



The Persistent Problem of Racial Disparities in The Federal Death Penalty

Introduction

In 1991, in the first federal death penalty prosecution post-Furman,¹ the federal government obtained a death sentence against David Ronald Chandler. Although Chandler's death sentence ultimately was commuted, apparently because of serious questions about his guilt,² the government has proceeded with federal death prosecutions at an ever-accelerating pace.³ This paper details the profoundly troubling evidence that racial disparities continue to plague the modern federal death penalty. Of the next six federal inmates scheduled for execution, all are African-American defendants. Defendants of color make up the majority of federal death row and the majority of modern federal executions. Furthermore, modern Attorneys General seek the death penalty at far higher rates if the victim is White, and White federal defendants are far more likely to have their death charges reduced to life sentences through plea bargaining. Given this evidence, Congress should take four steps: (1) implement an immediate moratorium on federal executions and prosecutions; (2) fund a thorough study of the federal death penalty and its racial disparities; (3) enact a federal Racial Justice Act permitting capital defendants to use statistical evidence as proof of racial bias; and (4) enact legislation requiring the Department of Justice to provide regularly information about implementation of the federal death penalty, including statistical data about the race of victims and defendants in cases submitted and recommended for capital prosecutions.

The Evidence

1. ALL SIX OF THE NEXT SCHEDULED FEDERAL EXECUTIONS ARE AFRICAN-AMERICAN INMATES.

Six African-American federal death row inmates — Richard Tipton, Cory Johnson, James H. Roane Jr., Bruce Webster, Orlando Hall, and Anthony Battle — all face impending execution. Three defendants, Richard Tipton, Cory Johnson, and James H. Roane, Jr., were sentenced to death in February 1993 in Richmond, Virginia. Their executions were scheduled in May 2006, but the executions have been stayed because of litigation challenging the constitutionality of the government's lethal injection protocol.⁴ Bruce Webster was sentenced to death in November 1995 in Fort Worth, Texas. His execution date was scheduled for April 16, 2007, but it is currently stayed.⁵ Orlando Hall was sentenced to death in June 1996, also in Fort Worth, Texas. Anthony Battle was sentenced to death in March 1997 in Atlanta, Georgia. Scheduling of execution dates for Hall and Battle are also stayed pending the lethal injection litigation.⁶

2. TWO OF THE THREE MEN EXECUTED IN THE MODERN FEDERAL DEATH PENALTY ERA WERE MEN OF COLOR.

The United States federal government has executed three individuals since 1976: Timothy McVeigh, a White defendant executed in 2001; Juan Garza, a Latino defendant executed in 2001; and Louis Jones, an African-American defendant executed in 2003.⁷

3. THE DEATH PENALTY HAS BEEN REDUCED TO LIFE SENTENCES THROUGH PLEA BARGAINS FOR WHITE DEFENDANTS AT ALMOST TWICE THE RATE AS FOR DEFENDANTS OF COLOR.

A 2000 U.S. Department of Justice study of the federal death penalty found that a far greater percentage of White defendants were able to avoid the death penalty through plea bargains than Black defendants or Hispanic defendants.⁸ According to the study, 48% of White defendants received a sentence less than death through plea bargains while only 25% of Black defendants and 28% of Hispanic defendants pled to life sentences. Rory Little, a former federal prosecutor and member of the Department of Justice Capital Case Review Committee,⁹ attributed these “racially disparate capital punishment statistics” to the exercise of federal prosecutorial discretion and “the exercise of leniency.”¹⁰

A follow-up report in 2001 by the Department of Justice nonetheless asserted that it is “unwarranted” to suspect racial discrimination played a role in generating these sharp racial disparities in plea-bargaining because “it takes two to make a plea agreement.”¹¹ The clear implication of this statement is that Black and Hispanic defendants have rejected plea offers at a greater rate than White defendants. The Department of Justice, however, did not come forth with any evidence in either its initial 2000 report or its follow-up 2001 report showing that Black and Hispanic defendants have been offered life pleas at the same rate as White defendants, but have rejected them at a greater rate.¹² Thus, there is no reason to believe that the “racially disparate capital punishment statistics” regarding plea bargains is the result of Black and Hispanic defendants rejecting plea bargains at a greater rate than White defendants.

4. U.S. ATTORNEYS GENERAL HAVE BEEN FAR MORE LIKELY TO SEEK THE DEATH PENALTY IN CASES INVOLVING WHITE VICTIMS, AND THE PROBLEM IS GETTING WORSE.

Like the overwhelming majority of state death penalty systems,¹³ there is strong evidence that the federal death penalty discriminates on the basis of the race of the victim, with the U.S. Attorney General far more likely to seek a death sentence in White victim cases than in cases with victims of color. Federal regulations require that United States Attorneys submit for the Attorney General’s review all cases indicted for federal crimes that could qualify for the federal death penalty.¹⁴ The Attorney General then authorizes¹⁵ death penalty prosecutions in cases from this group of death-eligible cases.¹⁶ Data about authorization rates is available for Attorneys General Reno, Ashcroft, and Gonzales. Each was substantially more likely to seek the death penalty in White victim cases, defined as a case with one or more White victims.¹⁷

Attorney General Reno authorized the death penalty in one out of every five cases if no victim was White, but she authorized the death penalty in more than one out of every three cases if at least one victim was White.¹⁸ In other words, a federal defendant’s odds of facing the death penalty went from one out of five to one out of three if a victim was White.¹⁹ Attorney General Ashcroft also authorized the death penalty in a greater percentage of cases with White victims than victims of color. He authorized the Department of Justice to seek the death penalty in roughly the same proportions as Attorney General Reno.²⁰

The statistics from Attorney General Gonzales are even more troubling. To date, he has authorized the death penalty in only one out of every six cases with no White victim, but almost one out of every two cases with a White victim.²¹

Across all three Attorneys General, the AG death penalty seek rate was 35% (146/416) in White victim cases, compared with 19% (212/1090) in all other cases.²² This represents a statistically significant 16-percentage point disparity between the two rates. It means that the risk of a death penalty authorization is 1.8 times higher (35%/19%) in White victim cases than in other cases. It also means that the risk of a death penalty authorization is 84% higher (16/19) in White victim cases than in other cases.

By continuing to authorize the death penalty disproportionately for cases with White victims, the federal government is sending the intolerable message that it values the life of a White person more than the life of a person of color.

5. THE MAJORITY OF DEFENDANTS SENTENCED TO DEATH IN THE MODERN ERA OF THE FEDERAL DEATH PENALTY ARE PERSONS OF COLOR.

As noted above, fifty-four individuals²³ have been sentenced to death in the modern federal death penalty era: of these, thirty-three defendants — more than half²⁴ — are persons of color. Twenty-seven African-American defendants, twenty-one White defendants, five Latino defendants and one Native American defendant have been sentenced to death under the federal death penalty laws.²⁵ These percentages reflect larger disparities than those observed on many state death rows.²⁶ Furthermore, the disparities also represent a significant shift from the pre-Furman death penalty era. Before Furman, the federal government executed thirty-four individuals between August 17, 1927, and March 15, 1963.²⁷ Of those executed, twenty-eight were White, two were Native American and three were African-American.²⁸ While these disparities alone do not prove bias in the federal system, they raise serious questions about it.

Recommendations

This evidence of racial disparities in the implementation of the federal death penalty fundamentally challenges its legitimacy and requires immediate action. First, Congress should implement a moratorium on federal death penalty prosecutions and executions. A moratorium is necessary until it is clear that the federal death penalty can be implemented without racial bias. Second, Congress should fund a federal study to examine racial disparities and the implementation of the federal death penalty. The study should examine, among other issues, why cases are selected for the death penalty and why cases are selected for federal prosecution instead of state prosecution.²⁹

Third, Congress should enact a federal Racial Justice Act, similar to the statute adopted by the State of Kentucky.³⁰ This legislation would allow capital defendants to use statistical evidence as proof of racial bias.³¹ Under current federal law, although an employee can use statistical evidence in civil rights litigation as evidence of discrimination, a capital defendant cannot challenge his capital charge, conviction or death sentence with persuasive statistical proof of racial bias.³² The Racial Justice Act is necessary to ensure that the question of life or death for federal defendants does not turn on the race of the defendant or the victim.

Fourth, Congress should enact reporting legislation that would require the Department of Justice to provide annually information about the implementation of the federal death penalty. This information should include statistical data relevant to studying racial disparities, including: (1) for each United States Attorney's office, the number of homicide cases reviewed by the office, broken down by race of defendant and race of victim, the number of cases indicted with capital-eligible crimes by race of defen-

dant and race of victim, and the number of cases submitted to the Attorney General's Review Committee on Capital Cases by race of defendant and race of victim; (2) information about cases approved and rejected by the Attorney General for capital prosecution, broken down by race of defendant and race of victim; and (3) information about plea bargaining, including the numbers of plea offers extended and entered, by race of defendant

and race of victim. The reporting legislation should also require the Department of Justice to provide financial information, including the cost of prosecuting federal capital and non-capital homicide cases. Transparency about the implementation of the federal death penalty is a critical step towards ensuring that the death penalty is not administered in an arbitrary or discriminatory manner.

APPENDIX A

All Federal Defendants Sentenced to Death in the Modern Death Penalty Era (Post-*Furman*)

LAST NAME	FIRST NAME	D-RACE	YEAR	EXECUTED
Agofsky	Shannon	W	2004	
Allen	Billie	B	1998	
Barnette	Aquila	B	1998	
Barrett	Kenneth	W	2005	
Basham	Branden	W	2004	
Battle	Anthony	B	1997	
Bernard	Brandon	B	2000	
Bolden	Robert	B	2006	
Bourgeois	Alfred	B	2004	
Brown	Meier	B	2003	
Caro	Carlos	L	2007	
Corley	Odell	B	2004	
Davis	Len	B	1996	
Fell	Donald	W	2005	
Fields	Edward	W	2005	
Fields	Sherman	B	2001	
Fulks	Chadrick	W	2004	
Gabrion	Marvin	W	2002	
Garza	Juan	L	1993	Y (2001)
Hall	Orlando	B	1995	
Hammer	David	W	1998	
Hardy	Paul	B	1996	
Higgs	Dustin	B	2000	
Holder	Norris	B	1998	
Honken	Dustin	W	2004	
Jackson	David	B	2006	
Jackson	Richard	W	2001	
Johnson	Angela	W	2004	
Johnson	Cory	B	1993	
Johnson	Darryl	B	1997	
Jones	Louis	B	1995	Y (2003)
Kadamovas	Jurijus	W	2007	
Lawrence	Daryl	B	2006	
LeCroy	William	W	2001	
Lee	Daniel	W	1999	
Lighty	Kenneth	B	2005	
McVeigh	Timothy	W	1997	Y (2001)

Mikhel	louri	W	2007
Mikos	Ronald	W	2005
Mitchell	Lezmond	N	2003
Nelson	Keith	W	2001
Ortiz	Arboleda	L	2000
Paul	Jeffrey	W	1997
Purkey	Wesley	W	1998
Roane	James	B	1993
Robinson	Julius	B	2002
Rodriguez	Alfonso	L	2006
Sampson	Gary	W	2003
Sinisterra	German	L	2000
Stitt	Richard	B	1998
Tipton	Richard	B	1993
Vialva	Christopher	B	2000
Webster	Bruce	B	1996
Wilson	Ronell	B	2007

Re-sentenced/Commuted to Life Sentence

LAST NAME	FIRST NAME	D-RACE	YEAR
Chandler	David	W	1991
Chanthadara	Boutaem	A	1995
McCullah	John	W	1993

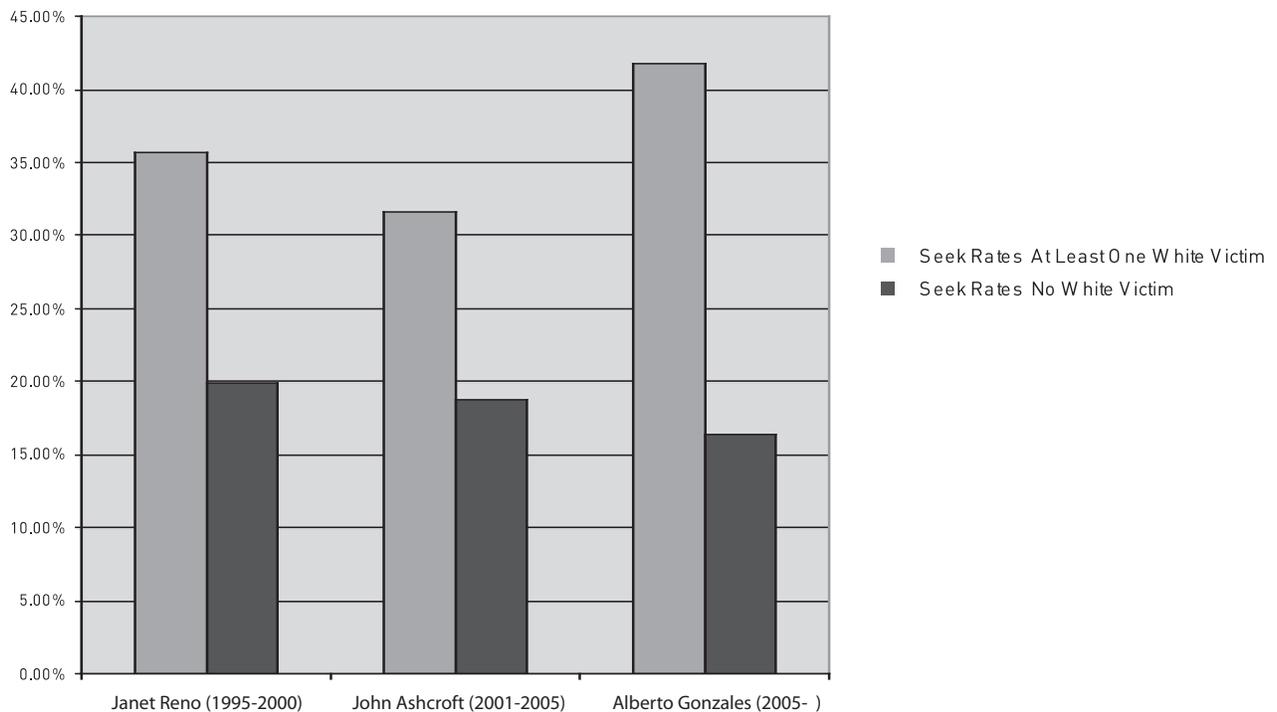
TOTAL	54
White	21
Black	27
Asian	0
Native American	1
Latino	5

APPENDIX B

Seek Rates by Attorney General and Race of the Victim

	Considered (N)	Authorized (N)	Seek Rates	Seek Rate Difference
Janet Reno (1995-2000)³³				
All Cases	600	149	24.83%	
Cases ≥ 1 White Victim	185	66	35.68%	15.68%
Cases with no White Victim	415	83	20.00%	
John Ashcroft (2001-2005)³⁴				
All Cases	623	138	22.15%	
Cases ≥ 1 White Victim	164	52	31.71%	12.97%
Cases with no White Victim	459	86	18.74%	
Alberto Gonzales (2005- present)³⁵				
All Cases	328	71	21.65%	
Cases ≥ 1 White Victim	67	28	41.79%	25.31%
Cases with no White Victim	261	43	16.48%	

Rates at which the Attorney General Authorized the U.S. Attorney to Seek the Death Penalty



ENDNOTES

¹ In *Furman v. Georgia*, 408 U.S. 238, 241 (1972), the Supreme Court held the Georgia statutory death penalty unconstitutional. Four years later, in 1976, the Court upheld the constitutionality of Georgia's substantially revised statute. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). The "modern death penalty era" is used throughout this paper to refer to those cases prosecuted after *Furman* under revised death penalty statutes.

² See *United States v. Quinones*, 205 F. Supp. 2d 256, 266 n.13 (S.D.N.Y. 2002), *rev'd on other grounds*, 313 F.3d 49 (2d Cir. 2002) ("[A]s the government concedes, at least one of the 31 federal death row inmates, David Ronald Chandler, had a colorable claim of actual innocence, but his sentence was commuted by President Clinton ... [and] seemingly prompted by serious doubts about Chandler's guilt[.]")

³ See Marcia Coyle, *Federal Death Penalty Stalls*, NAT'L L. J. (April 30, 2007) ("There is no question that the Bush administration has been more aggressive than prior administrations in pursuing federal death sentences. And there is no question that the federal death row has been growing because of that effort even as state death rows decline.")

⁴ See Death Penalty Information Center (DPIC), *Federal Death Row Prisoners* (April 11, 2007), available at <http://www.deathpenaltyinfo.org/article.php?scid=29&did=193> [hereinafter DPIC]; see also, *Roane v. Gonzales*, No. 1:05-CV-2337 (RWR) (D.D.C. Feb. 27, 2006) (order granting motion for preliminary injunction barring execution of James Roane, Jr., Richard Tipton, and Cory Johnson).

⁵ See DPIC *supra*, note 4; *Roane v. Gonzales*, Case No. 1:05-CV-2337 (RWR) (D.D.C. Feb. 21, 2007) (order granting motion for preliminary injunction barring execution of Bruce Webster).

⁶ *Roane v. Gonzales*, No. 1:05-CV-2337 (RWR) (D.D.C. June 11, 2007) (order granting motion for preliminary injunction barring scheduling of execution dates for Anthony Battle and Orlando Hall)

⁷ See DPIC, *supra* note 4.

⁸ See U.S. Dept. of Justice, *The Federal Death Penalty System, A Statistical Survey*, 34-35 (September 12, 2000) available at <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html>.

⁹ Attorney General Janet Reno established the Death Penalty Review Committee in 1995. See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 409-410 (1999). U.S. Attorneys submit cases which they have charged as capital-eligible crimes to the Review Committee, which in turn makes advisory recommendations to the Attorney General about whether the government should seek the death penalty. The Attorney General appoints the Committee members, usually senior attorneys within the Department of Justice. *Id.*

¹⁰ See *id.* at 487 (quoting Kenneth Culp Davis, "the power to be lenient is the power to discriminate").

¹¹ See U.S. Department of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review*, 14-15 (June 6, 2001) [hereinafter DOJ 2001 report] available at <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm>.

¹² *Id.*; *supra* note 8.

¹³ See, e.g., Stephanie Hindson, Hillary Potter, Michael Radelet, *Race, Gender, Region and Death Sentencing In Colorado 1980-1999*, 77 U. COLO. L. REV. 549, 549 (finding that the death penalty is sought at significantly higher rates for White victims than Black victims); Michael J. Songer, Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 188 (2006) (finding that prosecutors in South Carolina were 3.5 times more likely to seek the death penalty if the victim was White and the defendant Black than in any other combination, a statistically significant finding); Isaac Unah and John Charles Boger, *Preliminary Report of the Findings of the North Carolina Death Penalty Study 2001* (2001), available at http://www.unc.edu/~iunah/prelim_rpt_nc_dpp.pdf (concluding that the race of the victim was statistically significant in predicting who will receive the death sentence in North Carolina); U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparateness* (1990) [GAO report concluding that race of the victim was "found to influence the likelihood of being charged with capital murder or receiving the death penalty" and noting that this "finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques."]; see also David C. Baldus, George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 41 No. 2 Crim. L. Bull. 6 (April 2005) (reviewing studies, including the Baldus study of Georgia discussed in *McKleskey v. Kemp*, 481 U.S. 279 (1987)).

¹⁴ Failure to submit cases for consideration may mask additional racial disparities by removing from scrutiny the potentially discriminatory decisions by United States Attorneys whether to charge a particular case with a federal, death-eligible crime.

¹⁵ The Attorney General's Review Committee first reviews submitted cases, but its recommendations are not binding on the Attorney General's decision. See *Rory*, *supra* note 9, at 409-410.

¹⁶ Scholars sometimes refer to the rate at which the Attorney General authorizes cases as the "seek rate." For example, if an Attorney General reviewed 100 cases and authorized 50 cases, that would constitute a 50% seek rate.

¹⁷ See Appendix B.

¹⁸ Attorney General Reno authorized the death penalty in 66 of the 185 cases with White victims, a seek rate of 36%, compared with 83 of the 415 cases with no White victim, a seek rate of 20%. This difference in the seek rates is 16% and is statistically significant. See Appendix B.

¹⁹ In 2006, the RAND Corporation released a study of the federal death penalty in which it concluded that the observed racial disparities disappear after adjusting for case characteristics, including aggravating factors. See Stephen Klein, Richard Berk, & Laura Hickman, *Race and the Decision to Seek the Death Penalty in Federal Cases*, at iii, xvii (2006), available at www.ncjrs.gov/pdffiles1/nij/grants/214730.pdf. This study was limited to cases during Attorney General Janet Reno's term, and its methodology has been heavily criticized. See, e.g., Professor David Baldus, *Review of 'Race and the Decision to Seek the Death Penalty in Federal Cases'*, submitted February 19, 2006 (criticizing, *inter alia*, the study's methodology for analyzing race). See also Stephen B. Bright, et al., *The Death Penalty in the Twenty-First Century*, 45 AM. U. L. REV. 239, 341 (1995) [GAO statistician Dr. Harriet Ganson explaining that the conclusion by lead researcher Steven Klein that no disparities were observed in a similar study of California's death row was inconsistent with the data].

²⁰ Attorney General Ashcroft authorized the death penalty in 52 of the 164 cases with White victims, a seek rate of 32%, compared with 86 of the 459 cases with no White victim, a seek rate of 19%. The difference in the seek rates based on the race of the victim is 13% and is statistically significant. See Appendix B.

²¹ Attorney General Gonzales authorized the death penalty in 28 of the 67 cases with White victims, a seek rate of 42%, compared with 43 out of the 261 cases with no White victim, a seek rate of 16%. The difference in these seek rates is 25% and is statistically significant. See Appendix B. The seek rate difference for Attorney General Gonzales between cases with White victims and cases with no White victims is significantly higher than the seek rate differences for Attorneys General Reno and Ashcroft. *Id.*

²² See Appendix B.

²³ An additional three individuals initially received sentences of death but subsequently received life sentences, either through new sentencing hearings or commutation. Two of these individuals are White and one is Asian-American. See DPIC, Federal Death Row Prisoners (April 11, 2007); Appendix A.

²⁴ Sixty-one percent of all individuals sentenced to death under the modern federal death penalty have been people of color. See Appendix A, compiled with information from DPIC, Federal Death Row Prisoners (April 11, 2007).

²⁵ *Id.*

²⁶ See U.S. Dept. of Justice, *supra* note 8, at 36 n. 28 (reporting the percentages of state defendants awaiting execution in 1998 by race: White, 55%; Black, 43%; Other, 2%). See also DPIC (2007), available at <http://www.deathpenaltyinfo.org/article.php?scid=5&did=184#inmaterace> (reporting the percentage of state defendants awaiting execution as of 2007 by race: White, 45%; Black, 42%; Latino, 11%; Other, 2%). Compare Appendix A (reporting the percentage of federal death row defendants as of 2007 by race: White, 39%; Black 50%; Latino, 9%; Native American, 2%).

²⁷ See Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615, 1615 (2004).

²⁸ *Id.*

²⁹ See, e.g., National Institute of Justice, *Strategic Planning Meeting on Research Involving the Federal Death Penalty System, Summary of Proceedings*, 2-3 (Jan. 10, 2001) (“[Participant researchers] noted that research focusing on cases within Federal jurisdiction should draw upon all potential capital cases coming to Federal prosecutors, not just those submitted for death penalty review. . . . [A]n ideal study would include decision making at every juncture in the case process leading to a death sentence [and] . . . all State and Federal capital-eligible cases should be combined for analysis in order to more fully understand whether race/ethnicity is a neutral factor[.]”). These issues were not addressed by the 2006 RAND study, discussed *supra* note 19. Congress should also request the release of the RAND data so that it may be examined by outside statisticians.

³⁰ Ky. Rev. Stat. Ann. § 532.300 (West 2006).

³¹ *Id.*

³² See Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 519-520, 525-27 (1995) (comparing the goals and methods of proof in the proposed federal Racial Justice Act with those in the 1964 Civil Rights Act); *but cf. McCleskey v. Kemp*, 481 U.S. 279, 306, 313 (1987) (holding that statistical proof is inadequate to prove a constitutional violation of race discrimination in capital cases).

³³ This data is from the RAND study. See Klein, Berk & Hickman, *supra* note 19.

³⁴ The data for this section of the data is from information collected by the Federal Death Penalty Resource Counsel.

³⁵ *Id.* This information includes all cases through May 10, 2007.



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