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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-6811

TITLE WARREN McCLESKEY, Petitioner V. RALPH KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER

PLACE Washington, D. C.

DATE October 15, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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WARREN McCLESKEY, :

Petitioner :

v. : No. 84-6811

RALPH KEMP, SUPERINTENDENT, :

GEORGIA DIAGNOSTIC AND :

CLASSIFICATION CENTER :

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Washington, D.C.

Wednesday, October 15, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 o'clock a.m.

APPEARANCES:

JOHN CHARLES BOGER, ESQ., New York, New York;
on behalf of Petitioner.

MARY BETH WESTMORELAND, ESQ. Assistant Attorney General of Georgia, Atlanta, Georgia;
on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments first this morning in No. 84-6811, Warren McCleskey versus Ralph Kemp.

Mr. Boger, you may proceed when you are ready.

ORAL ARGUMENT OF JOHN CHARLES BOGER, ESQ.,

ON BEHALF OF PETITIONER

MR. BOGER: Mr. Chief Justice, and may it please the Court:

If the State of Georgia had criminal statutes that expressly imposed different penalties, harsher penalties, on black defendants simply because they were black, or on those who killed white victims, simply because those victims were white, the statutes would plainly violate the Constitution.

There was a time, of course, when the State of Georgia did have such statutes, before our nation's Civil War, when free blacks and slaves alike could be given a death sentence merely for the crime of assault on a Georgia white citizen.

With the ratification of the Fourteenth Amendment, such criminal statutes came explicitly no longer to be written. Yet the old habits of mind, the racial attitudes of that time have survived, as this Court well knows, into the current century.

Today, we are before the Court with a substantial body of evidence indicating that during the last decade Georgia prosecutors and juries, in their administration of Georgia's post-Furman capital statutes, have continued to act as if some of those old statutes were still on the books.

A black defendant convicted in the State of Georgia of the murder of a white person goes to his sentencing hearing with as serious a handicap against him on racial grounds alone as if the prosecutor had hard evidence that he had been tried and convicted previously of another murder.

The color of a defendant's skin, in other words, or that of his victim, is often as grave an aggravating circumstance, in fact, in Georgia, as those expressly designated by Georgia's legislature.

We've documented below the role that's been played by racial considerations in Georgia's capital sentencing system. Our evidence demonstrates that Georgia sentences the killers of its white citizens at a rate nearly eleven times that to which it sentences to death the killers of its black citizens.

And even after most of the legitimate sentencing considerations had been taken into account, a defendant remains over four times likely to receive a

capital sentence if his victim chanced to be white.

Now the sources of petitioner's evidence below are two meticulous studies. They were conducted by Professors David Baldus and George Woodworth. And they have two major strengths that I think the Court should focus on at the outset.

The first strength is their comprehensiveness. They provide us with a thorough picture of how the Georgia capital sentencing system operated during the 1973-1979 period covered by the studies.

The second feature of these studies is the extraordinary openness of Professors Baldus and Woodworth. Their indefatigable willingness to entertain every criticism, to test every rival hypothesis, to seize upon every statistical means known to them to take their racial findings and shake them hard and see if by some statistical means or method, those findings would drop out of their analysis.

In other words, Professor Baldus was not wedded at the outset to any assumptions about what he wanted to prove. He was open to all comers. He was open to the state. He was open to the court.

Indeed, during our evidentiary hearing in 1983, he invited the District Judge, please sir, you

designate for us those factors you think make a difference in Georgia. You tell us a statistical method. We will with our computer here run that model. We will see whether in the test before the court we're right that race plays a part, or not.

The judge accepted that test. The data were run under his model. And indeed, the racial effects, as Judge Forester saw the system in Georgia, actually increased.

It's because Professor Baldus was wedded to no prior assumptions; it's because he subjected his statistical analysis to so many varieties of review; that his studies provide, I believe, such a powerful indictment of the Georgia system.

Now, one would suppose that the State of Georgia, faced with this serious challenge to the administration of its capital statutes, would have come forth with some explanation for these racial disparities. That's the conventional pattern in these equal protection cases or Eighth Amendment cases. Some legitimate reason that might demonstrate that what appear to be racial disparities, racial discrimination, actually is something more benign operating in the system.

But Georgia did not take this step, either in

the year of discovery that preceded our 1983 hearing, or during that hearing itself, or even in the three years that this case has wended its way up on appeal.

The state certainly has not offered any rational state interest that would justify racial discrimnation in itself. But neither has the state offered any legitimate sentencing considerations that if taken into account would diminish the apparent role of race.

It has not come forward, as you suggested last term, in the Bazemore case, would be appropriate, with other statistical models to make race go away.

Instead, Georgia's sole response has been narrowly technical and methodological. It has launched an attack on our data sources. It has questioned the value of modern statistical analysis in this area. And it has sought a technical legal rule. It has sought to obtain in this one area, the area of capital sentencing, a standard of proof so high that it has no peer anywhere else in the law.

Now, its first attack on petitioner's data sources has a kind of a keen irony to it, because of course, as you know from the briefs, Professor Baldus and his colleagues drew their information from Georgia's own official files, from its police reports, from its

prosecutors' statements, from its trial transcripts, from its records in the Supreme Court of Georgia.

These are the very record that Georgia uses to prosecute capital cases.

QUESTION: Who took the information from those sources?

MR. BOGER: They were taken under the direction of a coding supervisor --

QUESTION: I didn't ask you that. I asked you who did it.

MR. BOGER: Oh, I'm sorry. The second study that Professor Baldus drew on primarily for his analysis came from the Georgia Pardons and Parole Board. And the Pardons and Parole Board has officers, who are college trained, who go out and talk with the police officers and the prosecutors who get files from the police and the prosecutors.

QUESTION: Who went out and talked?

MR. BOGER: We had one witness who testified, a Mr. Ware, who was one of these officers. These are Pardon and Parole officials.

QUESTION: I thought there were -- who read trial transcripts and purported to extract information from them?

MR. BOGER: There was a first study and a

second study, Justice White.

QUESTION: I understand.

MR. BOGER: The first study, the procedural reform study, was coded largely from information in the files of the Supreme Court of Georgia. Those files include the trial transcripts.

So in that first study one of the principal data sources were the trial transcripts themselves.

QUESTION: Well, I still want to know, who read them?

MR. BOGER: Students, law students, law graduates; and they read them and --

QUESTION: Were any of them law graduates?

MR. BOGER: At some point, I believe Fred Kyle was a graduate of the University of Iowa Law School and had a political science degree.

QUESTION: Sooner or later.

MR. BOGER: That's right.

QUESTION: And how about the next study?

MR. BOGER: The next study was coded by law students from the Pardon and Parole Board files. And it was supervised by one of the gentleman who had been involved in the first study.

QUESTION: And so Professor Baldus relied on their interpretation of trial transcripts, or on

whatever records they were looking at, as to whether some factor was present in the case?

MR. BOGER: That's correct, although let me hasten to say, Justice White, there was an elaborate set of what are called protocols, there was an elaborate set of rules.

QUESTION: I understand that.

MR. BOGER: So that in other words, it wasn't five law students turned loose to make their own judgments. They in fact were given guidance on every one of the variables about which they had to enter information.

And undoubtedly they then had to apply those rules to the transcripts, to the facts as they saw them.

QUESTION: Right, right, right.

MR. BOGER: But that was the way in which data was gathered.

There's no suggestion that there's any serious amount of misinformation that was collected because of the use of these trained students. Indeed, the state never came forward with any serious information that suggested that the files themselves had been miscoded as matters into the questionnaire.

QUESTION: Well, I thought the trial court thought there was a serious question in that regard?

MR. BOGER: No, Your Honor, the trial court looked at a set --

QUESTION: I thought he, for example, I thought he thcught all those -- a great many of those "U" indications were erroneous.

MR. BOGER: Well, no. That's an important question. I want to address it. The "U" codes was something with respect the District Court I think misunderstood.

What -- Baldus had a set of coding ccnventions.

QUESTION: Well, let -- he may have misunderstood it. But he thcught -- he did think that they -- a lot of them were wrong.

MR. BOGER: No, what happened, Your Honor --

QUESTION: Well, did he or not?

MR. BOGER: On the "U" codes, he simply noted that there were a lot of them. He then also noted that he could have coded "U"s when you went to dc the analysis as present rather than absent.

QUESTION: And so he thought the coding had been wrong.

MR. BOGER: The coding had been incorrect. All the experts --

QUESTION: And you think the District Court

was wrong?

MR. BOGER: I think it was clearly erroneous. Even the state's experts, on that point, Your Honor, said the coding should have been the other way.

But it didn't matter --

QUESTION: Right, right.

MR. BOGER: -- because Professor Baldus took the suggestion of the District Court, said, I'll go back and recode these "U"s the other way, and I'll show you that when I do, as he did, the analysis doesn't change. Race stays important.

All of the minor coding questions --

QUESTION: Right.

MR. BOGER: -- that were raised in the District Court were resolved in this way.

Professor Baldus said, do you think I should dealt with others that weren't included in my analysis? I'll go back and recode and reinclude the others that were left out. And I'll show that doesn't make a difference.

So in other words, he demonstrated that the minor questions that were raised by the state at the hearing really made no substantial difference at all.

QUESTION: Was your organization working with Professor Baldus?

MR. BOGER: We asked Professor Baldus to undertake the study. But then we had no contact with the data collection process itself.

QUESTION: Did you make some suggestions to him?

MR. BOGER: We did, indeed. We suggested, for example, that he include certain items in his questionnaire.

But having done that, we left, of course, to Professor Baldus the job of finding out whether that evidence existed --

QUESTION: Right.

MR. BOGER: -- in the State of Georgia.

Indeed, the arrangement between the Legal Defense Fund and Professor Baldus was the following: You undertake the studies; we'll fund it through some private foundation money we have; whatever your results, you may publish it, if the results --

QUESTION: He was paid by your organization, though?

MR. BOGER: He actually received no salary. He received expenses for the conduct of the study itself.

QUESTION: From your organization?

MR. BOGER: Well, there were monies from a private foundation that had been given to us to allow us

to conduct such a study. But it was a hands -- an arm's length relaticnship as far as the integrity cf the study itself was concerned, and the state never questioned that.

This was brought out by us at the hearing. And Professor Baldus, the District Judge remarked throughout the hearing, was a man obviously cf academic integrity.

There was no suggestion that he was trying tc shape his results to meet the ends of litigation.

Indeed, he warned us that based on his preliminary guess, he didn't think there would be any discrimination in Georgia; that a prior study done in California in 1971 had suggested that there was no discrimination there, and that's what he expected to find.

He worked against his own hunches, in other words, as he did this study.

QUESTION: Mr. Boger, getting away from the validity of the study as such, and to the constitutional issue, if the study is utilized to support your proposition, what does a petitioner of a defendant have to show for the constitutional violation under equal protection or Eighth Amendment?

Does he not have to show intentional

discrimination against this particular defendant?

MR. BOGER: Yes, I believe he does, Your Honor, and yet I believe that we have shown that in this case. We've had to show it inferentially, of course. Juries in Georgia deliberate in secret, and there are no records kept; and prosecutors rarely confess their own --

QUESTION: Well, you cited Bazemore, which of course was a Title VII statutory case. Are there cases involving a constitutional violation where the Court has relied on statistical proof of the type you're suggesting we use here?

MR. BOGER: Well, there are a number of different sources of that authority, Your Honor. Both Washington v. Davis, of course, and Arlington Heights, say that the courts must be sensitive to such evidence as does exist, and acknowledge that in some cases the evidence of historical fact plus statistics may be all that does exist.

In the jury discrimination cases, for example, one rarely --

QUESTION: But this evidence is addressed, of course, as I understand it, to the victim; discrimination in the sense of discrimination against the victim.

MR. BOGER: There's also evidence of discrimination against black defendants who've murdered whites, especially in the mid-range of moderately aggravated cases.

In other words the race of defendant discrimination exists, and Baldus documented it, but it's not as pervasive. It really is more of a subdivision of the cases in Georgia.

But the race of victim discrimination, as Your Honor suggests, is statewide, and in all the cases.

QUESTION: But I'm not sure how that supports a claim of discrimination against the defendant.

MR. BOGER: Well, if the question is one, if you would, of standing, a defendant -- if I have two defendants at my right hand, and two at my left, and the two at my right have murdered whites in Georgia, and two at my left have murdered blacks, surely my defendants on the right hand would have standing if Georgia had a statute that made killing a white person a more serious crime.

They'd say that's unconstitutional. That's an invidious discrimination.

If Georgia is administering its statutes in precisely that way, so that in fact those who murder whites are subject to more severe risk of death, then I

believe the situation is identical.

QUESTION: It's such a curious case, because what's the remedy? Is it to execute more people?

MR. BOGER: Well, no, we've suggest that there are two approaches the Court can --

QUESTION: Do you want the Court to provide, then, abolition of the death penalty altogether?

MR. BOGER: Well, no, I don't think abolition is the outcome either. Under the Eighth Amendment, as we've suggested, if the statute is not operating evenhandedly, Georgia's current statute need be struck.

And if it is, Georgia can conceivable try to remedy its problems and come back with --

QUESTION: But the statutory provisions, you don't allege that Georgia's death penalty statutes are unconstitutional?

MR. BOGER: Not facially, Your Honor; they were proved of course in the Gregg case. But they have proven incapable, in fact, of preventing this kind of discrimination which we've documented.

And so like Furman we've reached a point where the Court, we argue, must say, these procedures, whatever they are, have not worked in the State of Georgia --

QUESTION: Well, Mr. Boger, don't you have to

show that this particular jury discriminated?

MR. BOGER: Your Honor, I think we have shown that it's more likely than not that this jury did.

QUESTION: Well, this particular jury was only convened once. And I think you have to show under our cases that this particular jury would have dealt differently with a black defendant who killed a black person.

MR. BOGER: Well, Mr. Chief Justice, let me suggest to you why I believe we have made that showing. We of course don't have confessions from the jurors themselves. No one has come forward.

But indirectly what we have is a pattern that Professor Baldus documented --

QUESTION: But not a pattern on the part of this jury.

MR. BOGER: No, this jury only assembles, as you say, for one decision. Of course, in the Bazemore case, you had a hundred county commissions that had to make judgments about what salaries were going to be paid.

And the county commissions were composed of people who rotated on and off because of actual politics.

QUESTION: But was there any -- did the constitutional holding in Bazemore support your

position, do you think?

MR. BOGER: I believe Bazemore assisted, as did the Batson case, which talked about simply having proof that makes it more likely than not that discrimination exists.

If we could show, Mr. Chief Justice, that six our of ten of blacks who murdered whites are receiving death in a racially discriminatory fashion, on grounds where if there were white defendants, they wouldn't have, we would not be able to show, of course, which ones of the six they were.

QUESTION: No, but when you're -- the institution that you're challenging is the jury here. And it's the jury in this defendant's case.

MR. BOGER: Well, of course, Your Honor, it's not simply the jury. I was responding in terms of your question. But Professor Baldus' evidence shows dramatically that the prosecutor plays a serious role in this process.

QUESTION: Well, then, do you think your evidence supports a finding that this particular prosecutor, who prosecuted this case, discriminates as between blacks who've killed whites and blacks who've killed blacks?

MR. BOGER: Not as between charging, but as

between deciding who to plead out to a lesser defense or permit not to go to trial, and who to move on to penalty.

QUESTION: Okay, you say your evidence supports a finding that this particular prosecutor, in doing what you say, discriminated in the manner I described?

MR. BOGER: I don't believe we have to show that a particular prosecutor, as opposed to the prosecutorial office, Your Honor. What we have shown is --

QUESTION: Well, but do you think your evidence would support a finding as to this particular prosecutor?

MR. BOGER: I think we could conclude under your Fernco rationale -- you said that we looked to all of the rational reasons. We assume people act rationally. We look to all of the legitimate reasons why one would make a decision.

And if none of the legitimate reasons make the distinction that seems to have been made, then we can infer that what is at work is an illegitimate consideration.

In this case, we've shown that there have been 17 defendants in Fulton County who killed police officers, or who were involved in police officer

killings.

Of those 17, in the 1973-79 period, only two even went to a sentencing jury; and of those two, one went before a jury having killed a black police officer. And he received a life sentence.

QUESTION: How many were plea bargaining?

MR. BOGER: At least -- let's see, out of the 7 who were, like Mr. McCleskey, the trigger person who were involved in an armed robbery, there were three plea bargains, and four went to trial.

QUESTION: Well, it's hard to claim discrimination against McCleskey at the plea bargaining stage in this case.

He was offered a plea bargain and turned it down.

MR. BOGER: No, that's incorrect, Your Honor.

QUESTION: Oh, really?

MR. BOGER: That's an erroneous statement by the Court. In fact, I've got a deposition by the prosecutor, which was offered at the state habeas proceeding. His statement on the record was that there was no plea discussion.

No the defense counsel testified at that same hearing that he urged Mr. McCleskey to consider asking for a plea negotiations. Mr. McCleskey said, I did not

-- I was not the trigger man; I didn't commit the murder; I don't want a plea bargain.

But then we submitted --

QUESTION: So there was no offer, but there was a reluctance on Mr. McCleskey's part to consider a plea bargain?

MR. BOGER: That's correct. But on page 15 of Russell J. Parker's deposition -- he was the District Attorney -- question, was there a plea bargain in effect? Answer: We never discussed a plea.

So that really was an erroneous statement by the District Court.

But back to the Chief Justice's question, we can show in effect --

QUESTION: Before you go -- Mr. Boger. Mr. Boger. Mr. Boger?

MR. BOGER: Yes, Mr. Justice Powell. I'm sorry.

QUESTION: Before you go ahead with your argument, what were the aggravating circumstances in this case?

MR. BOGER: The aggravating circumstances were murder committed during an armed robbery, and the slaying of a police officer in the official course of his duty.

Those would be two --

QUESTION: Would they fall in the upper, middle, or lower category of aggravating circumstances?

MR. BOGER: Well, they are mid-range in themselves. What the evidence --

QUESTION: They are mid-range, committing a felony and shooting an officer in the course of committing a felony?

MR. BOGER: That's what the evidence shows, Your Honor. In Fulton County, as I indicated, there were 17 defendants who had shot police officers. And 7 of those, at least, had committed armed robberies or other serious felonies at te same time. And Mr. McCleskey is the only death sentence.

QUESTION: Excuse me.

MR. BOGER: I'm sorry.

QUESTION: You have to accept the jury verdict that the defendant shot the police officer, don't you?

MR. BOGER: Well, we of course contended below that that was --

QUESTION: Right, I understand that.

MR. BOGER: But yes, at this point we are.

QUESTION: But here you bound by that. So this defendant was found guilty of shooting a police officer while he was in the process of committing a

robbery.

MR. BOGER: That's correct. It's no doubt, Justice Powell, that's a serious offense.

QUESTION: Right.

QUESTION: There was an other aggravating factor too, wasn't there? Wasn't the shot which the police officer suffered, in the head, was at very close range, indicating that there was a conscious attempt to kill the man?

MR. BOGER: There certainly appeared to have been at least a flurry of shots toward the officer. I don't believe it was at close range, Justice Scalia. I think it would depend I guess on what we mean by close range. But 10 or 12 feet, I believe. It was not an execution-style slaying, in that sense.

The officer apparently ran into the front of the furniture store. Someone ran, either our client or somebody else; he was shot in the right eye from some distance, 10 or 12 feet apparently.

But there's no doubt that the crime is a serious one. What the evidence shows, though, it's not the kind of crime that gets death in Fulton County, or indeed, statewide, on any regular basis. That's what's remarkable.

I mean, it really is a surprise, I suspect to the Court, as it is

to counsel to find that when you look, the people who are getting death are not this kind of case. Indeed, it's the torture murderers and the multiple killers in Fulton County who receive death. Out of 17 people who've killed police officers in Fulton County, this is the only death sentence during the period of time.

QUESTION: Mr. Boger, I assume that this kind of statistical evidence, if valid, with regard to imposition of the death penalty, would also be valid with regard to conviction; so that if you showed that there is a disproportionate pattern of convictions of those who are accused of killing white victims, or of black defendants, the same problem would arise?

MR. BOGER: I don't believe we saw a pattern of evidence like that, but I suppose that if one could show that prosecutors were deliberately seeking lesser charges, that the logic under the Equal Protection Clause would extend that far. Of course, under an Eighth Amendment analysis, it wouldn't necessarily.

QUESTION: Well, not just prosecutors, but juries. I mean, part of this was the jury action as well as the prosecutor's seeking.

MR. BOGER: That's correct.

QUESTION: Now, I also assume that it's wrong

to discriminate on the basis of race but on the basis of any other unchangeable physical characteristic, so that you wouldn't say we can convict people more readily because they're ugly, or because they're shifty-eyed.

Now, what if you do a statistical study that shows beyond question that people who are naturally shifty eyed are to a disproportionate extent, convicted in criminal cases?

Does that make the criminal process unlawful?

MR. BOGER: I don't think the Court has afforded the same kind of protection, constitutionally, to shifty-eyedness or those other characteristics.

QUESTION: How about females?

MR. BOGER: There is some heightened protection for females. And yet Professor Baldus' study reassures us that there appears not to be discrimination based on sex in the State of Georgia.

There's no surprise to what we're seeing here. This is not some sort of statistical fluke or aberration.

We have a century-old pattern in the State of Georgia of animosity in years long gone by, and now still residual racial prejudices that Justice White noted last term in the Turner case, some of which are not even known to the people involved.

And therefore when we see these interracial kllings, blacks who kill whites, and we see prosecutors disposing of these cases, and juries deciding on death sentences, particularly when we're asking the juries to do that most difficult of tasks, which is to judge who is worthy of staying alive, and who is not, it shouldn't be any surprise to us that some of this kind of discrimination comes through, where it wouldn't necessarily with sex, and certainly not with shifty-eyedness.

QUESTION: Well, Mr. Boger, at bottom the claim being made here is a curious one, in the sense that in many death penalty cases, what the defendant comes forward asking for is more opportunities for the exercise of mercy, and to allow juries, for whatever reason, not to impose a death penalty.

And yet you come forward with a claim that says, in effect, not enough people -- the death penalty is not being imposed on enough people.

It's just a -- it's a basic tension.

MR. BOGER: No, it's not necessarily a tension. The Court has, I think, wisely decided that there should be a large measure of discretion afforded to juries.

But discretion cannot be exercise outside

constitutional grounds. And race -- distinctions based on race are one of the principal --

QUESTION: But we have a case pending this term in which we are asked to reinforce again in the death penalty context that juries have absolute discretion not to impose the death penalty for whatever reason.

MR. BOGER: Well, I think that's where the Court has to draw a line. It has to say that if juries in fact are imposing death sentences because of race, that that discretion cannot be tolerated.

I though in part that's what the Turner --

QUESTION: So this Court's cases that have, since Furman, opened up to allow more discretion, were wrongly decided, and we should move back toward less discretion?

MR. BOGER: Not necessarily. They were based on the hope -- they were based on the strong presumption which should have been afforded the states that they could carry out those statutes without racial discrimination.

Georgia has failed that test. Mr. McCleskey was undoubtedly sentenced to death, in part, because he committed a homicide and an armed robbery. But he was also sentenced to death, in part, we belive, because he

was black.

QUESTION: How do you suppose -- what procedure could have been inserted that would have solved that problem, other than the one that Justice O'Connor has suggested, that is, going back to a rigid system where a certain crime, felony murder, produces the death penalty?

That would certainly solve the problem. What short of that would solve the problem?

MR. BOGER: Georgia, Justice Scalia, has one of the most unfettered, one of the loosest systems of capital sentencing that's come before the Court. They don't, as in California or Texas, have anything that sets special circumstances at the guilt phase to narrow the range of crimes. They don't have a list of mitigating circumstances, the way most statutes do, or any balancing at the sentencing phase.

The Court held in Zant v. Stephens, once a single aggravating circumstance has been found, there is no more constraint on a Georgia jury.

And as we showed through the depositions of the prosecutor, there are no prosecutorial standards, much less -- statewide, there are none even within Fulton County to help check the discretion of the prosecutors, to make sure that they're channeling their

decisions in a way that avoid this kind of problem.

Of course it'd be a matter for the Georgia legislature to come up with some solutions remedially, but there are a number of solutions that are available to it, I'd suggest.

If there are no questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Boger.

Ms. Westmoreland, we'll hear now from you.

ORAL ARGUMENT OF MS. WESTMORELAND, ESQ.,

ON BEHALF OF THE RESPONDENT.

MS. WESTMORELAND: Mr. Chief Justice, and may it please the Court:

Presented to the Court today are three central issues regarding the Georgia death penalty scheme.

Initially, we're concerned with the question of the application of the statistical analysis, both in this case in particular, and in the death penalty context as a whole.

Secondly, were the standards to be applied in evaluating the Eighth Amendment claim has been raised, and whether an Eighth Amendment claim has actually been substantiated.

And thirdly, the question of an alleged equal

protection violation; and whether that claim has also been substantiated by the facts of the case.

To begin with, I would like to point out to the Court a few facts that I think are pertinent for consideration.

In this case, we have a situation in which Mr. McCleskey's case was characterized by this study as a mid-range case.

These are the facts which constitute a mid-range case under the study in question: a police officer killing, involved during an armed robbery, with co-perpetrators, in broad daylight, in a store in which approximately seven people were hostage, all of whom were forced to lie on the floor, many of whom were tied up during the commission of this crime.

We have two shots fired at the police officer. The first hit him in the eye; the fatal shot. The second shot fired happened to bounce off a cigarette lighter which was in his pocket. The testimony at trial indicated that would have been directly over his heart.

And there was also some indication, and the prosecutor argued, that there was at least an inference that could be drawn, that the police officer was already on the floor at the time the second shot was fired.

There is no question that the person

committing this act intended that the killing be done.

QUESTION: Were there any mitigating circumstances?

MS. WESTMORELAND: No mitigating evidence was presented at the sentencing phase in this case whatsoever, Your Honor.

What we have is a situation in which the evidence was presented to show that Mr. McCleskey had three prior convictions for armed robbery. He was also connected to two other robberies during the course of the trial, one of which involved the stealing of the weapon which was identified as being the murder weapon in this case; a second of which related to the arrest which led up to his confession or statements in this case.

We also have the testimony of two victims from the furniture store robbery who identified Mr. McCleskey. We have the testimony of Mr. McCleskey's co-perpetrator, who places Mr. McCleskey as the only one of the four participants in the area of the store who could have fired the fatal shots.

And we finally have the testimony of another inmate who heard Mr. McCleskey bragging about the killing, and even stating to the effect that if 12 more police officers had come in, he would have done the same

thing and shot his way out.

These are facts that under this study constitute a mid-range case.

Based on those factors alone, we would submit that the study itself certainly causes great questions to be raised about its validity.

QUESTION: May I ask you, General Westmoreland, do you agreement that it's a mid-range case? That are a lot of -- a fair number of comparable cases in which the death penalty was not imposed?

MS. WESTMORELAND: Your Honor, I do not agree that it's a mid-range case. I think the facts of this case certainly supported the death penalty in this circumstance.

And I think it is a most aggravated case.

QUESTION: Well, the death penalty is supportable in mid-range cases.

Are there other cases, a fair number of other cases, that you would agree are comparable to this in which the death penalty is not imposed?

MS. WESTMORELAND: Your Honor, I don't think that the evidence in this case supports that finding whatsoever.

There is no showing that cases that are actually factually comparable to this case did not

receive a death penalty.

There's some indication that some police officer killings did not receive a death penalty, or even some police officer killings with an armed robbery did not receive a death penalty.

Those two facts alone don't make these cases factually similar. As I've noted, all of the previous other facts which serve to make this case that much more aggravated.

The mid-range case, and the mid-range analysis done in this case, does not compare factually similar cases. And a reading of the testimony indicates, this is simply an aggravation level, using regression analyses, that comes up with a weight to be attached to this case.

There is no way of knowing whether the cases in this so-called mid-range are factually similar at all. As a matter of fact, it was never even asserted that they were factually similar.

It was simply asserted that once the regression analysis was conducted, based on one particular regression, that the aggravation level, if you will, that was derived from that regression was similar for these cases; no indication as to whether they had similar aggravating circumstances; similar

mitigating circumstances; or anything of this sort.

So we would simply assert that there was no showing that similar cases, factually similar cases, hve not received a death sentence in this case.

QUESTION: Well, didn't the District Court agree with you in this respect?

MS. WESTMORELAND: Yes, Your Honor, the District Court did.

QUESTION: And didn't the Court of Appeals -- it didn't generally review the findings of the District Court, but in this particular respect, it seemed to agree with the District Court --

MS. WESTMORELAND: Yes, Your Honor.

QUESTION: -- about the mid-range cases.

MS. WESTMORELAND: In this respect, the Eleventh Circuit did note that they felt that there had really been no showing that there was actually a mid-range of cases that --

QUESTION: Of similar -- of similar cases?

MS. WESTMORELAND: Of similar factual nature; that's correct, Your Honor.

QUESTION: I thought the Court of Appeals assumed that your opponents were right on this issue for the purposes of its decision?

MS. WESTMORELAND: Your Honor, what the

Eleventh Circuit did was, on several occasions throughout its opinion, stated that they were assuming the validity of the study.

When the reached the discussion of the mid-range of cases, the Court, in addition to concluding that legally there was no basis for a finding of discrimination, also noted that they did not see that it had been established that there was a mid-range of cases, or that there had not been proven that there was such a mid-range of cases.

QUESTION: Well, do you take the case then as one on which we basically assume it's a factual matter, and we're reviewing findings, or we have a legal question, where we assume basically that the study is sound, and then the question is whether it raises a legal issue?

MS. WESTMORELAND: Your Honor, I think the Court can take either one of two approaches.

Obviously, we have two totally different opinions from the District Court and the Eleventh Circuit in that regard.

We would submit that the factual findings by the District Court are subjected to a clearl erroneous standard.

QUESTION: Right, I understand.

MS. WESTMORELAND: And they have never been overturned. The Eleventh Circuit, in fact, at one point complimented the District Court on its thorough analysis and noted that it would have to deal with these factual findings.

QUESTION: No, but if we disagreed, just as a hypothesis, if we disagreed with the legal conclusions of the Court of Appeals, would we not have to send it back to the Court of Appeals and say, well, let's find out if you're right about the study or your opponents are right about the study?

MS. WESTMORELAND: Your Honor, that's obviously one possible alternative. We would submit that the record is so clear on this point that it is obvious that no intention discrimination has been shown.

QUESTION: But can we be 100 percent confident that all of the cases with identical facts, that the death penalty is imposed? That's basically what you're saying.

MS. WESTMORELAND: Your Honor, I'm submitting that what has not been shown is that there are similar cases in which the death penalty has not been imposed.

And once again, that's not even the question that we're focussing on here. That still doesn't mean there's intention discrimination in this case.

QUESTION: Well, I understand. I understand that argument.

MS. WESTMORELAND: Excuse me, Your Honor. But I would submit that the Court can make this decision without resorting to a remand to the Eleventh Circuit.

QUESTION: We can, in effect, say the findings are right, and just affirm.

MS. WESTMORELAND: Certainly, Your Honor.

I would also like to point out a few factors to the Court in relation to this study that has been highly touted by the petitioners, and by others, and related to be an extremely, quote, accurate and complete study, and note to the Court that as the District Court found, this study is far from either accurate, and it is also far from being complete.

It has been asserted that there were 500 variables collected. And just a brief examination of the record will show that it was attempted --

QUESTION: Ms. Westmoreland, did the state put on any testimony for that?

MS. WESTMORELAND: Your Honor, what -- the state took two approaches in its presentation to the District Court.

First was a challenge to the data base methodology, the manner of collection information, and

that type of information.

The state secondly put on a counter hypothesis, if you will; that is, based on the study itself, white victim cases are sysematically --

QUESTION: Did they put that on with witnesses?

MS. WESTMORELAND: Yes, Your Honor. We had two statisticians testify on behalf of the state.

QUESTION: Two what?

MS. WESTMORELAND: Statisticians who had run analysis of the data that we were given from Professor Baldus. We did not go out and obtain new data on each individual case.

QUESTION: Independent. You didn't get any independent statistics?

MS. WESTMORELAND: No, Your Honor, we did not. Not in the sense of obtaining new data.

QUESTION: So what basis do you have for saying that this material missed the mark? It's just on your -- the state's lawyers and the judge set themselves up as experts on statistics?

MS. WESTMORELAND: No, Your Honor, we presented --

QUESTION: Well, what else did you have?

MS. WESTMORELAND: Your Honor, that was my point. We do have -- we had the two statisticians who

did testify on behalf of the respondent in this action.

We gave various challenges to the data base itself; the manner in which the data base was actually put together; the methodology utilized in analyzing the data base, based on the various problems with that data base; as well as going through and doing a complete analysis, based on this same data base, of all the cases, based on different sentencing outcomes, based on different aggravating circumstances, and various other factors, in an examination across the board, shows that within each of these facets, white victim cases are qualitatively different from black victim cases. They tend to have more factors such as armed robberies, rapes; more property motivated types of crimes.

The black victim cases, on the other hand, based on the data presented by the petitioner, tend to arise in more circumstances involving such things as a family dispute; a barroom quarrel, if you will.

And these things occurred throughout the various sentencing stanges, and throughout, as we noted -- under different aggravating circumstances, and in various categories of cases; and is a systematic difference, which we would submit, certainly accounts for any disparity that may exist in the sentencing process itself.

QUESTION: Were these variables not taken account of in the study?

MS. WESTMORELAND: The variables are taken into account in some of the analyses. But our submission to the District Court was that based upon the fact that across the board the white victim cases still remained systematically worse; that you simply can't eliminate this difference by taking into account even the 230 variables that they did utilize in one particular analysis.

That still doesn't eliminate the qualitative difference in the cases that were examined.

QUESTION: Well, I don't -- well, does it eliminate any qualitative differences attributable to the two factors you just mentioned?

MS. WESTMORELAND: Your Honor, those two --

QUESTION: I mean, I can't imagine that one of the variables wouldn't be whether the case involved a family dispute or a barroom brawl or an intentional felony.

MS. WESTMORELAND: Those are included in some of the analyses submitted into the District Court, yes, Your Honor; those particular ones are.

And we submitted numerous tables to the District Court examining many variables, several hundred

variables, utilized by Professor Baldus, showing where they fell more in white victim cases, as opposed to black victim cases.

And our -- the bottom line submitted by the respondent is, you cannot come up with two similar cases to compare; because each case is unique on its own individual facts. In making -- in attempting to any type of analysis of this regard, you simply cannot find two cases that are sufficiently similar to be able to say that race is the one factor that causes that death sentence, either from a jury or from a prosecutor.

In regard to --

QUESTION: May I just ask you, if they argue, as I understand it, that there's eleven times as great a chance if you have a white victim than a black victim, even though, as I understand it, there are substantially black victim cases than there are white victim cases.

That's right, isn't it?

MS. WESTMORELAND: Yes, Your Honor, that's correct.

QUESTION: Out of some 1,500 black victim cases, there are a total of 20 death sentences.

MS. WESTMORELAND: That's correct, Your Honor.

QUESTION: And out of about 970 white victim cases, there are over 100 death sentences.

MS. WESTMORELAND: That's correct as well, Your Honor.

QUESTION: And you say all of that is explained by the fact that the white victim cases are consistently the more serious?

MS. WESTMORELAND: That's correct, Your Honor; that's our submission, that in examining these cases, out of the black victim cases I believe you'll find perhaps over a thousand occur in something like a family dispute, a lover dispute, a fight involving liquor of some sort, where some -- one party is drunk or the other party is drunk. Those types of disputes occur so frequently in black victim cases that they do tend to fall out of the system much earlier, and -- leaving the much more aggravated, the more highly aggravated white victim cases, involving armed robberies, and such things as property disputes.

And for whatever reason, frequently more times we'll see torture cases involving white victim cases than you do in black victim cases.

But once again, yes, that is accounted for by the qualitative difference in the two types of cases, as well.

One point has been made in relation --

QUESTION: Ms. Westmoreland?

MS. WESTMORELAND: Yes, Your Honor.

QUESTION: If this Court decides tc simply address the Court of Appeals' approach, and not deal with your point about the validity of the study, it's your position, I take it, that assuming the study is valid, it just doesn't show a sufficient level of discrimination?

MS. WESTMORELAND: Your Honor, we submit the study does not show what it purports to show; and that is, intention racial discrimination in this case, as a first point.

As has been noted by the Court, that is one of the standards used in equal protection cases in particular. And there has been absolutely no indication that this jury and this prosecutor engaged in any type of intentional dicrimination.

In fact, as noted previously, the facts of this case certainly would dispute any such attempt at an inference under the circumstances.

QUESTION: May I just ask you --

QUESTION: Can statistical evidence be relied upon at all tc establish intentional discrimination, in your view?

MS. WESTMORELAND: Your Honor, I think one of the more important considerations is the type of case

we're dealing with.

Certainly, this Court has relied on statistical evidence in other contexts, primarily jury composition cases and Title VII statutory proceedings.

This case, based on what Justice O'Connor has already noted, the unique circumstances and the wide range of mitigating factors available, does not lend itself readily to the type of analysis used here, the multiple regression type of analysis, in which this Court has time, and time again, noted that what the jury is doing, first of all, is expressing the moral outrage of the community --

QUESTION: And how about the evidence insofar as the prosecutor is concerned, the evidence that tends to show that prosecutors just aren't willing as often to offer a plea bargaining?

MS. WESTMORELAND: Your Honor, the shifts us into essentially a selective prosecution type of argument. And the Court has also noted on other occasions that the prosecutor does have broad discretion in which cases to present to a jury and which cases to pursue throughout the system.

And certain which simply are not included in this study --

QUESTION: Does that discretion include

discretion to discriminate on the basis of race?

MS. WESTMORELAND: Certainly not, Your Honor. That's not really the point. The point is, though, that there are so many subjective factors involved in the prosecutor's exercise of discretion that they simply cannot be quantified and utilized in a multiple regression type of analysis.

The prosecutor automatically considers not just the strength of the evidence of the case, but the credibility of each and every witness that he has, the availability of the witnesses, whether some may not be able to come to trial, whether a witness is going to fall apart under cross-examination, his own case load pressure certainly is a factor.

QUESTION: Ms. Westmoreland?

MS. WESTMORELAND: Yes, Your HOnor.

QUESTION: May I ask you another question? I understand your position that the study is insufficient, and that perhaps it's impossible to really get to the bottom of something like this.

But assume for a moment that we had a really -- an ideal statistician whom everybody could agree was sound and came to the right answers and took account of all variables; and that after doing all that in a reliable way he concluded that if the victim was white,

there was eleven times greater chance than if the victim was black that the death penalty would be imposed.

Would that raise a constitutional question in your mind?

MS. WESTMORELAND: Your Honor, I think what it does is create the question of, have we raised of inference of discrimination such as to present a prima facie case of discrimination.

QUESTION: Well, would that present a prima facie case in your view?

MS. WESTMORELAND: Once again, it would depend on the circumstances. Becaue we would submit that there is simply no way to take acccunt of all those variables.

QUESTION: I understand. But my hypothetical is that we have this ideal statistician who accomplished the task that you say is impossible; and you may very well be correct.

But if we had such an answer to the factual question, would there be a legal question raised in your mind?

MS. WESTMORELAND: Your Honor, I think it once again gets back to, in that case, is 11 percent going to be enough to raise a prima facie case inference of discrimination.

QUESTION: Eleven times as great.

MS. WESTMORELAND: This Court has been hesitant to set --

QUESTION: Well, I'm asking you what your view is. What is the position of the State of Georgia on that issue?

MS. WESTMORELAND: Your Honor, I don't think an 11 percent disparity --

QUESTION: What if it was 20 percent, 20 to 1?

MS. WESTMORELAND: Then you've moving closer to a prima facie case.

QUESTION: What in the view of the State of Georgia is an acceptable percentage variation?

MS. WESTMORELAND: Your Honor, I don't think the State of Georgia has a precise view as to any acceptable percentage of variation one way or the other. Certainly, there could come a time, assuming Your Honor's hypothetical of course, where the variation could become so broad that you're presented with a situation as in Yick Wo or Gamillion v. Lightfoot, where there's simply no other conclusion that can be drawn.

Or you have the inexorable zero situation.

This is far from that type of a situation. We simply don't have that type of a disparity. The 11 percent disparity, I would note, in this case, that's referred to, is done on an unadjusted analysis not

considering any other factors except the simply fact that this is white victim cases versus black victim cases.

QUESTION: Of course they say, when you make the adjustment, it reduces it to four times instead of elevent times.

MS. WESTMORELAND: Yes, Your Honor, that is correct. And we would note to the Court that also makin these various adjustments continually reduces the statistical significance that can be attached to that regression coefficient.

One thing that the Eleventh Circuit focussed on, and I think needs to be pointed out to the Court as well, is the .06 and the 6 percentage question. And the -- once again, the same 4 percent number that has been referred to.

These are regression coefficients. They are not -- necessarily mean anything more than a weight that is attached in a computer analysis to a particular variable that the computer's given to work with.

All the computer is trying to do is to make the predicted outcome equal the actual outcome; either a death sentence case or a life sentence case, depending on what information you give it, what variables you give it to work with.

As was noted, these coefficients change, depending on what's included in each individual analysis, a coefficient may go up, it may go down, it just varies completely. And it's not really adequate to be utilized on its face to show any type of disparity.

Professor Baldus himself testified on three separate occasions that the regression coefficient was -- referred to it as being "rough" when he was talking about trying to plot it within some of the other variables in the analysis. He said, now this is just an estimate; it's a rough estimate; it should be utilized as just a rough estimate and approached with some caution in what you do with this particular regression coefficient.

The statisticians that we presented also testified that other problems with the data caused problems in how to interpret the coefficient itself. This 6 percent number that has been referred to time and time again.

One word that was thrown around an awful lot in the District Court and subsequent proceedings is the concept of multicolinearity. Essentially the problem is that there are well over a hundred variables in this analysis that are highly correlated with death sentencing outcome and the racial variables.

What this does is effect the coefficient itself, and according to the testimony of the respondent's experts, can make the coefficient essentially distorted and impossible to interpret. It can be a positive coefficient when it should be negative; the number can be higher than it should be or lower than it should be.

Essentially what you have is a number that, based on the various problems with the data base, is not interpretable in this type of a context.

In question -- in relating to the question of statistical analysis itself, as noted previously, we would submit that statistical analysis is not appropriate in this type of factual situation involving so many individualized and unique factors in each individual case, when what the Court is trying to do is examine a community's expression of its moral outrage at a given offense.

The jury is also trying to make an individualized determination of each individual capital defendant.

And the Court has noted on many occasions that the jury considers subjective factors in making this analysis that are very difficult, if not impossible, to quantify and put in any type of analysis of this sort.

In fact, in Caldwell v. Mississippi, the Court focussed on the fact that the jury was considering intangible things that were not readily picked out of an appellate record in the case.

It's quite different from circumstances such as jury selection, when the Court's focussing on a narrow process involving a given disparity between the population in the jury pool, and a very few qualifications that are being considered by the jury commissioners; and also considering usually one set of persons making a decision, one set of jury commissioners; maybe two; as opposed to a different juryy for each case that comes along.

In addition to that, it's somewhat different from a Title VII analysis. Once again, although there are more factors considered in the Title VII analysis, it's not the same type of subjective evaluation that is made by a jury and by a prosecutor in a death penalty context as well.

Additionally --

QUESTION: I don't understand that last point. Why is this different from Title VII?

MS. WESTMORELAND: Your Honor, although Title VII does certainly involve more factors than a simple jury selection process could, for instance, normally

under employment situation, you're going to have an employer focussing on a -- a few specific things that are the main points being utilized in evaluating whether or not to hire a given employee.

Certain they're going to be, in any given case, some subjective factors. But it's not the same type of focus that is being utilized when we've got a jury looking at a unique case, a unique individual, in which the jury can consider as mitigating, and determine to essential afford mercy to a defendant based on anything that it chooses that is present in the record before the jury.

QUESTION: But certainly on the theoretical point of whether statistical evidence can properly be used, assuming it's reliable, as evidence of -- prima facie evidence of descrimination in the particular case, there's no basis for distinguishing this from the Title VII situation, is there?

MS. WESTMORELAND: Your Honor, I think that our point is that the difference is, the number of subjective factors that necessarily come into play in the jury's decision-making process.

QUESTION: That goes to the reliability of the statistical evidence. But as to the principal of whether statistical evidence is a valid indication of --

assuming it's valid statistical evidence -- is a valid indication of discrimination ina particular case, there's no difference between the two.

MS. WESTMORELAND: Well, to that extent, Your Honor is probably correct. But the point being that in this type of case, it is going to be such that even if a statistical analysis is done, it is going to be virtually probative of nothing, due to the fact that it's simply going to be unreliable.

QUESTION: General Westmoreland, one difference certainly between Title VII analysis and this kind of case is that under Title VII you can gain relief in some situations by simply proving disparate impact.

MS. WESTMORELAND: This is true, Your Honor, of course. And in this case, we're simply far from simply disparate impact, as the Court has already noted. The question is intention discrimination.

And we would submit, the question is intention discrimination by this jury and by this prosecutor, and that it simply has not been shown under the facts in this case.

It has been asserted that we are attempting to change the equal protection standard somehow, to make it different in a death penalty context.

The point simply is that in this case, based

on what has been presented, there is insufficient evidence to draw the inference of discrimination that this Court has drawn in other contexts.

We're not seeking to change the standard; simply to apply to the given facts and circumstances presented before the Court. To require the petitioner to simply carry the burden of proof that the petitioner always has in an equal protection context.

And our assertion has simply been that there simply has not been that establishment of a prima facie case; or, even if that case was met, certainly the ultimate burden of proof was not met by the petitioner.

QUESTION: And that's a factual matter mostly, you say?

MS. WESTMORELAND: Yes, Your Honor.

QUESTION: We should go with the District Court?

MS. WESTMORELAND: Yes, Your Honor, that's our submission, certainly.

QUESTION: So if the District Court had found the other way and accepted the statistical evidence, in the next case, then we would likewise go with the District Court.

MS. WESTMORELAND: Your Honor, if the District Court had accepted the statistical evidence, accepted

the validity of it, certainly that would be a factual finding of intentional discrimination, which under 42(a) does apply in this type of circumstance, yes.

We finally submit to the Court that the petitioners have attempted essentially to indict the entire Georgia criminal justice system by the presentation to the District Court and the presentation to this Court.

That simply has not been done. The evidence in the case does not show either intentional discrimination; not does it show any type of arbitrariness or capriciousness in the death sentencing scheme in the State of Georgia.

Georgia has a valid statutory scheme that has been upheld by this Court on numerous occasions. It was validly applied in this case, under the facts of this case, to Mr. McCleskey.

If anything, the evidence presented in this case shows that the system works; not that it does not work.

Both experts for the petitioner testified the system was not random. It certainly sorted cases --

QUESTION: But wouldn't you agree, Ms. Westmoreland, that the Georgia system does allow a greater room for discretion than some of the other

states do?

MS. WESTMORELAND: Yes, Your Honor, it does allow more discretion, which also works to the benefit of the defendant in any given case.

QUESTION: Right.

MS. WESTMORELAND: Georgia allows mercy to be extended more often than many states would allow.

QUESTION: Arguably, it allows the jury to take into consideration, as a mitigating circumstance, that the victim was black.

MS. WESTMORELAND: Arguably it would, Your Honor. But what it also does it allow the jury to consider any number of other thing in mitigation. And to extend mercy in any given case.

And as this Court has held, there is no constitutional prohibition against a jury extending in any given case.

Thus we submit to the Court that, as noted previously, the Georgia death penalty system is working as it should work; is working as this Court anticipated it would in Gregg v. Georgia; and the petitioner has failed to meet his burden of proof.

CHIEF JUSTICE REHNQUIST: Thank you, General Westmoreland.

Mr. Boger, your time expired even as you were

in the act of reserving it.

The case is submitted.

(Whereupon, at 11:00 a.m., the case in the above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-6811 - WARREN McCLESKEY, Petitioner V. RALPH KEMP, SUPERINTENDENT

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BY Paul A. Richardson

(REPORTER)