, J., concurring in judgment).

done to the integrity of the criminal-justice process when race is a factor in the decision to impose the ultimate punishment.

Challenges to death sentences couched in terms of the Eighth Amendment's protections, rather than as matters of equal protection governed by Fourteenth Amendment protocol, may offer the best hope for addressing the Court's acquiescence in this persistent racism.[90] It was, after all, reliance on the Eighth Amendment that led the Court to reject existing capital-punishment schemes in *Furman* only a year after upholding state death-penalty statutes in *McGautha v. California*.[91] It may well be that a re-examination of the values that led to *Furman* could lead to a new approach to addressing the problem of race bias in capital sentencing, one resting in the heart of the Eighth Amendment protection against the imposition of cruel and unusual punishments.

90. *See Andrews*, 802 F.2d at 1267 (noting that a "pattern of discriminatory or otherwise arbitrary sentencing decisions in capital cases" could support an Eighth Amendment claim).

91. 402 U.S. 183 (1971), *vacated, sub nom Crampton v. Ohio*, 408 U.S. 941 (1972); *see e.g.* Malcolm L. Stewart, *Justice Blackmun's Capital Punishment Jurisprudence*, 26 Hastings Const. L.Q. 271, 276 (1998) (characterizing shift from *McGautha* to *Furman* as made "abruptly"). The typical explanation for the apparent shift in the Court's position focuses on the fact that the claim raised in *McGautha* was predicated on Fourteenth Amendment due process grounds, while *Furman* rested on the cruel and unusual punishment prohibition contained in the Eighth Amendment. *See e.g.* Jonathan Bridges, *Hooding the Jury*, 35 U.S.F. L. Rev. 651, 673–77 (2001) (discussing *McGautha*, *Furman*, and *Gregg v. Ga.*, 428 U.S. 153 (1976)); Robert Taylor Lemon II, Student Author, *Constitutional Criminal Law—The Role of Mitigating Circumstances in Considering the Death Penalty*, 53 Tul. L. Rev. 608, 611 n. 24 (1979). This analysis is supported by the Court's own explanation in *Gregg*:

> *McGautha* was not an Eighth Amendment decision, and to the extent it purported to deal with Eighth Amendment concerns, it must be read in light of the opinions in *Furman v. Georgia*. There the Court ruled that death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty violated the Eighth and Fourteenth Amendments. . . . While *Furman* did not overrule *McGautha*, it is clearly in substantial tension with a broad reading of *McGautha*'s holding. . . . [W]e adhere to *Furman*'s determination that where the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments.

Gregg, 428 U.S. at 195 n. 47.