PROSECUTORIAL DISCRETION IN REQUESTING THE DEATH PENALTY: A CASE OF VICTIM-BASED RACIAL DISCRIMINATION

RAYMOND PATERNOSTER*

Data from 300 homicides involving an aggravating felony were examined to determine what factors influence the prosecutor's decision to seek the death penalty. It was found that the race of the victim was significantly related to the decision to seek the death penalty even when several legally relevant factors were taken into account. The data also revealed that black killers of whites were more likely and black killers of blacks less likely to have the death penalty requested. A breakdown of homicides into those involving a single aggravating felony and those involving multiple felonies revealed that racial effects were stronger in the former category. There was some evidence that this difference in the effects of race reflected a different threshold of tolerance for white and black murders. Black victim homicides resulted in a death request only when they crossed a threshold of aggravation that was higher than that found for white deaths.

I. INTRODUCTION

In a landmark decision in its 1975 term the United States Supreme Court ruled that the death penalty may be applied in a constitutionally approved manner (*Gregg v. Georgia, Proffitt v. Florida, Jurek v. Texas*).[1] This decision overturned the

[1] In the same session the Court struck down mandatory death penalty statutes in *Woodson v. North Carolina* and *Roberts v. Louisiana*. Although the Texas statute allows the jury to consider factors in aggravation and mitigation, there are fundamental differences between it and the Georgia and Florida

Court's ruling in *Furman v. Georgia* just three years earlier. In *Furman* a sharply divided Court had ruled that although the use of execution by the states is not *per se* unconstitutional, the *process* by which it was being carried out violated the Eighth Amendment's prohibition of cruel and unusual punishment.[2] Although *Furman* was decided by a 5-4 vote with each Justice writing a separate opinion, the opinions of Douglas, Stewart, and White each pointed to the "uneven," "freakishly" rare, and "capricious" imposition of the death penalty. Despite differences in rationale, these three Justices were united in their criticism of the untrammeled discretion in pre-*Furman* capital statutes.

The statutes approved in *Gregg, Jurek*, and *Proffitt* each attempted to channel discretion. In the Georgia and Florida statutes this was accomplished by enumerating the aggravating and mitigating circumstances that the sentencer must consider before imposing a death sentence. Both statutes provided that a jury could only impose a death sentence if the existence of at least one statutory aggravating circumstance was established beyond a reasonable doubt.

Although *Gregg, Jurek*, and *Proffitt* spoke of untrammeled sentencing discretion, the decision of the sentencing body to impose death is only one discretionary point in the death penalty process. In order for the sentencer to *impose* death, the prosecutor must first decide to *seek* a death sentence. The decision of the prosecutor to seek the death penalty, like most prosecutorial charging decisions, is a low-visibility, high-discretion decision which has critical implications for the subsequent handling of the case. Prosecutors under those post-*Furman* statutes that have been held constitutional may decline to request the death penalty even though the factual circumstances of a case permit it. The exercise of such discretion is seen in the disparity between the number of death eligible homicides in a state during a given time period and the number of cases where the death penalty is sought. In South Carolina, for example, during a four-and-a-half-year period the death penalty was sought in only 113 of 311 death eligible cases, or 36 percent.

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statutes. It is probably best described as a quasi-mandatory statute. (See Davis, 1978; Dix, 1979 for a detailed review of the Texas capital sentencing scheme.)

   [2] In *Furman* and subsequent decisions only Justices Brennan and Marshall held that capital punishment was *per se* unconstitutional.

Litigants opposed to the new guided discretion capital sentencing statutes were aware of the issues posed by prosecutorial discretion. Petitioner Gregg suggested to the Court that even if the discretion of the jury could be guided, the prosecutor's discretion to seek or not seek the death penalty would be virtually unrestricted, since the Georgia statute, like all other state statutes, does not require the monitoring or review of prosecutors' decisions. In addition, homicides that are not charged as capital murders are not likely to be included in any proportionality review by appellate courts. Despite the critical nature of prosecutorial discretion, Justice White dismissed Gregg's concern as "unsupported by any facts." He expressed his belief that sentencing standards would filter down and inform charging decisions:

> Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. . . . Thus the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly "similar." If the cases really were "similar" in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital cases . . .

At the time *Gregg* was decided neither petitioner Gregg nor Justice White had any empirical evidence suggesting, on the one hand, that the changes in the Georgia statute were merely "cosmetic" or, on the other, that prosecutorial as well as jury discretion would be channeled by the new guidelines. Later evidence, however, suggests that post-*Furman* sentencing reforms have not eliminated jury capriciousness or discrimination. In their study of the post-*Furman* capital punishment statutes of Florida, Georgia, and Texas, Bowers and Pierce (1980) found that the likelihood of the jury returning a death sentence in a case of felony-type murder (a murder with felony circumstances) was higher for defendants who killed white victims. They noted a particularly high probability of death sentences for black defendants who killed white victims for both felony and non-felony homicides, although for felony homicides the race of the victim was clearly the dominant factor. In an examination of homicide cases committed during 1976-77 in a sample of Florida counties, Radelet (1981) found evidence of discrimination similar to that reported by Bowers and Pierce (1980), although only the race of the victim appeared important. On the other hand, Arkin

(1980), looking at data from Dade County for the years 1973-76, found no significant difference between either the race of the victim or the race of the defendant and the likelihood of receiving the death penalty. However, Arkin's data are from only one (unrepresentative) county, and the relatively small number of cases (29 black victim and 113 white victim homicides) means that the possibility of a Type II error is substantial.[3]

The evidence also suggests that killers of whites are more likely to be charged with capital homicide in the first instance. To date, the tendency has been found in Florida (Bowers and Pierce, 1980; Radelet, 1981), South Carolina (Jacoby and Paternoster, 1982; Paternoster, 1983), and Georgia (Baldus *et al.*, 1983). Thus, it appears that despite considerable procedural reform, racial discrimination has not been removed from post-*Furman* capital statutes. The race of the victim in particular has a strong impact on both the charging of murder cases and imposition of the death penalty. The phenomenon is apparently not new, for more than thirty years ago Garfinkel (1949) found a similar pattern in North Carolina.

The disproportionate presence of killers of whites on death row does not, however, unequivocally show that racial discrimination permeates post-*Furman* capital sentencing statutes. A finding that killers of whites are more likely to be charged with a capital offense and given a death sentence may reflect: (1) differences in victim or offender characteristics other than race and/or (2) qualitative differences in the characteristics of black victim and white victim homicides. It is possible that homicides involving white victims are particularly likely to be accompanied by other factors that suggest the death penalty is appropriate. For example, whites may be more likely than blacks to be killed by strangers, in the course of a felony, or in a particularly brutal manner.

With the exception of the work done by Baldus and his colleagues with Georgia data, prior studies have incorporated few of the possibly relevant controls in their analyses. Bowers and Pierce (1980), Arkin (1980), and Jacoby and Paternoster (1982) in their research controlled only for the presence of an accompanying felony, while Radelet (1981) controlled only for

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[3] Interestingly, in Arkin's data (1980: 89) defendants who killed white victims had a higher probability of being (1) convicted, (2) convicted of first-degree murder, (3) sentenced to life or death, and (4) sentenced to death than those who killed black victims. There was, then, a consistent and in some instances considerable disparity by victim's race, but with Arkin's small sample sizes this disparity is not large enough to attain significance.

the victim-offender relationship and the type of homicide (first-degree murder). The possible inadequacy of these controls is obvious, for they allow substantial variation in many legally relevant variables, including the brutality of the homicide, the vulnerability of the victim, the quality of any accompanying felonies, and the offender's past record. The purpose of this paper is to more rigorously test the hypothesis of racial discrimination at the charging stage by controlling for a variety of factors other than race that from a legal perspective might properly influence prosecutorial decisions to seek the death penalty. These include both victim characteristics and characteristics of the homicide.

II. METHODS

This study draws on information collected from the approximately 1,800 non-negligent homicide events committed in the state of South Carolina from June 8, 1977, when the state's current death penalty law took effect, until December 31, 1981. The unit of analysis is the homicide event, defined as an act of homicide committed by a single offender against one or more victims. Thus, if one offender has killed two victims, it is coded as one homicide event with multiple victims; if two defendants have killed one victim, it is coded as two homicide events since death could be requested for either, neither, or both defendants.

Data Collection

Data pertaining to the characteristics of the offender, victim, and homicide event were collected from several different sources. An initial data set of the over 1,800 homicide events was created using Supplemental Homicide Reports (SHRs). The local law enforcement agency completes an SHR for each homicide committed in the state and sends it to a state agency, which codes the report and forwards the data to the FBI's Uniform Crime Report Program. All local law enforcement agencies participate in the South Carolina SHR program so there is virtually total coverage of homicides. SHRs were obtained for all non-negligent homicides committed during the years 1977-81. Homicides committed before the South Carolina death penalty statute took effect on June 8, 1977, were deleted from the file.

The SHR contains demographic information about the victim and offender (race, age, sex, relationship between victim and offender), and limited descriptive information about the

homicide (number of victims and offenders, type of weapon used, the presence or absence of an accompanying felony or non-felony offense, date, time, and place of the homicide). Missing from the SHRs is the kind of detailed information that might distinguish crimes or defendants with respect to special aggravating or mitigating circumstances. For example, we cannot learn from this data set how many times the victim was shot, knifed, or beaten, whether there was evidence of post-mortem abuse, whether the defendant was of subnormal intelligence, whether the defendant turned himself in, and the like. Thus, the information from the SHR had to be supplemented with other information relating to factors that might properly influence a prosecutor's decision to seek the death penalty.

To do this we coded information from the original police incident report and any supplemental investigation reports prepared for each homicide. The former are detailed reports of the homicide scene compiled by local law enforcement officers, and the latter include information that was not known at the time of the crime but was gathered through subsequent police investigations of the homicide or suspect. Often these reports contain detailed descriptions of how the homicide was carried out, including such matters as the nature and location of the injuries, evidence of contemporaneous crimes, evidence of drinking or drug use, and biographical information on the suspected offender. We were able to obtain such reports for about 95 percent of the homicide events in the data file. They allowed us to correct as well as elaborate on the information contained in the SHR file.[4]

For cases resulting in an arrest and subsequent criminal indictment, we obtained from the computer files of the State Office of the Attorney General the docket number of the case, the trial date, information about the offender (name, birthdate, sex, and race), about the outcome of the case, and about the sentence received. These data were integrated with the data

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[4] At the time the SHR is completed, there may be little available information about a homicide. At the time of the offense, for instance, there may be no known offender, and the incident report and SHR will be incomplete. With subsequent investigation, however, a suspect may be arrested and charged, and descriptive information would appear in the subsequent homicide investigation report. There may also be instances in which the initial incident report errs by, for example, stating that the homicide involved only a single defendant when a subsequent investigation reveals another offender. Access to the supplemental reports allowed us to update and correct the SHR master file that was created for this study. The State Law Enforcement Division SHRs which form the basis for the UCR data are unmodified once an incident report is received and coded.

we obtained on each case from the SHRs and police incident reports.

Finally, information was obtained concerning the prosecutor's charging decision in each homicide case. Although the process behind the decision to seek the death penalty is a private, low-visibility one, the decision made is a matter of public record. State law requires the prosecutor's office to notify defense counsel of its intention to seek the death penalty at least 30 days prior to the trial date, and a form noting this intention is filed with the State Courts Administrators Office with a copy forwarded to the state supreme court. To monitor death cases, the research office of the state supreme court maintains a list of all homicide cases in which the death penalty was sought. This list includes the name of the defendant, the plea to the murder charge, the sentence sought by the prosecutor, the aggravating circumstance(s) established during the trial, the sentence received, and whether a direct appeal was taken. These data were matched with the corresponding homicide events on the SHR and police incident report data file. This information, of course, was available only for those defendants against whom the death penalty was sought.

Data Coding

Trained graduate student coders matched each police incident and investigation report with its corresponding Supplemental Homicide Report, with the Attorney General's data on indictments and convictions, and with the list of death-request cases from the research office of the state supreme court. Once all the data sources for a given homicide event had been assembled, the coders transcribed the data from the sources onto a factsheet. The coders closely examined the incident and investigation reports, looking for descriptive information about the homicide and the participants involved. In most instances, the initial coding and transcribing of a factsheet were verified by a second coder. At times, information from the data sources was validated by phone calls to police departments or attorneys, or by examination of court transcripts or newspaper accounts of the crime. The information obtained from coding and transcribing the police, court, and other data sources onto the factsheet was then entered into a master file for each homicide, which enabled a thorough reconstruction of the event.

Data Analysis

In the section that follows, the factors that influence the prosecutor's decision to seek the death penalty will be examined. Since we are concerned with the possible presence of racial discrimination in the operation of South Carolina's capital punishment statute, the following null hypothesis is tested:

> The decision of the prosecutor to seek a death sentence in a given homicide case will be unrelated to the race of the victim when factually similar cases are compared.

The determination of "factually similar cases" follows the model described in South Carolina's death penalty statute regarding the state supreme court's duty to review all death sentences and determine if the penalty is disproportionate to that imposed in similar cases "considering both the crime and the defendant."[5] In applying this model to prosecutorial behavior, I examine the initial pool of homicide events for the presence or absence of relevant characteristics of the offense and offender. As a first test of the discrimination hypothesis, I compare the probability of a death request by the prosecutor in white and black victim cases, controlling singly for each salient characteristic. The final test of the racial discrimination hypothesis examines the effect of the race of the victim,

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[5] According to the South Carolina death penalty statute, the state supreme court must review the case record whenever the death penalty is imposed. The entire record and transcript of the case are sent to the state supreme court and a standard questionnaire prepared. For each imposed death sentence the statute describes the following model for proportionality review:

(C) With regard to the sentence, the Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance . . . , and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant (emphasis added). S.C. CODE ANN., § 16-3-25 (Supp. 1983).

This is not the model, however, that the South Carolina Supreme Court actually follows in conducting its proportionality review of imposed death sentences. Rather than comparing cases where the death penalty was imposed to those *factually similar* cases where the death penalty *could have* been imposed, the supreme court uses only those cases where a death sentence was both imposed and affirmed on appeal. This construction of similarity as *dispositionally similar* has resulted in a very small pool of reviewable capital cases. At the time of this writing there have been only five affirmed cases in the state. Not surprisingly, when the state supreme court has compared a given case with these past cases in a proportionality review, it has found that there is no other truly similar case to compare it to, and that, therefore, the imposed death sentence is neither excessive nor disproportionate.

controlling simultaneously for other relevant characteristics in a multivariate analysis.

III. FINDINGS

Table 1 reports the number of homicide events falling into each of the seven aggravating circumstance categories listed in the state death penalty statute.[6] That statute, in effect, created a new category of homicide: capital murder. A capital murder must include both the elements of a traditional common law murder and at least one of the statutory aggravating circumstances. Of the 1,686 homicides with known offenders committed in the state from June 8, 1977, until December 31, 1981, only 311 (18 percent) were capital murders. As can immediately be seen, most of the capital murders involve the commission of a contemporaneous felony as the aggravating circumstance, with murder during the course of an armed robbery being the most frequent homicide event. In fact, 300 of the 311 capital murders committed (96 percent) involved the commission of an accompanying felony. Death was sought in 107 of these 300 capital murders.

Column 3 of Table 1 reports the variation in the probability that prosecutors will request the death sentence for each statutory aggravating factor. When kidnapping, larceny with a deadly weapon, or torture is involved, the chance that death will be sought is more than seven in ten, but when armed robbery is the aggravating felony, the likelihood that the death penalty will be requested is about one in three, and when criminal sexual conduct has occurred, it is less than one in five.

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[6] (1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with attempt to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with the use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;
(2) Murder was committed by a person with a prior record of conviction for murder;
(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties. S.C. CODE ANN., § 16-3-20 (Supp. 1983).

Table 1. Probability of the Prosecutor Seeking the Death Penalty for Each Statutory Aggravating Circumstance—for All Homicide Events and for White Victim and Black Victim Cases

(1) Statutory Aggravating Circumstances[1]	(2) (Number of Death Requests/Number of Homicides)	(3) Probability of Death Request	(4) Probability of Death Request Black Victim Cases	(5) Probability of Death Request White Victim Cases	(6) Ratio of White/Black Probability
(1) Murder in the commission of the following crimes or acts:					
(a) Rape	(18/45)	.400	(3/14) .214	(15/31) .484	2.26[b]
(b) Criminal sexual conduct	(4/22)	.182	(0/6) .000	(4/16) .250	
(c) Kidnapping	(16/22)	.727	(5/6) .833	(11/16) .688	.82
(d) Burglary	(16/29)	.522	(2/5) .400	(14/24) .583	1.46
(e) Armed Robbery	(83/230)	.361	(10/62) .161	(73/168) .435	2.70[d]
(f) Larceny with a deadly weapon	(28/38)	.737	(3/6) .500	(25/32) .781	1.56[a]
(g) Housebreaking	(15/25)	.600	(2/5) .400	(13/20) .650	1.62
(h) Killing by poison	(0/1)	.000	(0/0)	(0/1) .000	
(i) Torture[3]	(49/57)	.860	(7/8) .875	(42/49) .857	.98
(2) Prior conviction for murder	(4/4)	1.000	(0/0)	(4/4) 1.000	
(3) Risk of death to more than one person in a public place					
(4) Murder for pecuniary gain	(5/5)	1.000	(3/3) 1.000	(2/2) 1.000	1.000
(5) Murder of a judicial officer					
(6) Murder for hire	(2/2)	1.000	(1/1) 1.000	(1/1) 1.000	
(7) Murder of a police officer	(5/9)	.556	(1/1) 1.000	(4/8) .500	1.000

1. S.C. Code Ann. § 16-3-20 (Supp. 1983).
2. The total number of capital homicides in column 2 is greater than the actual number of capital homicides found during the period of time in question, June 8, 1977-December 31, 1981. This is because any one homicide event may contain several of the statutory aggravating circumstances and could, therefore, appear more than once in column 2.
3. This aggravating circumstance is the most difficult to establish because it refers to the torture of the victim prior to death and not to post-mortem abuse. Post-mortem abuse cannot be admitted at the guilt or sentencing phase of a capital trial as a statutory aggravating factor but has been allowed during this phase as evidence of the circumstances of the crime and characteristics of the offender. In reading and coding incident reports, it is difficult to assess whether any abuse the victim received occurred prior to or after death. This category should, therefore, be viewed with caution.
4. Although this category is treated as a separate aggravating circumstance, all five of these cases actually involved the factual circumstances of murder/armed robbery. In these 5 cases the defendants were charged with three separate aggravating circumstances: armed robbery, larceny while armed with a deadly weapon, and murder for pecuniary gain.
[a] $p < .10$ [b] $p < .05$ [c] $p < .01$ [d] $p < .001$

The obvious task is to identify those factors that lead prosecutors to seek the death sentence in some but not all capital murders.

A clue to one such factor can be seen by comparing columns 3-5 of Table 1. Column 3 reports the probability of the prosecutor seeking the death penalty for all homicide events for each statutory aggravating circumstance. Columns 4 and 5 display separate probabilities for crimes involving black and white victims. For six of the seven felony circumstances (rape, criminal sexual conduct, kidnapping, burglary, armed robbery, larceny with a deadly weapon, and housebreaking) the probability of a death request is higher when whites are the victims, and the difference in probabilities is statistically significant for the felony circumstances of rape, larceny, and armed robbery (see column 6 of Table 1). Perhaps not surprisingly, the most significant evidence of racial disparity is found for armed robbery, the felony circumstance that had both the greatest number of homicide events and the most death requests. To some extent this may be a direct function of numbers, for the probability of a Type II error diminishes with sample size, but the white victim/black victim ratio of 2.70 is also the largest in the table, suggesting that among the group of aggravating felonies, armed robberies are especially likely to be a locus of victim-based discrimination.

These data must, however, be reviewed with caution because homicides that share an identical aggravating felony may differ on other legally relevant dimensions. A particular problem is that the *number* of aggravating circumstances may differ across homicide events. For example, two rape murders would appear in the same row of Table 1 as a murder involving the aggravating circumstance of rape even if rape were the only aggravating circumstance in one while the other involved rape, armed robbery, and kidnapping. Furthermore, the latter event would appear in the armed robbery and kidnapping rows alongside cases that involved only these aggravating circumstances.

Table 2 reveals that the confounding of single and multiple felony homicides is substantial. For example, although there were 45 homicides in which rape was an aggravating circumstance, it was the sole aggravating circumstance in only 20 (44 percent) of these. Larceny was an aggravating circumstance in 25 homicides but the sole circumstance in only 9 (36 percent). It is even rarer for burglary to be the only aggravating circumstance in a homicide; and while kidnapping,

Table 2. Frequency Matrix of Statutory Aggravating Felonies: Number of Times Each Felony Occurs as Sole Aggravating Circumstance (on diagonal) and Number of Times Each Occurs With Other Felonies

	Armed Robbery	Larceny	Rape	Criminal Sexual Conduct	Burglary	Housebreaking	Kidnapping	Torture
Armed robbery	158							
Larceny	25	9						
Rape	7	3	20					
Criminal sexual conduct	4	1	6	14				
Burglary	17	5	4	0	1			
Housebreaking	16	4	2	0	0	0		
Kidnapping	14	0	8	3	2	2	0	
Torture	43	11	16	5	5	4	19	0

housebreaking, and torture are frequent elements of felony-type homicides, they never appear as the sole aggravating circumstance. Table 2 makes it clear that a homicide may frequently contain two or more felony circumstances.

The pattern of aggravating felonies in Table 2 reveals some systematic linkages among them. When a murder/armed robbery also involves another aggravating felony, it is most likely to include one or more of the following: larceny, burglary, housebreaking, or torture. Murders that involve the elements of armed robbery and rape or armed robbery and criminal sexual conduct are, however, unlikely. Homicides with a factual combination of kidnapping and rape, rape and torture, or housebreaking, burglary, and larceny are more frequently found. Thus, particular felony homicides will frequently involve several situationally linked elements. It is clear, then, that felony murders may differ considerably in both the kinds and number of associated felony circumstances, rendering the creation of a general "felony-type murder" category suspect.[7]

One way to avoid the problem of multiple aggravating felonies is to examine those homicide events involving only one aggravating felony. However, with the exception of armed robbery (n=158), this produces homogeneous homicide categories with small numbers of cases. Thus, instead of creating several homicide categories, each comprising only those homicides with one aggravating felony, I divide the 311 capital murders as follows. First, I identify the group of capital murders in which the only aggravating circumstance is one or more statutory felonies. As mentioned before, 300 of the 311 capital murders fall into this category. This group is in turn subdivided into three more homogeneous groups. One consists of those murders that involved either armed robbery alone or armed robbery together with larceny with a deadly weapon (n=169).[8] A second group consists of homicides involving murder with one of the non-robbery aggravating felonies as the

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[7] Earlier research that differentiates homicides on the basis of at least one accompanying felony is similarly limited. (See, e.g., Arkin, 1980; Bowers and Pierce, 1980; Radelet, 1981; Jacoby and Paternoster, 1982.)

[8] Combining cases in which armed robbery is charged alone or with larceny with a deadly weapon ("armed larceny") is conceptually and empirically warranted. There were 158 instances of murder with armed robbery as the only aggravating circumstance and 11 instances of murder with both armed robbery and larceny with a deadly weapon only. In those 11 instances the additional aggravating circumstance of armed larceny did not mean that a separate felony of larceny with a deadly weapon was committed. Armed larceny was simply a lesser offense situationally included in armed robbery. The prosecutor's decision to charge both is a form of "charge

sole aggravating circumstance (n=44). The first group holds the statutorily prescribed aggravating circumstance constant and so includes more homogeneous offenses than the second group, which includes a single but variable kind of felony circumstance. These two groups are in turn more homogeneous than the third, which consists of different combinations of multiple felony murders. This third group contains all of the homicides that involved two or more aggravating felonies (n=87). The analysis will then proceed by investigating the effect of the race of the victim on prosecutorial discretion to seek the death penalty in: (1) all murders involving statutory aggravating felonies, (2) murders involving armed robbery-larceny as the sole aggravating circumstance, (3) murders involving one non-robbery felony as the sole aggravating circumstance, and (4) murders involving multiple statutory felonies.

Table 3 reports the probability of a prosecutorial death request for all felony homicides and each subcategory of felony homicide. This is further broken down by the race of the victim and the race of the offender. The first panel of Table 3 displays the results for the combined group of 300 homicides. A comparison of the likelihood of facing a death penalty request in white and black victim homicides reveals considerable victim-based racial disparity. The probability that a death sentence will be sought is two and a half times greater in white victim than black victim homicides (.432 vs. .172; $p < 0.001$). Consistent with the findings of Bowers and Pierce (1980) and Radelet (1981), there is no evidence of direct offender-based discrimination in felony-type homicides. While white offenders have a slightly greater likelihood of facing a death penalty request than black offenders, this difference is neither substantial nor statistically significant (.386 vs. .343; $p < .10$).

The bottom three panels of Table 3 show that the apparent effect of the race of the victim on the likelihood of a prosecutorial death penalty request is not an artifact of the kind of aggravating felony, but is diminished in more serious, multiple felony homicides. For homicides involving armed robbery as the only aggravating circumstance, a strong and significant effect for victim's race exists. The probability of a

stacking" and may reflect a prior decision to seek the death penalty rather than a cause of it.

Homicides involving armed larceny only were included in the single felony, non-armed robbery category while homicides that involved armed robbery or armed larceny in combination with other statutory aggravating felonies were included in the multiple felony homicide category.

Table 3.   Probability of Prosecutor Seeking the Death Penalty in Felony Homicides and Subcategories of Felony Homicide— Controlling Separately for Race of Victim and Offender

| | All Felony Homicides | | |
	Number of Homicide Events	Number of Death Requests	Probability of Death Request	Ratio of Probabilities
White victim	213	92	.432	2.51[d]
Black victim	87	15	.172	
White offender[1]	119	46	.386	1.12
Black offender	178	61	.343	

| | Homicide with Armed Robbery as the Only Aggravating Circumstance | | |
	Number of Homicide Events	Number of Death Requests	Probability of Death Request	Ratio of Probabilities
White victim	114	31	.272	2.99[c]
Black victim	55	5	.091	
White offender	59	11	.186	1.23
Black offender	109	25	.229	

| | Homicide with One Non-Robbery Felony as the Only Aggravating Circumstance | | |
	Number of Homicide Events	Number of Death Requests	Probability of Death Request	Ratio of Probabilities
White victim	26	8	.308	2.77[a]
Black victim	18	2	.111	
White offender	21	7	.333	2.33[c]
Black offender	21	3	.143	

| | Homicide with Multiple Felonies | | |
	Number of Homicide Events	Number of Death Requests	Probability of Death Request	Ratio of Probabilities
White victim	73	53	.726	1.27
Black victim	14	8	.571	
White offender	39	28	.718	1.04
Black offender	48	33	.688	

[1]There are only 297 cases for offender data because there were three homicide events where the race of the offender could not be determined either from the police incident report, the SHR, or the State Attorney General's indictment data.
[a]p < .10   [b]p < .05   [c]p < .01   [d]p < .001

death request in murder/armed robbery is .272 when the victim is white but decreases to .091 for black victims (ratio of 2.99; p < .01). An identical pattern is found for single felony homicides not involving armed robbery. The prosecutor is approximately three times more likely to seek a death sentence in cases involving white rather than black victims (.308 vs. .111; p < .10).

The overall probability of a death sentence request is, as might be expected, significantly higher for multiple felony homicides than for single felony murders [(61/87) .701 vs. (46/213) .210; p < .001]. At the same time the effect of the race of the victim on the decision to seek a death sentence is considerably attenuated, though not eliminated (.726 vs. .571; p > .10).

The data for different subcategories of homicide in Table 3 reveal, then, considerable victim-based disparity. There apparently is no similarly consistent evidence of offender-based disparity, however. For homicides involving armed robbery only, black offenders are somewhat, though insignificantly, more likely to face a death sentence request than white offenders (.229 vs. .186; p > .10). This relationship reverses for non-robbery, single felony murders and homicides with multiple felony circumstances, where white offenders are more likely to have the death penalty requested than black offenders. The white offender/black offender differential is quite small for multiple felony murders (ratio of 1.04 to 1) but is moderately large and significant for single felony, non-armed robbery murders (ratio of 2.33; p < .01). This finding for non-armed robbery, single felony murders probably reflects two unique features of this category of felony homicide: (1) the small number of such murders (n=43) makes racial breakdowns unstable, and (2) for these homicides black offenders are more likely to kill other blacks than whites, and the associated probability of a death request for blacks who kill other blacks is exceptionally low (1/17, .059).

This last point suggests that victim-based discrimination may be accentuated or attenuated when considered in conjunction with the race of the offender. Prosecutors may be *more* prone to seek a death sentence in white victim cases when the offender is black and may be substantially *less* likely to seek a death sentence when both the offender and the victim are black. Table 4 examines this possibility; it reports the probability that the prosecutor will seek a death sentence, controlling simultaneously for the race of both the offender and the victim. The first panel presents the findings for all felony homicides. Apparently, the disparity in the probability of a death penalty request in white and black victim homicide cases is, in part, attributable to two sources: (1) an enhanced probability of a death penalty request for blacks who kill whites and (2) a diminished probability of a death penalty request for blacks who kill other blacks. Blacks who kill whites

are significantly *more likely* to face a death penalty request than are whites who kill whites (.495 vs. .375; p < .05). Blacks who kill blacks are significantly *less likely* to have the death penalty requested than are whites who kill blacks (.113 vs. .467; p < .001). It would seem that, at least in the initial decision to seek a death sentence, black offender/white victim homicides are treated as more aggravated killings, and black offender/black victim homicides are treated as less aggravated deaths. It makes more difference who a black slays than a white, for while blacks who kill whites are almost four and a half times more likely to have a death sentence requested than blacks who kill other blacks (.495 vs. .113; p < .001), whites who kill blacks are somewhat, although insignificantly, more likely to face a death penalty request than are whites who kill other whites (.467 vs. .375; p < .10).

Since homicides involving armed robbery constitute such a large proportion of all felony murders, it is not surprising to find this pattern replicated in that subcategory of homicide. The second panel of Table 4 suggests that prosecutors are significantly more likely to seek the death penalty in murder/armed robbery when a black kills a white than when a white kills another white (.333 vs. .196; p < .05). It is also the case that in armed robbery/murders blacks who kill other blacks are less likely to have the death penalty requested than are whites who kill blacks, although this difference is not significant (.087 vs. .125; p > .10). Indeed, it is clear that when a black is killed in the commission of an armed robbery, the offender is unlikely to face a death request whether black (.087) or white (.125). The substantial race of victim effect found in Table 3 for armed robbery/murders is due primarily to the fact that blacks who kill whites are particularly likely to have the death penalty requested, compared with other offender/victim racial combinations (.333 vs. .142; p < .01), and members of either race who kill blacks are particularly unlikely to face a death penalty request (.092 vs. .272; p < .01).

The pattern of effects is less clear for non-robbery, single felony homicides (third panel of Table 4). There are fewer than 50 of these homicides in the data and the fewest number of death requests. Nevertheless, (if we ignore the one instance where a white killed a black) the greatest likelihood of a death penalty request is still to be found for black killers of whites (.500) and the least likelihood for black killers of blacks (.059). A black who kills a white is significantly more likely to face a death penalty request than a white who kills a white (.500 vs.

.300; p < .10) and is over eight times more likely to have the death penalty sought than one who kills another black (.500 vs. .059; p < .01).

The data for multiple felony murders in Table 3 showed a negligible effect for either race of victim or race of offender. The last panel of Table 4 reveals that for these more aggravated homicides the killing of a white is no more likely to result in a death penalty request than the killing of a black, unless the killer of a black is also black, in which case the probability diminishes substantially. Prosecutors seek the death penalty

Table 4.   Probability of Prosecutor Seeking the Death Penalty in Felony Homicides and Subcategories of Felony Homicide— by Race of Offender/Victim Combinations

	All Felony Homicides (N=297)[1]		
	Number of Homicide Events	Number of Death Requests	Probability of Death Request
Black kills black	71	8	.113
Black kills white	107	53	.495
White kills black	15	7	.467
White kills white	104	39	.375

	Homicides with Armed Robbery as the Only Aggravating Circumstance (N=168)		
	Number of Homicide Events	Number of Death Requests	Probability of Death Request
Black kills black	46	4	.087
Black kills white	63	21	.333
White kills black	8	1	.125
White kills white	51	10	.196

	Homicides with One Non-Robbery Felony as the Only Aggravating Circumstance (N=42)		
	Number of Homicide Events	Number of Death Requests	Probability of Death Request
Black kills black	17	1	.059
Black kills white	4	2	.500
White kills black	1	1	1.000
White kills white	20	6	.300

	Homicides with Multiple Felonies (N=87)		
	Number of Homicide Events	Number of Death Requests	Probability of Death Request
Black kills black	8	3	.375
Black kills white	40	30	.750
White kills black	6	5	.833
White kills white	33	23	.697

[1]There were three homicide events where the race of the offender could not be determined either from the police incident report, the SHR, or the State Attorney General's indictment data.

in over 70 percent of multiple felony, interracial homicides and where whites kill whites. However, they request a death sentence in less than 40 percent of the multiple felony homicides in which blacks kill blacks. None of the pairwise comparisons involving white offender/black victim (.833), black offender/white victim (.750), and white offender/white victim homicides is significant, but each of these has a significantly higher likelihood of a death request than black offender/black victim homicides (all p's < .05).

The data presented thus far suggest quite consistently that, when exercising their discretion to charge a homicide as a capital murder, South Carolina prosecutors are influenced by the race of the victim. They are significantly more likely to seek the death penalty when victims are white. There may also be an interaction effect such that the death penalty is less likely to be sought when both offender and victim are black and more likely to be sought when the defendant is black and the victim is white. This suggests that black lives are devalued relative to white ones, but we are not yet justified in concluding that the observed differences in the likelihood of death penalty requests are a response to racial factors. We must be cautious because we have thus far controlled only for aggravating felonies, and homicides involving identical aggravating felonies may differ in ways that are thought to make one murderer more deserving of the death penalty than another.

For example, one armed robbery may involve a single offender who taunts, kills, and then abuses a grandmother and her grandchild. Another may involve several offenders, one of whom fires one shot at a shopkeeper who is trying to prevent their escape. Juries may be expected to respond differently to these crimes, and prosecutors, whether from their knowledge of juries or from their own sense of relative immorality, may respond to such factors in deciding whether to seek the death penalty. If such factors are differentially distributed across white and black victim felony homicides, especially when blacks are offenders, they could explain death penalty request patterns that we have tentatively attributed to victim's race.

Table 5 lists various statutory and non-statutory aggravating factors that prosecutors may respond to in felony homicide cases and the probability of a death sentence request associated with each.[9] As expected, several factors significantly influence the decision to seek death. The number of statutory

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[9] In addition to the aggravating circumstances listed in note 6, the state death penalty statute also lists mitigating circumstances, the presence of which

felonies accompanying the homicide appears particularly important. In cases where there are two or more statutory aggravating felonies the probability of a death request is over three times greater than in cases with only one such felony. There is, however, a causal direction problem here, for in coding this variable we relied in part on prosecutorial records. It is possible that prosecutors tend to charge multiple felonies when they intend to seek death. Other significant factors in the prosecutor's decision are the number of non-statutory felonies that accompany the homicide, the presence of non-felony aggravating factors that reflect the cruelty of the offense, the number of victims, the number of offenders, the sex of the victim, the kind of weapon used, and the relationship between the victim and the offender.

Columns 4 and 5 of Table 5 present probabilities of death requests for each aggravating factor, controlling for race of victim. Comparing the two columns makes it clear that, at least taken singly, these statutory and non-statutory aggravating factors cannot account for the effect of victim's race that we have previously observed. In all but two instances, the

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may incline the prosecutor not to seek the death penalty. These mitigating circumstances are:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person;

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(5) The defendant acted under duress or under the domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age or mentality of the defendant at the time of the crime;

(8) The defendant was provoked by the victim into committing the murder;

(9) The defendant was below the age of eighteen at the time of the crime. S.C. CODE ANN. § 16-3-20 (Supp. 1983).

In addition, subsequent to *Lockett v. Ohio*, the list of possible mitigating circumstances that the defendant may proffer was expanded to include "any aspect of a defendant's character . . . and any of the circumstances of the offense. . ." *Lockett v. Ohio*, 438 U. S. 586, 604 (1978). The incident and investigation report provided information on the presence of mitigating circumstances but did not include information on the defendant's criminal record or information that might have been revealed at trial. The latter information was probably not known to the prosecutor at the time of the charging decision and so could not have had an effect.

A variable was created which was coded "0" if there was evidence of one or more mitigating circumstances and "1" if there were no such circumstances present. The presence or absence of a mitigating circumstance was found to have no significant relationship to the prosecutor's decision to seek a death sentence. For this reason, mitigating circumstances were not included in any further analyses.

probability of a death request for white victim homicides is significantly higher than that found for black victims, and in all 18 comparisons the direction of the difference is as predicted by the victim's race hypothesis. In addition, in seven of nine instances the probability of a death request for the less aggravated category among white victims is *higher* than the probability in the more aggravated category among black victims. For instance, the probability of a death request for single white victim homicides (the less aggravated category) is higher than that found for multiple black victim homicides (.391 vs. .250). This does not, however, mean that prosecutors respond to the aggravating factors differently when blacks rather than whites are the victims. In six of nine categories the aggravating factors apparently operate in the same way in white and black victim cases; in two (number of offenders and victim's age) there is a possible effect for white victim cases but none for blacks. Only for type of weapon does the direction of the effect apparently depend on the victim's race.[10]

A similar analysis was undertaken on the three subtypes of felony homicide. Table 6 reports the findings with respect to murder/armed robbery, Table 7 for single felony, non-armed robbery homicides, and Table 8 for homicides with multiple aggravating felonies. Table 6, which best controls for the quality of the statutory aggravating felony, essentially replicates Table 5 except that the overall effect of number of victims and the difference in death penalty requests between white and black victim cases involving one offender are, probably because of the reduced sample size, no longer statistically significant. What is most striking is that for each of the eight variables in this table, killers of whites in the less aggravated circumstance are more likely to face a death sentence request than killers of blacks in the more aggravated circumstance. In only three categories, number of non-statutory felonies, sex of victim, and age of victim, is the direction of the variable's effect the same for white and black victim cases.

Table 7 presents equivalent data for the subset of homicides involving one aggravating felony other than armed robbery. The findings are in most respects similar to Table 5

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[10] The pairwise difference of probabilities between high aggravation black victim categories and low aggravation white victim categories was significant for: the number of offenders (p < .05), sex of the victim (p < .10), age of the victim (p < .01), and the type of weapon (p < .05).

Table 5. Factors Relating to the Prosecutor's Decision to Seek the Death Penalty in Homicides Involving Murders with Any Statutory Felony—Overall and Controlling for White and Black Victims

Factor	Level	(Number of Death Penalty Requests/ Number of Homicide Events) (1)	Probability of Death Request (2)	Ratio of Probabilities: More Aggravated Circumstance/ Less Aggravated Circumstance (3)	Probability of Death Request Separately for: Black Victims (4)	White Victims (5)	Ratio of Probabilities: Black Victim Probability/ White Victim Probability (6)
Number of Statutory Felonies with Homicide[1]	2+	(61/87)	.701	3.24[d]	(8/14) .571	(53/73) .726	1.27
	1	(46/213)	.216		(7/73) .096	(39/140) .279	2.91[d]
At Least One Non-Statutory Felony with Homicide[2]	1	(29/54)	.537	1.69[d]	(4/12) .333	(25/42) .595	1.79[b]
	0	(78/246)	.317		(11/75) .147	(67/171) .392	2.67[d]
At Least One Non-Felony Aggravating Factor[3]	1	(49/62)	.790	3.24[d]	(6/12) .500	(43/50) .890	1.72[d]
	0	(58/238)	.244		(9/75) .120	(49/163) .301	2.51[d]
Number of Victims	2+	(26/47)	.553	1.73[d]	(2/8) .250	(24/39) .615	2.46[b]
	1	(81/253)	.320		(13/79) .165	(68/174) .391	2.37[d]
Number of Offenders	2+	(72/166)	.434	1.66[d]	(6/35) .171	(66/131) .504	2.95[d]
	1	(35/134)	.261		(9/52) .173	(26/82) .317	1.83[b]
Sex of Victim	female	(36/77)	.468	1.47[c]	(4/18) .222	(32/59) .542	2.44[c]
	male	(71/223)	.318		(11/69) .159	(60/154) .390	2.45[d]
Age of Victim[4]	young/old	(40/115)	.348	.96	(4/23) .174	(36/92) .391	2.25[b]
	adult	(67/185)	.362		(11/64) .172	(56/121) .463	2.69[d]
Type of Weapon	gun	(83/206)	.403	1.58[c]	(7/54) .130	(76/152) .500	2.02[d]
	other	(24/94)	.255		(8/33) .242	(16/61) .262	2.07
Victim-Offender Relationship	stranger	(82/188)	.436	1.86[d]	(9/38) .237	(73/150) .487	2.05[c]
	acquaintance	(25/112)	.223		(6/49) .122	(19/63) .302	2.48[b]

[1] Coded as 2 if there were two or more statutory aggravating felonies accompanying the homicide: rape, criminal sexual conduct, kidnapping, burglary, armed robbery, larceny with a deadly weapon, housebreaking, or torture.

[2] Coded as 1 if any felony offense not listed as a statutory aggravating felony accompanied the homicide.

[3] Coded as 1 if any of the following circumstances accompanied the homicide: post-mortem abuse; multiple efforts to kill victim (i.e., stabbing and beating); victim was shot more than one time; defendant moved or tried to hide the body.

[4] Age of victim was coded as young or old if the victim was either under 26 or over 60 and adult if between the ages of 26 and 59.

[a] $p < .10$ [b] $p < .05$ [c] $p < .01$ [d] $p < .001$

Table 6. Factors Relating to the Prosecutor's Decision to Seek the Death Penalty in Homicides Involving Murder with Armed Robbery as the Only Aggravating Factor—Overall and Controlling for White and Black Victims

Factor		(Number of Death Penalty Requests/ Number of Homicide Events) (1)	Probability of Death Request (2)	Ratio of Probabilities: More Aggravated Circumstance/ Less Aggravated Circumstance (3)	Probability of Death Request Separately for: Black Victims (4)		White Victims (5)		Ratio of Probabilities: Black Victim Probability/ White Victim Probability (6)
At Least One Non-Statutory Felony with Homicide[1]	1	(11/24)	.458	2.66[c]	(1/6)	.167	(10/18)	.556	3.33[b]
	0	(25/145)	.172		(4/49)	.082	(21/96)	.219	2.67[b]
At Least One Non-Felony Aggravating Factor[2]	1	(9/16)	.563	3.20[c]	(0/5)	.000	(9/11)	.818	—
	0	(27/153)	.176		(5/50)	.100	(22/103)	.214	2.14[b]
Number of Victims	2+	(4/16)	.250	1.20	(0/5)	.000	(4/11)	.364	
	1	(32/153)	.209		(5/50)	.100	(27/103)	.262	2.62[c]
Number of Offenders	2+	(27/105)	.257	1.82[a]	(2/29)	.069	(25/76)	.329	4.77[c]
	1	(9/64)	.141		(3/26)	.115	(6/38)	.158	1.37
Sex of Victim	female	(8/23)	.348	1.81[a]	(1/7)	.143	(7/16)	.438	3.06[c]
	male	(28/146)	.192		(4/48)	.083	(24/98)	.245	2.95[c]
Age of Victim[3]	young/old	(13/66)	.197	.88	(1/18)	.056	(12/48)	.250	4.46[b]
	adult	(23/103)	.223		(4/37)	.108	(19/66)	.288	2.67[c]
Type of Weapon	gun	(30/122)	.246	1.92[a]	(3/40)	.075	(27/82)	.329	4.39[d]
	other	(6/47)	.128		(2/15)	.133	(4/32)	.125	.94
Victim-Offender Relationship	stranger	(24/100)	.240	1.38	(2/22)	.091	(22/78)	.282	3.10[b]
	acquaintance	(12/69)	.174		(3/33)	.091	(9/36)	.250	2.75[b]

[1] Coded as 1 if any felony offense not listed as a statutory aggravating felony accompanied the homicide.
[2] Coded as 1 if any of the following circumstances accompanied the homicide: post-mortem abuse; multiple efforts to kill victim (i.e., stabbing and beating); victim was shot more than one time; defendant moved or tried to hide the body.
[3] Age of victim was coded as young or old if the victim was either under 26 or over 60 and adult if between the ages of 26 and 59.
[a]p < .10 [b]p < .05 [c]p < .01 [d]p < .001

Table 7. Factors Relating to the Prosecutor's Decision to Seek the Death Penalty in Homicides Involving Murder with One Non-Armed Robbery Felony as the Only Aggravating Factor—Overall and Controlling for White and Black Victims

Factor	(Number of Death Penalty Requests/Number of Homicide Events) (1)	Probability of Death Request (2)	Ratio of Probabilities: More Aggravated Circumstance/Less Aggravated Circumstance (3)	Probability of Death Request Separately for: Black Victims (4)	White Victims (5)	Ratio of Probabilities: Black Victim Probability/White Victim Probability (6)
At Least One Non-Statutory Felony with Homicide[1] 1	(4/11)	.364		(0/2) .000	(4/9) .444	—
At Least One Non-Felony 0	(6/33)	.182	2.00	(2/16) .125	(4/17) .235	1.88
1	(2/2)	1.000		(0/0) .000	(2/2) 1.000	
At Least One Aggravating Factor[2] 0	(8/42)	.190	5.26[c]	(2/18) .111	(6/24) .250	2.25
Number of Victims 2+	(4/5)	.800		(0/0) .000	(4/5) .800	
1	(6/39)	.154	5.19[c]	(2/18) .111	(4/21) .190	1.71
Number of Offenders 2+	(4/6)	.667		(0/1) .000	(4/5) .800	
1	(6/38)	.158	4.22[c]	(2/17) .118	(4/21) .190	1.61[a]
Sex of Victim female	(5/18)	.278		(0/5) .000	(5/13) .385	
male	(5/26)	.192	1.45	(2/13) .154	(3/13) .231	1.50
Age of Victim[3] young/old	(4/13)	.308		(1/3) .333	(3/10) .300	1.90
adult	(6/31)	.194	1.59	(1/15) .067	(5/16) .313	4.67[b]
Type of Weapon gun	(7/22)	.318		(1/8) .125	(6/14) .429	3.43[a]
other	(3/22)	.136	2.34	(1/10) .100	(2/12) .167	1.67
Victim-Offender Relationship stranger	(4/17)	.235		(1/8) .125	(3/9) .333	2.66
acquaintance	(6/27)	.222	1.06	(1/10) .100	(5/17) .294	2.94

[1] Coded as 1 if any felony offense not listed as a statutory aggravating felony accompanied the homicide.
[2] Coded as 1 if any of the following circumstances accompanied the homicide: post-mortem abuse; multiple efforts to kill victim (i.e., stabbing and beating); victim was shot more than one time; defendant moved or tried to hide the body.
[3] Age of victim was coded as young or old if the victim was either under 26 or over 60 and adult if between the ages of 26 and 59.
[a] $p < .10$ [b] $p < .05$ [c] $p < .01$ [d] $p < .001$

and Table 6, but the relationships are, generally speaking, somewhat weaker. In the overall data five factors are not significantly associated with prosecutors' charging decisions: the number of non-statutory felonies, the sex of the victim, the age of the victim, the type of weapon employed, and the victim-offender relationship. While the small sample size makes it more difficult to achieve statistical significance in this table than in Tables 5 or 6, the absolute effects of these variables (i.e., the ratio of probabilities) are at times more pronounced than they were in the armed robbery sample. In the case of victim's age the direction of the relationship is reversed. There are fewer significant differences in cases involving victims of different races in this sample than in the armed robbery sample, but 14 of 16 differences are in the predicted direction (in two instances there were no black victim homicides), and four differences attain statistical significance. The smaller number of statistically significant racial differences for these homicides is probably an artifact of the lower power that accompanies smaller sample size. In seven of ten non-significant relationships that can be compared to data in Table 6 the apparent increase in the propensity to request death when whites rather than blacks are victims is greater than it is when armed robbery is the accompanying felony. Similarly, the presence of considerable disparity can also be seen in the fact that in only one of six comparisons do killers of whites in less aggravating circumstances face proportionately fewer death penalty requests than killers of blacks in more aggravating circumstances. Thus, the cases reported in Tables 6 and 7 reflect different factual circumstances, but they apparently do not differ with respect to the effect of the victim's race. While the significance of this effect is attenuated in Table 7 by small sample size, it is still fair to characterize it as substantial.

A similar analysis was undertaken for the third category of homicides, those involving multiple felonies. The data are reported in Table 8. For multiple felony homicides only three variables were significantly related to the prosecutor's decision to seek death: the presence of at least one non-felony aggravating factor, the type of weapon employed, and the victim-offender relationship. Comparing these multiple felony homicides with armed robbery only homicides (Table 6) suggests that the failure of the other factors to be significantly related to the prosecutor's charging decision in these cases cannot be entirely attributed to small sample size. In only one

Table 8. Factors Relating to the Prosecutor's Decision to Seek the Death Penalty in Homicides Involving Murder with Multiple Felonies—Overall and Controlling for White and Black Victims

Factor	(Number of Death Penalty Requests/Number of Homicide Events) (1)	Probability of Death Request (2)	Ratio of Probabilities: More Aggravated Circumstance/Less Aggravated Circumstance (3)	Probability of Death Request Separately for: Black Victims (4)	White Victims (5)	Ratio of Probabilities: Black Victim Probability/White Victim Probability (6)
At Least One Non-Statutory Felony with Homicide[1]						
1	(14/19)	.737		(3/4) .750	(11/15) .733	.98
0	(47/68)	.691	1.07	(5/10) .500	(42/58) .724	1.45[a]
At Least One Non-Felony Aggravating Factor[2]						
1	(38/44)	.864		(6/7) .857	(32/37) .865	1.01
0	(23/43)	.535	1.61[d]	(2/7) .286	(21/36) .583	2.04[a]
Number of Victims						
2+	(18/26)	.692		(2/3) .667	(16/23) .696	1.04
1	(43/61)	.705	.98	(6/11) .545	(37/50) .740	1.36[a]
Number of Offenders						
2+	(41/55)	.745		(4/5) .800	(37/50) .740	.92
1	(20/32)	.625	1.19	(4/9) .444	(16/23) .696	1.57[a]
Sex of Victim						
female	(23/36)	.639		(3/6) .500	(20/30) .667	1.33
male	(38/51)	.745	.86	(5/8) .625	(33/43) .767	1.23
Age of Victim[3]						
young/old	(23/36)	.639		(2/2) 1.000	(21/34) .618	.62
adult	(38/51)	.745	.86	(6/12) .500	(32/39) .821	1.64[c]
Type of Weapon						
gun	(46/62)	.742		(3/6) .500	(43/56) .768	1.54[a]
other	(15/25)	.600	1.24[a]	(5/8) .625	(10/17) .588	.94
Victim-Offender Relationship						
stranger	(54/71)	.761		(6/8) .750	(48/63) .762	1.02
acquaintance	(7/16)	.438	1.74[c]	(2/6) .333	(5/10) .500	1.50

[1] Coded as 1 if any felony offense not listed as a statutory aggravating felony accompanied the homicide.
[2] Coded as 1 if any of the following circumstances accompanied the homicide: post-mortem abuse; multiple efforts to kill victim (i.e., stabbing and beating); victim was shot more than one time; defendant moved or tried to hide the body.
[3] Age of victim was coded as young or old if the victim was either under 26 or over 60 and adult if between the ages of 26 and 59.
[a] p < .10   [b] p < .05   [c] p < .01   [d] p < .001

instance, victim-offender relationship, is the absolute effect (ratio of probabilities found in column 3) more pronounced in Table 8. When each factor is subdivided into white victim and black victim homicides (columns 4 and 5), the effect of the victim's race persists. In 12 of 16 comparisons the probability of a death penalty request is higher for killers of whites than blacks, and in six of these the difference is statistically significant. Thus, the factual differences between homicides involving one and more than one aggravating felonies are not such as to eliminate the evidence of victim-based discrimination.

So far the data suggest that in deciding when to seek the death penalty in capital homicides, South Carolina prosecutors are influenced by several aggravating features of the offense and by the race of the victim. The data also suggest that the effect of the victim's race cannot be totally explained by the individual effects of aggravating factors. The remaining question is whether the effect of the victim's race continues to influence the charging decision when other factors are simultaneously examined.

To address this question a multivariate analysis was conducted. Since the dependent variable is dichotomous (death sought, death not sought) probit analysis rather than ordinary least squares (OLS) was used (Finney, 1971; Hanushek and Jackson, 1977). The logic of probit analysis is similar to that of OLS. In a probit model, however, the parameter estimates (Bs) do not represent the amount of change in the observed value of the dependent variable produced by a unit change in the independent variable. Instead, probit parameters estimate the change in the predicted value of a standard normal variable. The estimated values in a probit equation can then be used to calculate the predicted probability of the presence of the dependent variable by consulting the standard normal curve.[11] The models

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[11] This calculation can be illustrated from the probit equation estimated for all felony homicides, reported in the first row of Table 9. Taking a fairly typical homicide event consisting of one statutory felony ($x1=1$), no non-statutory felony ($x2=0$), no non-felony aggravating factors ($x3=0$), a single victim ($x4=0$), a single offender ($x5=0$), a male victim ($x6=0$), an adult victim ($x7=0$), a gun as the murder weapon ($x8=1$), committed by a stranger ($x9=1$); the probit equation for the predicted probability of a death penalty request would be:

$$P = -1.786 + .872(1) + .622(0) + 1.095(0) + (-.090)\ (0) + .148(0) +$$
$$.129(0) + .015(0) + .327(1) + .113(1) + .501(1)$$
$$P = -1.786 + .872 + .327 + .113 + .501$$
$$P = .027$$

By entering the standard normal table with a predicted Z value of .027, it is found that (from the corresponding area under the normal curve) the predicted

estimated here are binary probit models since all variables were dichotomized as zero or one, with the probability of a death request as the dependent variable. The probit analyses combine all single felony homicides with no other aggravating circumstance because there are too few single felony homicides not involving armed robbery to allow for a separate probit analysis (n=44). This should not distort our results because the pattern of bivariate relationships for the set of explanatory factors is similar in the categories we have combined (see Tables 6 and 7).[12] Separate probit models were estimated for the entire group of felony murders (n=300), the group of single felony homicides (n=213), and the group of multiple felony homicides (n=87).[13]

Column 1 of Table 9 reports the probit estimates for the model when all felony murders are considered. Significant predictors of the charging decision for these homicides include the number of statutory felonies accompanying the homicide (B=.872), the number of non-statutory felonies accompanying the homicide (B=.622), the presence of non-felony aggravating factors (B=1.095), and the type of weapon employed (B=.327). In addition, the victim's race has a highly significant effect on the decision to seek a death sentence. The probit coefficient for victim's race is positive, indicating that the probability of a death request is higher for homicides involving white victims than black (B=.501; p < .01). This suggests that in murders involving statutory aggravating felonies, by far the most

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probability of a death penalty request in a homicide with these characteristics would be .51. For a homicide with an identical set of characteristics committed against a black victim, the corresponding probit prediction equation would be:

$$P = -1.786 + .872 + .327 + .113$$
$$P = -.474$$

and the predicted probability of a death request would be .32. The use of the probit prediction equation illustrates in another way the greater likelihood of a death request in white victim homicides compared with black victim homicides. In homicides with identical factual circumstances the predicted probability of a death request is almost twice as high in white as in black victim cases.

[12] A separate probit analysis was run on the smaller subset of armed robbery only homicides (n=169). Since these make up a large proportion of the entire group of single felony homicides (79%), the results are virtually identical. All explanatory factors that were significant in the total single felony model were significant in the armed robbery only model, none of the parameter estimates varied considerably, and the fit of the armed robbery only model was as good (R^2 = .25; Likelihood X^2 = 34.57, 9 d.f.; p < .001).

[13] With dichotomous explanatory and dependent variables a logit model could also have been estimated. The difference between probit and logit is that the probit model assumes that the underlying probability function is standard normal while the logit procedure assumes an underlying logistic function (Hanushek and Jackson, 1977: 204-10). To see if the choice of estimation procedure mattered, all equations were also estimated using a logit model. The substantive results were identical. Logit estimates may be obtained from the author.

frequent kind of capital murder, the race of the victim is a salient determinant in the prosecutor's decision to seek a death sentence. The effect of the victim's race cannot, within the limits of our data, be accounted for by the kinds of homicides committed against white and black victims since it remains

Table 9.   Maximum Likelihood Probit Estimates for Factors Affecting Prosecutor's Decision to Seek the Death Penalty

| | Unstandardized Probit Estimates (Standard Error) | | |
Factor[1]	(1) All Homicides with Accompanying Felonies (N=300)	(2) Homicides with a Single Felony[2] (N=213)	(3) Multiple Felony Homicides (N=87)
Number of Statutory Felonies	.872d (.207)	——	——
Number of Non-Statutory Felonies	.622c (.220)	.831c (.268)	.095 (.461)
Number of Non-Felony Aggravating Factors	1.095d (.240)	1.247d (.348)	.962c (.349)
Number of Victims	− .090 (.265)	.073 (.369)	− .276 (.435)
Number of Offenders	.148 (.198)	.250 (.241)	.218 (.422)
Sex of Victim	.129 (.207)	.481b (.268)	− .318 (.362)
Age of Victim	.015 (.180)	.121 (.223)	.005 (.365)
Weapon Used	.327a (.201)	.427b (.245)	− .117 (.436)
Victim-Offender Relationship	.113 (.198)	.087 (.236)	.523 (.432)
Race of Victim	.501c (.214)	(.249) (.249)	(.282) (.465)
Constant	− 1.786	− 2.135	− .397
Likelihood Function[3]	112.39d	43.116d	16.85a
$\hat{R}^2$(OLS R^2) [4]	.36(.35)	.26(.22)	.18(.19)

[1]The independent variables were all dummy coded so that the first of each pair of possibilities in Table 5 received a "1" and the second received a "0." Black victim cases were coded "0" and white victim cases were coded "1."

[2]The explanatory factor, number of statutory felonies, is not included in this column nor in column 3 because it is a constant. Column 2 contains all homicide events which involved one statutory aggravating felony, and column 3 contains all homicides involving two or more statutory felonies.

[3]The Likelihood Function is a test for the significance of all the independent variables in the model. As such, it is analogous to an F-test in OLS regression. The Likelihood Function has a chi-square distribution with degrees of freedom equal to the number of independent variables contained in the model.

[4]The $\hat{R}^2$ value obtained in a probit model is analogous to the R^2 in OLS estimation. It represents the proportion of variance explained by the model, assuming the dependent variable was measured on its underlying interval level scale. $\hat{R}^2$ approaches the OLS R^2 in large samples but should nevertheless be read with caution since, as McKelvey and Zavoina (1975) note, the sampling distribution of $\hat{R}^2$ is unknown.

a$p < .10$ b$p < .05$ c$p < .01$ d$p < .001$

strong when other relevant legal considerations are taken into account. More specifically, the effect of the victim's race persists even after the influence of the number of statutory felonies, the number of non-statutory felonies, the number of non-felony aggravating factors, and the type of weapon is taken into account. Furthermore, if the number of other felonies we coded is in some substantial number of cases a result of the prosecutorial decision to seek the death penalty rather than a cause of it, the influence of the victim's race may be much stronger than that which is revealed here.

A further reason to trust observed relationships is that the model used fits the data rather well. The Likelihood Function is highly significant ($X^2=112.39$, 10 d.f.; $p < .001$), and the R^2 shows that 36 percent of the variance in charging decisions is explained by the included variables. While this means that considerable variance remains to be explained, an R^2 of .36 is about as high as or higher than those reported by others who have attempted to explain bail release (Bynum, 1982), charging (LaFree, 1980; Radelet, 1981), and sentencing decisions (Chiricos and Waldo, 1975; LaFree, 1980; Hagan *et al.*, 1980; Myers, 1979; Frazier and Bock, 1982).

Several additional probit models were estimated with the set of all felony homicides to test other hypotheses. First of all, to confirm the earlier finding that the race of the offender had no main effect on the prosecutor's charging decision, a probit equation was estimated which contained all explanatory variables described in Table 9 plus the race of the offender (coded "0" for white and "1" for black offenders). The parameter estimates for this model were virtually identical to those reported in column 1 of Table 9, as were the estimated R^2 (.36) and Likelihood Function X^2 from this model ($X^2=112.81$, 11 d.f.; $p < .001$). With the race of the offender included in the model, the effect of victim's race was essentially unchanged from that reported in Table 9 (B=.541 vs. .501; both p's $< .01$). The effect of offender's race was non-significant but positive (B=.118; $p > .10$), indicating that when other variables are controlled, black offenders are slightly more likely to face a death penalty request than are white offenders.

A second and related hypothesis concerns the possible interaction effect observed in Table 4, which suggested that at least for some homicides black offenders who kill white victims are significantly more likely to have the death penalty requested and black offenders who kill black victims are

significantly less likely to face a capital charge. To test the effect of different race of offender/race of victim combinations on the probability of a death request, three interaction dummy variables were constructed. These three variables were coded as follows: Dummy 1, "1" black kills white, "0" others; Dummy 2, "1" white kills black, "0" others; Dummy 3, "1" black kills black, "0" others. The category white kills white was suppressed and is the comparison group for the other three categories. The three dummy variables were included in a probit equation with all the independent variables (except race of offender and victim), and the results are reported in the first column of Table 10. A comparison of the first column of Tables 9 and 10 reveals that the parameter estimates for the explanatory variables from the two models are quite similar. All effects that were significant in Table 9 are also significant in Table 10, and the differences in the magnitude of the parameter estimates are negligible. Table 10 does show, however, evidence of an interaction effect for race of offender and race of victim. When other factors are controlled, in comparison to whites who kill whites, blacks who kill whites are significantly *more* likely to have the death penalty requested (B=.274; p < .10), and blacks who kill other blacks are significantly *less* likely to face a death request (B= −.512; p < .05). Whites who kill blacks are somewhat, although insignificantly, more likely to have the death penalty requested than whites who kill other whites (B=.091, p > .10). The model with the interaction effects provides as good a fit to the data as the main effects model (Likelihood Function X^2=115.54; p < .001; R^2=.37).

When type of felony is controlled, it appears that the victim-based discrimination we observed for all cases is largely a function of discriminatory charging in single felony homicides. Column 2 of Table 9, which reports the effect parameters for single felony homicides, presents results similar to those reported for all cases. Every factor that was significant when all cases were examined, except for the number of statutory felonies which does not vary here, is significant for single felony cases, and the sex of the victim, which was not significant over all cases, attains significance as well. The effect of the victim's race continues to be significant (B=.519; p < .05) when other explanatory factors are held constant. In addition, the Likelihood Function suggests that the model fits the data well (X^2=43.16, 9 d.f.; p > .001), although there is only a modest amount of variance explained (R^2=.26). Thus, there is

Table 10.   Maximum Likelihood Probit Estimates for Factors Affecting Prosecutor's Decision to Seek the Death Penalty— Race of Offender/Race of Victim Dummy Variables Included

	Unstandardized Probit Estimates (Standard Error)		
	(1) All Homicides with Accompanying Felonies	(2) Homicides with a Single Felony[2]	(3) Multiple Felony Homicides
Factor[1]	(N=297)	(N=210)	(N=87)
Number of Statutory Felonies	.847[d] (.208)	——	——
Number of Non-Statutory Felonies	.619[c] (.222)	.820[d] (.271)	.121 (.468)
Number of Non-Felony Aggravating Factors	1.097[d] (.242)	1.313[d] (.354)	.984 (.371)
Number of Victims	− .073 (.267)	.166 (.376)	− .313 (.447)
Number of Offenders	.106 (.200)	.193 (.247)	.195 (.434)
Sex of Victim	.145 (.209)	.491[b] (.273)	− .276 (.379)
Age of Victim	− .012 (.183)	.085 (.229)	− .021 (.370)
Weapon Used	.286[a] (.205)	.369[a] (.257)	− .070 (.447)
Victim-Offender Relationship	.296 (.204)	.013 (.244)	.506 (.460)
Dummy 1 (Black kills white)	.274[a] (.204)	.238 (.276)	.191 (.356)
Dummy 2 (White kills black)	.091 (.419)	.303 (.502)	− .162 (.739)
Dummy 3 (Black kills black)	− .512[b] (.258)	− .578[b] (.300)	− .182 (.659)
Constant	−1.301	−1.614	− .231
Likelihood Function[3]	115.54[d]	46.14[d]	17.14
($\hat{R}^2$) OLS R[2] [4]	.37(.35)	.27(.23)	.18(.19)

[1]The independent variables were all coded so that the first of each pair of possibilities in Table 5 received a "1" and the second received a "0."

[2]The explanatory factor, number of statutory felonies, is not included in this column nor in column 3 because it is a constant. Column 2 contains all homicide events which involved one statutory aggravating felony, and column 3 contains all homicides involving two or more statutory felonies.

[3]The Likelihood Function is a test for the significance of all the independent variables in the model. As such, it is analogous to an F-test in OLS regression. The Likelihood Function has a chi-square distribution with degrees of freedom equal to the number of independent variables contained in the model.

[4]The $\hat{R}^2$ value obtained in a probit model is analogous to the R^2 in OLS estimation. It represents the proportion of variance explained by the model, assuming the dependent variable was measured on its underlying interval level scale. $\hat{R}^2$ approaches the OLS R^2 in large samples but should nevertheless be read with caution since, as McKelvey and Zavoina (1975) note, the sampling distribution of $\hat{R}^2$ is unknown.

[a]$p < .10$ [b]$p < .05$ [c]$p < .01$ [d]$p < .001$

substantial reason to believe that for a large subset of felony-type murders, at least, the apparent effect of the victim's race on prosecutorial decisions to seek the death penalty cannot be attributed to differences in the kinds of homicides committed against black and white victims.

As with all murders involving felonies, the race of the offender had no effect on the prosecutor's decision to seek a death sentence in single felony murders. A probit model was estimated which contained all of the explanatory factors listed in column 2 of Table 9 plus offender's race. The probit estimate for the offender's race was negligible (B=.007; p > .10), while the effect for victim's race remained positive and significant (B=.522; p < .05). The inclusion of the race of the offender had virtually no impact on any of the other parameter estimates; all were identical to the third decimal place, and the amount of variance explained (R^2=.26) and overall fit of the model (X^2=43.16; p < .001) were comparable to the model reported in Table 9. A second model was estimated which contained the three offender's race/victim's race interaction dummy variables. The results of this model are reported in column 2 of Table 10. Comparing column 2 of Tables 9 and 10 reveals that the effect parameters for the other explanatory factors are similar. All variables that were significant in the main effects model in Table 9 continue to be significant in the model with the interaction terms. The effect parameters for the dummy variables confirm the findings reported in Table 4 for single felony homicides. Black offenders who kill white victims are more likely, although not significantly so (B=.238; p > .10), to have the death penalty requested than whites who kill whites (the suppressed category). The same is true for whites who kill blacks (B=.303; p > .10). The most substantial effect is found for blacks who kill other blacks, who have a significantly *lower* probability of facing a death request than whites who kill whites (B= −.578; p < .05). This suggests the possibility that the likelihood of a death request is significantly higher in single felony white victim homicides than in single felony black victim homicides because prosecutors are particularly likely to seek death when a black kills a white and particularly disinclined to seek death when a black kills a black.[14]

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[14] In the model that included armed robbery only homicides (n=169), the effect for Dummy 2 (white kills black) was negative, B=−.172. This means that for armed robbery single felony murders whites who kill blacks are less likely to have the death penalty requested than whites who kill whites, while in non-armed robbery single felony homicides whites who kill blacks have a greater chance of having the death penalty requested than whites who kill other

Column 3 of Table 9, which reports data for homicide cases involving multiple felonies, reveals findings somewhat different from those found for single felony murders. Only one of the explanatory variables is significant: the number of non-felony aggravating factors. To some extent the absence of significant relationships probably reflects the lower power of the statistical tests for this relatively small group of cases and the inefficiency of probit estimation techniques with small sample sizes. There are also substantive differences, however, for the signs of three effect parameters—number of victims, sex of victim, and type of weapon used—are positive in the single felony case but negative for multiple felony murders. The effect of victim's race is consistent, however, as homicides involving white victims are somewhat, although insignificantly, more likely to result in the death penalty being requested than homicides involving black victims (B=.282; p > .10). There is more unexplained variation in the multiple felony model (R^2=.18) and the Likelihood Function is weakly significant (X^2=16.85; p < .10). The meaning of the Likelihood Function chi-square is somewhat misleading, however, since a better fit could easily be obtained by reestimating the model with some of the non-significant effects excluded. This would reduce the degrees of freedom for the statistical test with little effect on the magnitude of the Likelihood chi-square, resulting in a better fit.

The offender's race had a stronger effect in the multiple felony model than for single felonies. When a probit model was estimated which contained both race of offender and race of victim, the effect of both offender's race (B=.162) and victim's race (B=.278) was positive. Although neither of these effects attained statistical significance, the sign indicates that, with other effects held constant, a death request is more likely in both white victim and black offender homicides. A test for possible interaction effects (column 3 of Table 10) reveals findings consistent with single felony homicides. Blacks who kill whites are somewhat more likely (B=.191) and blacks who kill other blacks somewhat less likely (B= −.182) to face a death penalty request than whites who kill whites (the suppressed category). However, in multiple felony murders, unlike single felony homicides, whites who kill blacks are somewhat less likely (B=−.162) to have the death penalty requested than are whites who kill whites. None of the three interaction terms is significant though.

whites. In comparison to its standard error, though, both effects were substantively small and non-significant.

IV. SUMMARY AND DISCUSSION

I have attempted here to uncover some of the reasons why South Carolina prosecutors seek the death penalty in some homicide cases but not in others. Under South Carolina's death penalty statute and the capital punishment statutes in most other states, the prosecutor has unbridled discretion in deciding whether to seek the death penalty. The Supreme Court in *Gregg v. Georgia* anticipated that the prosecutor's discretion would be guided by the same standards that are intended to focus the jury's attention on the characteristics of the offense and offender, but the data presented here provide considerable reason to believe that the Supreme Court's expectation has not been met in practice. The findings show that in felony-type murders, especially if not entirely those that involve single aggravating felonies, victim-based racial discrimination is evident in prosecutors' decisions to seek the death penalty. The claim that the apparent effect of the victim's race actually reflects differences in the way whites and blacks come to be killed appears unsupported. Although not every variable that bears on this rival hypothesis could be measured, our ability to control closely for felony type and a number of other plausibly influential variables cuts against this interpretation.

Nevertheless, the possibility of spuriousness cannot be dismissed entirely since the amount of variance left unexplained in the models suggests that other important explanatory variables have not been included. However, if such omitted variables account for the observed racial effect, they must be related not only to the dependent variable but also to the race of the victim.

Certainly, the model excludes some variables, such as defendant's criminal record, which when incorporated into it will increase its explanatory power. It is unlikely, however, that adding such variables to the model will reduce the apparent effect of the victim's race. This is so not only because the racial effect in murders involving felony circumstances is strong but also because there is little reason to expect that such factors are, within the class of felony murders, disproportionately characteristic of homicides involving white victims.

Assuming that a true race of victim effect exists when there is only one aggravating felony, there remains the question of why the victim's race influences prosecutorial death penalty requests only weakly when more than one aggravating felony

accompanies a homicide. One plausible explanation begins with the possibility that murders accompanied by multiple felonies are regarded by both the prosecutor and the community as more heinous than murders that involve a single felony. Certainly, prosecutors, as we see in the data, are more likely to seek a death sentence in such instances. In addition, a defendant's claim that he did not *really* intend to kill may be more credible in single felony homicides than with multiple felony crimes. A large proportion of the single felony murders (79 percent) involved armed robbery alone. In armed robbery murders unanticipated situational contingencies, such as the victim's possession of a weapon, may lead to murders that share some of the qualities of accidents or self-defense. This may be why the weapon effect is different for single and multiple felonies. When single felony murderers, mainly armed robbers, carry guns, defendants' claims that they never intended that a death would result from their crime may be less credible than when they rob armed with knives or other generally less deadly weapons. In multiple felonies, on the other hand, the use of knives, fists, or feet may bespeak greater brutality and a more fixed intent to kill than the use of guns.

For these or other reasons the differential rates of death penalty requests in single felony and multiple felony cases are consistent with the possibility that community responses to the nature of a homicide may leave prosecutors with the feeling that, once revulsion reaches a certain level, they have little choice but to seek the death penalty. In some cases this may be purely a political decision by prosecutors who see themselves as the people's representatives; in others it may be because prosecutors are responding to a sense of moral outrage they share with the community; and in still others it may be because prosecutors, attuned to the adversary game, always seek the most severe disposition they think the jury will accept. The exact reason doesn't matter, for the results could be like those we observe if, once a threshold of heinousness that has nothing to do with race is passed, the death penalty will inevitably be requested and if that threshold has a substantial likelihood of being passed in homicides accompanied by multiple felonies. Put another way, while the race of the victim may itself be an indicator of heinousness to the white community, it can be dwarfed to the point of non-salience by other aspects of a killing.

If this suggestion holds, it has two interesting implications. The first is that the insignificant directional difference found for

victim's race in multiple felony homicides should be taken seriously because it can be expected to persist and attain statistical significance as more cases arise.[15]   The second implication of the above argument, which is more basic but more tentative, is that the accepted or tolerated level of aggravation may be different for white and black victims, or, to put this another way, the killing of a white is itself an aggravating circumstance but one which has no visible effect when the crime is otherwise worthy of the death penalty. The value or sanctity of white lives may be seen by white-dominated communities or by prosecutors (who in South Carolina are all white) to be higher than the value of black lives. The suggestion is plausible in a state with a tradition of racism, where whites dominate the economic and political life of the community as well as the media and the machinery of the criminal justice system. If a community or its prosecutors are more offended (or threatened) when whites are killed than when blacks are, the murder of a black will have to be accompanied by more seriously aggravating circumstances before a death sentence is demanded. If white killings and black killings are accompanied by the same aggravating circumstances and if these circumstances are sufficient to lead to a death penalty request in the case of a black, victim race effects should disappear for death should generally be sought.[16]

The data offer some support for these conjectures. Figure 1 breaks down the probability of death requests in white and black victim homicides by the three factors found in the multivariate analysis to be most substantially related to the charging decision (see Table 9). The pattern in Figure 1 is unmistakable: as the homicide becomes more aggravated, the differential by race of victim narrows considerably. For homicides involving only one statutory aggravating felony and no other aggravating feature (the most common homicide fact pattern), the probability of a death penalty request is almost

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[15] Furthermore, we are actually dealing with the population of multiple felony homicides that occurred in South Carolina between 1977 and 1981. The victim effect is there. We are not being misled by the vagaries of random sampling. Resorting to significance tests to evaluate the reliability of the observed relationships allows for the possibility that unmeasured factors which are by chance correlated with model variables over the time period studied explain the associations, such as the association between victim's race and death penalty request, that we could measure.

[16] When death is not sought, the failure should reflect the presence of recognized mitigating factors (e.g., extreme youth) or strong idiosyncratic factors (e.g., a defendant's value as an informant, unconstitutional police tactics that induce the prosecutor to accept a plea bargain, or the intercession of a politically influential third party) that may or may not be independent of the race of the victim.

three times higher for white victims than for black victims (.279/.096=2.79; p < .001). For homicides involving at least two such statutory felonies, the probability of a death request in white and black victim cases is nearly identical (.726/.571=1.27; p > .10), and the little disparity that remains shrinks still further when one or more non-statutory aggravating factors is also present (8.65/8.57=1.01).[17] Finally, when all three aggravating features are present, the probability of a death request is identical in black and white victim cases.

Figure 1 also tells us that the number of statutory aggravating felonies is crucial to the fate of those who slay blacks. If there is only one, they are almost certain not to face a death penalty request. Since those who kill whites enjoy no such immunity, there is a substantial disparity in death requests by race of victim, no matter what other features characterize the crime. If the homicide involves two or more statutory aggravating felonies, the probability of a death request is relatively close for killers of white and black victims, and it becomes more so as the level of aggravation increases.

This pattern of victim-based discrimination in capital homicides that involve only one statutory aggravating felony and the way in which the pattern weakens and then disappears in those cases that involve multiple aggravating circumstances does not reflect consistent selectivity in seeking capital punishment for only the legally most serious of homicides. Rather, it provides support for the contention that there is a *race-specific* definition of homicide severity. The evidence from South Carolina points fairly strongly to different levels of acceptance for the killing of white and black citizens.

There is reason to believe that other states that regularly seek to apply the death penalty are similar to South Carolina in their attention to race. Most such states are in the south and have similar histories of discrimination. Effective legal checks on prosecutorial discretion do not exist. No state statute explicitly restricts such discretion, and in addition, no state appellate court has attempted to monitor prosecutorial behavior in the way that some review jury behavior for evidence of passion, prejudice, or disproportionality. And there is evidence from at least one other state that prosecutors in exercising their discretion attend to the same panoply of legal and racial factors that they do in South Carolina. A detailed

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[17] There is, however, the possibility that the decision to seek death reflects to some extent the felonies reported rather than vice versa.

Figure 1.   Probability of the Prosecutor Seeking the Death Penalty in All Homicides Involving a Statutory Aggravating Felony[1]
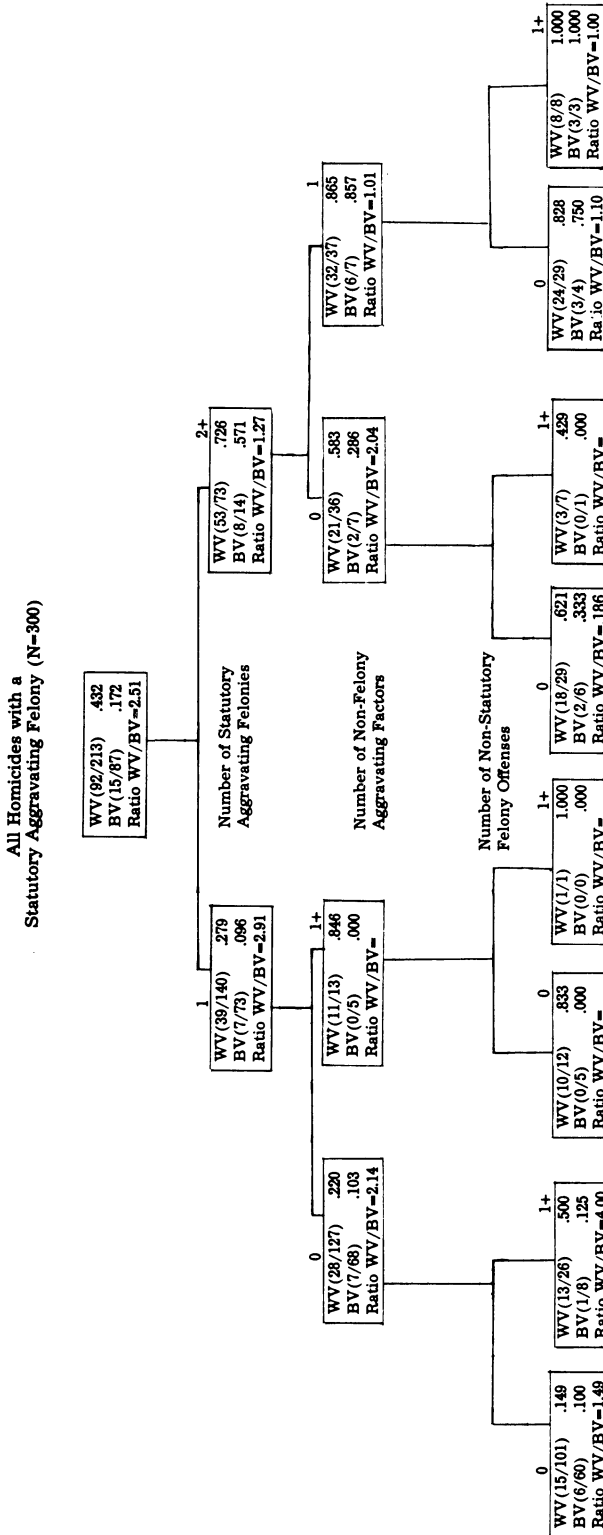
[1]Broken down by white victim (WV) and black victim (BV) cases and by the number of statutory aggravating felonies, the number of non-felony aggravating factors, and the number of non-statutory felony offenses. For the coding of these factors see note 1 at the bottom of Table 9.

study of capital charging in Georgia, in which the control over other relevant factors was considerably more rigorous than what was possible here, reports virtually identical results (Baldus *et al.*, 1983).

It also appears that the patterns found here are not limited to prosecutorial charging decisions. For example, of the 169 armed robbery murders in this study, seven (4 percent) resulted in a death sentence. In five of these instances the offender was black, and in all of them the victim was white. The South Carolina Supreme Court has affirmed the death sentence for five of the seven defendants where armed robbery was the only aggravating circumstance and has yet to rule on the other two. While seven instances are too few to allow safe generalizations, it appears from this evidence and from the research of others working with larger numbers of cases at this and other stages in the capital punishment process (Bowers and Pierce, 1980; Radelet, 1981; Baldus *et al.*, 1983) that the victim-based discrimination we observed at the charging stage is at best left uncorrected and is perhaps exacerbated at later stages in the death penalty decision-making process. This is not surprising if the pattern reflects a general tendency among whites to value black lives less than white ones.

Finally, it appears from this and other research that the Supreme Court's model for eliminating racial discrimination in the administration of the death penalty is not working. The listing of statutory aggravating and mitigating circumstances was supposed to guide prosecutors' decisions to seek the death penalty in the same manner that it was to guide juries in imposing it. The expectation was that the various decision-makers who play a role in channeling defendants toward or away from the ultimate sanction of death were to consider only those legally relevant features about a homicide that might make it deserving of the death penalty. The race of either the offender or the victim is not among the factors that may be permissibly considered. However, the expectation that guided discretion statutes could eliminate attention to race was, if it was ever sincerely held, overly optimistic. As I have noted, studies that focus on later decision points in the process leading to execution have shown that they too are tainted by racial considerations (Bowers and Pierce, 1980; Haney, 1980; Radelet, 1981; Jacoby and Paternoster, 1982; Paternoster, 1983; Baldus *et al.*, 1983). Yet even if these later decisions were not directly infected with racial bias, they would indirectly reflect it given prosecutorial behavior.

The persistence of attention to race in the face of the new death penalty statutes is not surprising. Feelings of racial intolerance and animosity are deeply rooted, and few other matters are as volatile and emotional as decisions about the appropriate punishment for murder. It may, indeed, prove impossible to remove racial motivations from decisions on the death penalty. Certainly, this paper and similar research provide no reason to believe that it will be done. After exploring these South Carolina data and reviewing the work of others, I find that the conclusion of Justice Marshall in *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980), is compelling:

> [T]he effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.

REFERENCES

ARKIN, Steven D. (1980) "Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-*Furman* Murder Cases in Dade County, Florida 1973-1976," 33 *Stanford Law Review* 75.

BALDUS, David C., Charles PULASKI and George WOODWORTH (1983) "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," 74 *Journal of Criminal Law and Criminology* 661.

BOWERS, William J. and Glenn L. PIERCE (1980) "Arbitrariness and Discrimination under Post-*Furman* Capital Statutes," 26 *Crime & Delinquency* 563.

BYNUM, Tim S. (1982) "Release on Recognizance," 20 *Criminology* 67.

CHIRICOS, Theodore G. and Gordon P. WALDO (1975) "Socioeconomic Status and Criminal Sentencing: An Empirical Assessment of a Conflict Proposition," 40 *American Sociological Review* 753.

DAVIS, Peggy C. (1978) "Texas Capital Sentencing Procedures: The Role of the Jury and the Restraining Hand of the Expert," 69 *Journal of Criminal Law and Criminology* 300.

DIX, George E. (1979) "Appellate Review of the Decision to Impose Death," 68 *Georgetown Law Journal* 97.

FINNEY, D. J. (1971) *Probit Analysis.* Cambridge: Cambridge University Press.

FRAZIER, Charles E. and E. Wilbur BOCK (1982) "Effects of Court Officials on Sentence Severity," 20 *Criminology* 257.

GARFINKEL, Harold (1949) "Research Note on Inter- and Intra-Racial Homicides," 27 *Social Forces* 369.

HAGAN, John, Ilene H. NAGEL (BERNSTEIN) and Celesta ALBONETTI (1980) "The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts," 45 *American Sociological Review* 802.

HANEY, Craig (1980) "Juries and the Death Penalty: Readdressing the *Witherspoon* Question," 26 *Crime & Delinquency* 512.

HANUSHEK, Eric A. and John E. JACKSON (1977) *Statistical Methods for Social Scientists.* New York: Academic Press.

JACOBY, Joseph E. and Raymond PATERNOSTER (1982) "Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty," 73 *Journal of Criminal Law and Criminology* 379.

LaFREE, Gary D. (1980) "The Effect of Sexual Stratification by Race on Official Reactions to Rape," 45 *American Sociological Review* 842.

McKELVEY, Richard D. and William ZAVOINA (1975) "A Statistical Model for the Analysis of Ordinal Level Dependent Variables," 4 *Journal of Mathematical Sociology* 103.

MYERS, Martha A. (1979) "Offended Parties and Official Reactions: Victims and the Sentencing of Criminal Defendants," 20 *Sociological Quarterly* 529.

PATERNOSTER, Raymond (1983) "Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina," 74 *Journal of Criminal Law and Criminology* 754.

RADELET, Michael L. (1981) "Racial Characteristics and the Imposition of the Death Penalty," 46 *American Sociological Review* 918.

CASES CITED

Furman v. Georgia, 408 U.S. 238 (1972).
Godfrey v. Georgia, 446 U.S. 420 (1980).
Gregg v. Georgia, 428 U.S. 153 (1976).
Jurek v. Texas, 428 U.S. 262 (1976).
Lockett v. Ohio, 438 U.S. 586 (1978).
Proffitt v. Florida, 428 U.S. 242 (1976).
Roberts v. Louisiana, 428 U.S. 325 (1976).
Woodson v. North Carolina, 428 U.S. 280 (1976).

STATUTES CITED

S.C. CODE ANN., §§ 16-3-20, 16-3-25 (Supp. 1983).